



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

ORDER P-444

Appeal P-9200435

Ministry of Health



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to:

1. A list of all Nursing Homes which are structurally non-compliant.
2. Permission to view the original reports on how these homes are non-compliant.

The Ministry denied access to the records pursuant to sections 18(1)(c) and (d) of the Act. The requester appealed the Ministry's decision.

The records are described as follows:

1. a list of those nursing homes which were structurally non-compliant with Regulation 690 promulgated under the Nursing Homes Act in May, 1988.
2. a "report" for each nursing home listed in Record 1, prepared by Ministry staff, which describes how these homes are structurally deficient.

Mediation of the appeal was not successful and notice that an inquiry was being conducted to review the decision was sent to the appellant, the Ministry and the 192 nursing homes (the affected parties) who were named on the list originally provided by the Ministry. This list was updated and reduced to 146 nursing homes in December, 1992, and the updated list and the reports associated with these 146 nursing homes represent the records at issue in this appeal. Written representations were received from the Ministry and 39 of the affected parties.

Several of the affected parties notified raised the possible application of section 17 of the Act to the records at issue. Additional representations were solicited from the Ministry, the appellant and all of the affected parties on the issue of the applicability of section 17 of the Act to the records. Representations on this issue were made by the Ministry, the appellant and 20 of the affected parties.

PRELIMINARY MATTER:

In the representations received from several of the affected parties, reference was made to a perceived invasion of the personal privacy of these individuals. The privacy rights provided by section 21 of the Act protect personal information of individuals. In my view, the records do not contain personal information as defined in the Act, and I find that section 21 of the Act does not apply.

ISSUES:

- A. Whether the mandatory exemption provided by section 17(1) of the Act applies.
- B. Whether the discretionary exemptions provided by sections 18(1)(c) and/or (d) of the Act apply.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 17(1) of the Act applies.

Several of the affected parties submit that sections 17(1)(a), (b) and (c) of the Act apply to the records. These sections state:

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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the affected party must satisfy **each** part of the following three-part test:

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 section 17(1) will occur.

[Order 36]

Part 1

In my view, it is not accurate to characterize the names and addresses contained in Record 1 as a trade secret or scientific, technical, commercial, financial or labour relations information within the meaning of those terms in section 17(1) of the Act.

Two affected parties submit that Record 2 contains information which may be characterized as "technical" information as it concerns the building specifications for individual nursing homes. I agree that the information contained therein, having to do with specific deficiencies in the structure of the nursing homes, may be characterized as being "technical" in nature. Accordingly, I find that the first part of the section 17 test has been met only for Record 2.

Part 2

In order to meet the requirements of the second part of the section 17 test, the party claiming the applicability of the exemption must demonstrate that the information contained in the record was "supplied in confidence, either implicitly or explicitly". Other than assertions that the information was confidential, I have received no representations from any of the affected parties responsive to this part of the test.

The Ministry submits that section 17(1) cannot apply to either of the records as the "information was not **supplied** by the third parties. The information was collected by the Ministry of Health through inspections carried out under the Nursing Homes Act."

In my view, the affected parties have failed to establish that the information was supplied to the Ministry. Accordingly, I find that the second part of the section 17(1) test has not been met, and the exemption provided by this section is, therefore, not applicable to the records.

ISSUE B: Whether the discretionary exemptions provided by sections 18(1)(c) and/or (d) of the Act apply.

Sections 18(1)(c) and (d) state:

A head may refuse to disclose a record that contains,

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18 is designed to protect certain interests, economic and otherwise, of the Government of Ontario and/or institutions. Sections 18(1)(c) and (d) take into consideration the consequences which would result to the Government and/or an institution if a record were released. Detailed and convincing evidence is required to support a claim under sections 18(1)(c) and (d) that one of the consequences identified in these sections could reasonably be expected to occur if the records were disclosed (Order 141).

Section 18(1)(c)

Section 18(1)(c) speaks of disclosure of information which could reasonably be expected to prejudice the economic interests or the competitive position of the Ministry. To meet the requirements of section 18(1)(c), the Ministry must successfully demonstrate a reasonable expectation of prejudice to the economic interests or the competitive position of the Ministry arising from disclosure of the records (Order 87). The expectation must not be fanciful, imaginary or contrived, but rather, one that is based on reason (Order 188).

In its representations, the Ministry submits:

... the Ministry of Health is the regulator of [the nursing home] industry and has the overall responsibility to ensure the adequate provision of extended care services. The Ministry of Health funds nursing homes on a per resident, per diem basis. Therefore, the disclosure of the information contained in the record will prejudice the economic interests of the institution.

...

If the names of these (non-compliant) homes were disclosed, the public may perceive these facilities as unsatisfactory locations for client placement, thereby causing additional economic harm to the homes and creating unnecessary anxiety for residents of these facilities and their families ... As a consequence, a number of homes which would require extensive redevelopment may choose to surrender the license to operate the facility ... the Ministry of Health would be required to assume control and financial liability for these facilities or provide alternate facilities ... if the Ministry had to manage and operate nursing home facilities in this situation, the Government would incur considerable financial costs.

Based on the Ministry's representations and my review of the records provided by the Ministry, I am not convinced that they contain information the disclosure of which could reasonably be expected to prejudice the economic interests or the competitive position of the Government of Ontario or the Ministry. Therefore, in my view, the records do not qualify for exemption under section 18(1)(c) of the Act.

Section 18(1)(d)

Section 18(1)(d) deals with information which, if disclosed, could reasonably be expected to be injurious to the financial interests of the Government of Ontario, or its ability to manage the provincial economy.

In its representations, the Ministry states:

Should the Ministry of Health be required to assume the operation of any or all of the facilities listed as being structurally non-compliant, the Ministry will exceed its allocation within the budget of Ontario. Given the emphasis on reducing costs of the provision of health care, an unanticipated and unnecessary increase in long term care costs will effect the Government of Ontario and its ability to manage the economy of Ontario.

I do not agree that the disclosure of the records at issue in this appeal can reasonably be expected to be injurious to the financial interests of the Government of Ontario. In my view, the scenario put forward by the Ministry in its representations is not a reasonably foreseeable consequence of the disclosure of the requested records. In my view, the Ministry has not provided the necessary "detailed and convincing" evidence to establish that the harm contemplated by section 18(1)(d) could reasonably be expected to occur if the information in the records is disclosed, and I find that the records do not qualify for exemption under this section.

ORDER:

1. I order the Ministry to disclose the records to the appellant within 35 days of the date of this order, and not earlier than the thirtieth (30th) day of the date of this order.
2. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ April 2, 1993