



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

ORDER P-1090

Appeal P-9500537

Ministry of Consumer and Commercial Relations



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NATURE OF THE APPEAL:

The Ministry of Consumer and Commercial Relations (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the document which formed the substance of an article that appeared in the *Toronto Star* on January 26, 1995. The article indicated that the *Toronto Star* had obtained this document from the Ministry in response to an access request under the Act.

The Ministry identified two responsive records, and advised the requester that an affected party would be given an opportunity to make representations concerning disclosure of the records before the Ministry responded to the request. In response, the requester wrote to the Ministry, stating:

I find this difficult to understand. The document was previously disclosed by your office. We can't imagine how when the *Toronto Star* requests the document and it is released into the public domain that a subsequent request could be treated differently. As I understand the view of your department, disclosure under the Act is disclosure to the world. If the document we are seeking has already been disclosed to the world why must you seek anyone's views with respect to its disclosure to our client.

The responsive records are:

- A two-page document entitled "Results of Questionnaire"(the questionnaire), with blank questionnaire form attached. This record contains survey results concerning a franchise arrangement, and was prepared by the affected party.
- A one-page fax cover sheet (the fax) submitted by the affected party to the Ministry in the context of the previous access request from the *Toronto Star*.

The requester represents a franchisor whose company was the subject of the *Toronto Star* article. The affected party is an association of franchisors.

After receiving a response from the affected party, the Ministry issued a decision. It provided access to the blank questionnaire form and partial access to the fax, and denied access to the remaining portion of the fax and the entire questionnaire on the basis of the following exemptions contained in the Act:

- third party information - section 17(1) (both records)
- personal information - section 21(1) (the fax only)

The requester (now the appellant) appealed the Ministry's decision.

A Notice of Inquiry was sent to the appellant, the Ministry and the affected party. Representations were received from all three parties.

DISCUSSION:

THIRD PARTY INFORMATION

Although not specifically identified in the decision letter or representations, it appears from the various materials submitted by the Ministry and the affected party that the basis for the section 17(1) exemption claim is section 17(1)(b), which reads as follows:

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,

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

For a record to qualify for exemption under section 17(1)(b) the Ministry and/or 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 the harm specified section 17(1)(b) will occur.

Part One

Disclosure of the signature appearing on the fax would clearly not reveal any of the types of information listed in section 17(1). I find that it does not satisfy the requirements of the first part of the test, and therefore does not qualify for exemption under section 17(1)(b).

As far as the questionnaire is concerned, it contains a summary of comments made by various franchisees who responded to a survey conducted by the affected party. It contains information relating to the business and commercial relationship between the franchisees and the appellant's client, and I find that this information is properly characterized as commercial information for the purposes of section 17(1).

Part Two

In order to satisfy part two of the test, the Ministry and/or affected party must show that the information was supplied to the Ministry, either implicitly or explicitly in confidence.

The Ministry submits that the questionnaire was voluntarily provided by the affected party in order to assist the Ministry in its consideration of franchising policy in Ontario. I agree that the questionnaire was supplied by the affected party.

As far as the confidentiality aspect of part two of the test is concerned, the Ministry's representations outline the context in which the questionnaire was supplied to the Ministry. The Ministry points out that it was provided by the affected party pursuant to a Ministry request for information regarding franchising in Ontario. According to the Ministry, it was the understanding that any information was being provided in confidence and was to be used in developing a policy respecting franchising legislation. The Ministry points out that in order to encourage stakeholders to engage in full and frank discussions with the government, it is necessary for the Ministry to give assurance of confidentiality with respect to documents submitted in that context. The representations of the affected party support the Ministry's position.

There is nothing on the face of the questionnaire to indicate that it is a confidential document, however, based on the representations submitted by the Ministry and the affected party I find that the information contained in the questionnaire was provided implicitly in confidence. Therefore, the second part of the test has been satisfied.

Part Three

In order to substantiate the harm mentioned in section 17(1)(b), two requirements must be met. First, it must be established that disclosure could reasonably be expected to "result in similar information no longer being supplied to the Ministry". In addition, it must be in the public interest that such information continue to be supplied to the Ministry.

The affected party submits that its consent to release the questionnaire to the *Toronto Star* was an error, which has caused considerable damage to the relationship between the affected party and its membership. It states that if information given to the Ministry can potentially become public then ongoing discussions between the Ministry and the affected party will be hampered at a time when they are most required. The representations of the affected party state that its board of directors has voiced major concern over the sharing of further information with the government as a result of the release of the questionnaire to the *Toronto Star*, although the representations do not go so far as to state categorically that this type of information will not be provided in future.

The Ministry submits that the affected party is the only recognized provincial franchise association and the sole source of certain empirical data and documentation required by the Ministry in its consideration of franchise legislative policy. The Ministry states that the affected party has put it on notice that, should the questionnaire be disclosed, it will not be in a position to provide similar information in future.

The appellant, on the other hand, questions if no harm existed when the *Toronto Star* requested the questionnaire, and the affected party consented to its release at that time, how it could legitimately be argued that harm exists now when the appellant requests access to the same information. In the appellant's view, the harm contemplated by section 17 of the Act is

information and document specific, not requester specific.

In my view, this appeal does not turn on the question of whether the same record was disclosed to a previous requester. Rather, it is the extent to which the information contained in the record is accessible to the general public. In the circumstances of this appeal, not only was the identical information disclosed in response to a previous request under the Act, but, more importantly, this disclosure resulted in the further dissemination of the pertinent information contained in the questionnaire to the general public through a major article in the largest circulation daily newspaper in the country.

Having reviewed the questionnaire and the representations provided by all parties, I find that the Ministry and/or the affected party have not provided evidence sufficient to establish the harm outlined in section 17(1)(b). Applying the reasoning articulated by former Commissioner Sidney B. Linden in Order 87, in my view, there can be no reasonable expectation of the harms described in section 17(1) arising from disclosure of information which has already been disclosed or where it is available from other sources to which the public has access.

Therefore, I find that the third part of the test has not been satisfied, and the questionnaire does not qualify for exemption under section 17(1)(b) of the Act.

INVASION OF PRIVACY

The name of the author of the fax has been exempted by the Ministry under section 21(1) of the Act. Before considering this exemption, I must first determine whether this name qualifies as personal information.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

It has been established in many previous orders that where individuals are named in their professional or official capacity, the names are not personal information. In this case, the individual who signed the fax cover sheet did so in his capacity as a representative of the affected party association, and I find that this name does not qualify as the personal information of this person, and the section 21(1) exemption does not apply.

ORDER:

1. I order the Ministry to disclose the signature on the fax cover sheet and the questionnaire in its entirety to the appellant within thirty-five (35) days of the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

December 28, 1995