Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER 125

## Appeal 880334

## Ministry of Financial Institutions

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# O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act"), which gives a person who has made a request for access to a record under subsection 24(1) of the Act a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On June 22, 1988, the Ministry of Financial Institutions (the "institution") received a request for the following information:

> The new Pension Benefits Act, 1987 (Ontario) and the accompanying regulations have now been proclaimed in force and require filing by the administrators of each Ontario regulated pension plan of a written statement of investment policies and goals on or before January 1, 1990.
>
> I would like to obtain a copy of all of the Statements of Investment Policies and Goals which have been filed since January 1, 1988. These Statements have been filed with the Pension Commission of Ontario (a branch of the Ministry of Financial Institutions).

During a subsequent telephone conversation with an employee of the Pension Commission of Ontario, the requester agreed to exclude the names of the pension plans and their

sponsors, and all other identifying names from the scope of his request.

2. On November 9, 1988, the institution wrote to the requester denying access to the requested records on the basis that they qualified for exemption under section 17 of the Act. In his letter of refusal the head stated that:

> This provision applies because disclosure of these records could prejudice significantly the competitive position of third parties.
>
> Additionally, release of these records could result in undue loss or gain to other groups. Severing the names of the pension funds will not preserve the identity of the third parties because included in the statements are investment goals and strategies of the pension funds. Not only is this commercial information which has been supplied in confidence to the Pension Commission of Ontario but includes information which enables easy identification of the third parties.

3. On November 21, 1988, the requester appealed the head's decision, and I gave notice of the appeal to the institution.

4. The records which were withheld by the institution consist of the Statement of Investment Policies and Goals of three pension plan funds. These records were obtained and reviewed by an Appeals Officer from my staff. Efforts were made by the Appeals Officer to settle the matter, however, settlement was not possible, because both parties maintained their original positions.

5. On June 30, 1989, I sent notice to the appellant, the institution and the three pension plan fund administrators

(the "affected parties"), that I was conducting an inquiry to review the decision of the head, and invited representations from the parties. Enclosed with this letter was a copy of a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the report.

6. I have received representations from all of the parties and have considered them in making my Order. One of the affected parties agreed to disclose the Statement of Investment Policies and Goals of the pension plan which he administers, with all identifying names severed. The other two affected parties did not agree to disclosure.

The sole issue is this appeal is whether the head properly applied the mandatory exemption provided by subsections 17(1)(a) and (c) of the Act in denying access to the requested records.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides the right of access to information under the custody or control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counterbalancing privacy protection purpose of the

Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

It should also be noted that section 53 of the Act provides that the burden of proof that the record or part of the record falls within one of the specified exemptions of the Act lies upon the head. The affected parties still resisting disclosure in this appeal have relied on the exemption provided by section 17 of the Act to prohibit disclosure of the records pertaining to them, and therefore share with the institution the onus of proving that this exemption applies to the records at issue in this appeal.

**ISSUE A: Whether the head properly applied the mandatory exemption provided by subsections 17(1)(a) and (c) of the Act in denying access to the requested records.**

Subsections 17(1)(a) and (c) of the Act read as follows:

> 17.--(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization;
>
> ...
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In my Order 36 (Appeal Number 880030), dated December 28, 1988, I established the three-part test which must be satisfied in order for a record to be exempt under section 17. The test, as outlined on page 4 of the Order, is as follows:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) claim invalid.

In his letter of appeal, the appellant outlines the following reasons in support of his position that the subsection 17(1) exemption should not apply:

> I do not agree with the reasons for denying my request. My understanding is that all pension plan participants are to receive a copy of their plan's Statement. As such, I cannot see how, in the case of large pension plans, this information can remain confidential. Furthermore, I do not agree that disclosure of the Statement prejudices the competitive position of third parties.
>
> I also do not understand how releasing this information would result in undue loss or gain to other groups (which groups?). I find it difficult to comprehend how by severing the name of the plan's

> sponsor and all other identifying names, that the third party will be easily identified.

