



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER 115

Appeal 880338

Ministry of Consumer and Commercial Relations



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November 14, 1989

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 115
Appeal Number 880338
Ministry of Consumer and Commercial Relations

This letter constitutes my Order in the appeal from a decision of the Ministry of Consumer and Commercial Relations (the "institution") to deny access to information requested by one of your clients under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On April 12, 1988, your client wrote to the institution requesting the following information:

Copy of letter from Century 21 _ W.E. Shay Ltd., dated January 26, 1988 addressed to (a named individual) in response to my complaint against the above real_estate company.

On October 31, 1988, the institution's Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") wrote to you advising that access to the requested letter was denied pursuant to section 21 of the Act. Subsection 21(1) of the Act provides

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a mandatory prohibition on the release of personal information, except under certain specified circumstances, and the institution felt that the letter in question constituted personal information of the author.

On November 28, 1988, you wrote to me appealing the decision of the institution on behalf of your client. I gave notice of the appeal to the institution on December 5, 1988.

As you are aware, as soon as your appeal was received by my office, an Appeals Officer was assigned to investigate the circumstances of the appeal and to attempt to mediate a settlement in this matter. The Appeals Officer obtained and reviewed the record, and undertook settlement discussions.

During the course of the appeal, the institution sent a further letter to your client advising that the institution had raised section 16 of the Real Estate and Business Brokers Act, R.S.O. 1980, chapter 431 as an additional justification for its decision not to release the record.

When a settlement of this appeal could not be reached, an Appeals Officer's Report was prepared and sent to both you and the institution, together with a Notice of Inquiry. At that time you and the institution were asked to make representations to me on all issues arising in the context of the appeal. Representations were received from the institution, and I understand that you advised the Appeals Officer that you wished to rely on representations previously submitted during the course of the appeal. I have reviewed all representations and considered them in making this Order.

The threshold issue arising in this appeal is whether Section 16 of the Real Estate and Business Brokers Act R.S.O. 1980, chapter 431, is a confidentiality provision that operates so as to bar the application of the Freedom of Information and Protection of Privacy Act, 1987.

Section 67 of the Act reads as follows:

67.__(1) The Standing Committee on the Legislative Assembly shall undertake a comprehensive review of all confidentiality provisions contained in Acts in existence on the day this Act comes into force and shall make recommendations to the Legislative Assembly regarding,

- (a) the repeal of unnecessary or inconsistent provisions; and
- (b) the amendment of provisions that are inconsistent with this Act.

(2) This Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.

(3) Subsection (2) shall not have effect until two years after this section comes into force.

Section 67 does not contain an exemption to the Act's disclosure obligations. Rather, subsection 67(2) provides that the Act overrides "confidentiality provisions" in other legislation, unless the other legislation specifically provides otherwise. However, because subsection 67(3) delays the application of subsection 67(2) until January 1, 1990, a head may be bound not to disclose information pursuant to a "confidentiality provision" contained in another piece of legislation until that date.

Section 16 of the Real Estate and Business Brokers Act reads as follows:

16.__(1) Every person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation under section 11, 12, 13, 14 or 15, shall preserve secrecy with respect to all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation and shall not communicate any such matters to any other person except,

- (a) as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act or the regulations; or
- (b) to his counsel; or
- (c) with the consent of the person to whom the information relates.

(2) No person to whom subsection (1) applies shall be required to give testimony in any civil suit or proceeding with regard to information obtained by him in the course of his duties, employment, inquiry, inspection or investigation except in a proceeding under this Act or the regulations. 1971. c.50, s. 76(5), part.

The institution, in its representations, argues that section 16 of the Real Estate and Business Brokers Act is a "confidentiality provision", setting out in clear language a duty to deny access to certain information. The institution also submits that the individual to whom the letter was addressed is employed in the administration of the Real Estate and Business Brokers Act and that he obtained the letter in the course of an inquiry under section 11 of that Act.

I have considered confidentiality provisions in a number of Orders to date e.g., Order 9 (Appeal Number 880016), released on July 28, 1988, Order 15 (Appeal Number 880010), released on September 8, 1988, and Order 62 (Appeal Number 880138), released on May 26, 1989. While I do not purport to offer a definitive outline of all types of provisions contemplated in section 67, it is clear that section 16 of the Real Estate and Business Brokers Act employs express mandatory language prohibiting disclosure of certain information. Accordingly, I find that section 16 of the Real Estate and Business Brokers Act is a "confidentiality provision" as that term is used in section 67 of the Freedom of Information and Protection of Privacy Act, 1987.

Having reviewed the record and all representations, I am also satisfied that the record at issue in this appeal came into the possession of an individual in the course of an inquiry under section 11 of the Real Estate and Business Brokers Act. The record therefore falls within the scope of the confidentiality provision contained in section 16 of the Real Estate and Business Brokers Act.

Accordingly, I find that section 16 of the Real Estate and Business Brokers Act operates so as to bar the application of the Freedom of Information and Protection of Privacy Act, 1987 until January 1, 1990.

I find it unfortunate that the institution did not raise section 16 of the Real Estate and Business Brokers Act as a basis for denying disclosure of the requested record until well

after this appeal commenced. As I have indicated in a number of previous orders, I expect and hope that the introduction of new and different grounds for refusing access to records at the appeal stage will be the exception rather than the rule.

In the circumstances of this case, the decision of the head not to release the record is upheld.

Yours truly,

Sidney B. Linden
Commissioner

cc: The Honourable Gregory Sorbara,
Minister of Consumer and Commercial Relations
Mr. Michael Cash, FOI Co_ordinator
Mr. Thomas Ayres, Solicitor