The institution submits that the disclosure of the Statements would reveal financial information, and therefore satisfies the requirements for the first part of the subsection 17(1) exemption. The head argues that:

> The word "financial" is not defined in the FOI POP Act but has the following ordinary and natural meaning, "of revenue or money matters" (The Concise Oxford Dictionary of Current English (5th ed.)) or "relating to finance or financiers" (Webster's 9th New Collegiate Dictionary). In Black's Law Dictionary (4th ed.) the word "financial" is defined as "fiscal or "dealing in money"... an examination of the records in question demonstrates their nature as financial documents. The general purpose of the statements is to provide an investment guideline for the management of pension funds. The statements contain information pertaining to investments, such as asset mix, eligible investments and valuation of investments. Clearly these documents "deal with money".

I agree with the institution's interpretation of the term "financial information", and, having examined the records at issue in this appeal, in my view, they contain "financial information" within the meaning of subsection 17(1).

Turning to the second part of the test, the institution submits that:

> the statements are supplied to the PCO implicitly in confidence... [T]he administrators must provide their statements to the PCO because it is a statutory requirement. Similarly, the PBA makes the statements available to individuals with a proprietary interest in the fund or plan. The release of the statement beyond this circumscribed and limited group, however, would not be... in the mind of the administrators

> because to do so would divulge a financial plan whose success could possibly be undermined by its release... [S]imilarly, staff at the PCO treat the statements as confidential; the statements would only be released as provided by the PBA.

In its submissions, one of the affected parties characterizes the information contained in the record relating to his pension fund as "of a confidential nature." This is the only reference to the issue of confidentiality raised by either of the affected parties and, in itself, is not sufficient to establish that the information was supplied in confidence to the institution.

Neither the Pension Benefits Act, S.O. 1987, c.35, nor Ontario Regulation #708/87 made under this Act provides any explicit promise of confidentiality to those supplying Statements of Investment Policies and Goals to the institution. If confidentiality exists at all, it must be implied from the circumstances of the scheme created under the Pension Benefits Act, and, based on submissions received from the institution and the affected parties, I am not convinced that an implicit confidentiality necessarily exists.

However, it is not necessary for me to base my decision in this appeal solely on the question of whether the records have been supplied to the institution in confidence, because, in my view, the third part of the subsection 17(1) exemption test has not been satisfied in this case.

In my Order 36, supra, I outlined the requirements of the third part of the test. At page 7 of that Order I stated that:

> ...in order to satisfy the Part 3 test, the institution and/or third party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a) - (c) would occur if the information was disclosed. (Emphasis added)

The institution submits that undue gain would accrue to the appellant if the records were disclosed because of his position as a pension fund manager. The head states that the statements are sometimes prepared by investment counsellors, and if the records were released, the appellant would be able to benefit from the work of these counsellors. The institution also argues that the investment counsellors would suffer a corresponding undue business loss if these records were disclosed to the appellant.

In its representations, one of the affected parties contends that undue gain could accrue to the appellant if he were to match the information contained in the records with the pension fund's published financial statements. However, the affected party does not explain how undue gain could accrue to the appellant or how such a matching could take place, especially in light of the fact that all identifying information would be severed from the records prior to release.

Having considered the representations of all parties and reviewed the content of the severed records, in my view, the institution and/or affected parties have not discharged the onus of establishing the requirements of the part-three test for exemption under subsection 17(1) of the Act. The institution has been unable to prove that investment counsellors did in fact produce the investment statements which are the subject of this

appeal. In addition, the two affected parties resisting disclosure were specifically asked to provide representations addressing the issue of who prepared the records and at what expense, and neither party chose to respond.

The records at issue in this appeal are quite distinct, and, although they contain certain statutorily required information, each one is tailored to the needs of a particular pension plan. In drafting a Statement of Investment Policies and Goals for the pension fund he administers, the appellant would be required to structure his Statement to meet the needs of that particular fund and, in my view, he would not derive any undue gain by having access to severed copies of previously filed Statements which relate to different pension plans.

Therefore, in my view, the requirements for exemption under subsection 17(1) of the Act have not been satisfied, and I order the head to release the three records at issue in this appeal to the appellant, with the identifying information severed. I also order that the institution not release these records until 30 days following the date of the issuance of this Order. This time delay is necessary in order to give the affected parties sufficient opportunity to apply for a judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served within this 30-day period, I order that the records be released within 35 days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made.

Original signed by: December 4, 1989
Sidney B. Linden Date
Commissioner