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

ORDER 122

Appeal 890201

Ministry of Housing

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

November 24, 1989

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 122
Appeal Number 890201
Ministry of Housing

This letter constitutes my Order in your appeal of the decision by the Ministry of Housing (the "institution"), to grant access to records requested under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On April 14, 1989, a requester wrote to the institution seeking access to the following information:

> Records regarding an application for financial assistance through the Low Rise Rehabilitation Programme by Princeton Apts. Ltd. in late 1986 or early 1987, including inspection reports made by a Property Standards Inspector from the Buildings Department of the City of Etobicoke. The address of the property in question is [location] in the City of Etobicoke.

The institution identified your organization (the "third party") and the City of Etobicoke as organizations potentially affected

by the release of this information, and, on May 18, 1989, issued a notice under section 28 of the Act, affording you and the City of Etobicoke the opportunity to make representations regarding disclosure. The City of Etobicoke declined to submit representations. After reviewing your representations, the institution decided to deny access to the application form but grant access to the inspection reports.
On July 6, 1989, you wrote to me appealing the institution's decision to grant access to the inspection reports, and I gave notice of your appeal to the institution on July 12, 1989 and to the requester on July 19, 1989. The basis for your argument on appeal was that disclosure of the record could lead to the record being used out of context thereby causing you serious harm and/or losses. You cited section 17 of the Act as the basis for your arguments against disclosure.

As you know, as soon as your appeal was received in my office, an Appeals Officer was assigned to investigate the circumstances of the appeal, and attempt to mediate a settlement.

The Appeals Officer obtained and reviewed the records at issue in this appeal. They consist of 47 inspection reports of the apartments at [a named location], made by a Property Standards Inspector from the Buildings Department of the City of Etobicoke. After reviewing the record, the Appeals Officer provided you with a copy of my Order 16 (Appeals 880025 et al), dated September 8, 1988, wherein I had addressed the issue of disclosure of inspection reports within the context of section 17 of the Act. The Appeals Officer asked you to review the Order given the similarities between the two appeals.

Settlement was not effected because all three parties maintained their original positions with respect to the interpretation of subsection 17(1) of the Act.

Accordingly, an Appeals Officer's Report was prepared and sent to you, the institution and the requester on August 23, 1989, together with a Notice of Inquiry. All parties were asked to make representations to me concerning the subject matter of the appeal.

I have received and considered representations received from you, the institution and the requester. You chose to rely on the objections contained in your written reply to the institution, as well as your letter of August 1, 1989 to the Appeals Officer.

Section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions of this Act lies upon the head. However, as stated at page 9 in my Order 49, (Appeal Numbers 880017 and 880048) dated April 10, 1989:

> ...where a third party appeals the head's decision to release any such record, the onus of proving that the record should be withheld from disclosure falls to the third party.

The sole issue in this appeal is whether the records qualify for exemption under subsection 17(1) of the Act.

Subsection 17(1) 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,
>
> (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; or
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order to qualify for exemption under subsection 17 the records must satisfy all three parts of the following test:

1. the records must contain 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 records must give rise to the resonable expectation that one of the types of injuries 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) exemption claim invalid.

Having reviewed all of the representations in conjunction with the record itself, I am not satisfied that the first part of the three-part test for exemption under subsection 17(1) has been met.

Further, even if the inspection reports had qualified as financial and/or commercial information within the meaning of subsection 17(1), the information must have been supplied by you to the institution in confidence. In this case the information in the records was not supplied by you to the institution; rather, the institution obtained the information from the City of Etobicoke through inspections required as a condition of your organization applying for funding under the Low Rise Rehabilitation Programme. I addressed the matter of the definition of "supplied" in Order 16 (supra) wherein I stated at page 13:

> The Federal Court of Appeal in the recent decision of Canada Packers Inc. and Minister of Agriculture et al (July 8, 1988) addressed the issue of the meaning of "supplied" in the context of the federal Access to Information Act S.C. 1980-81-82, c.111. The Canada Packers case involved federal meat inspection team audit reports and, speaking for the Court, Justice MacGuigan at pg. 7 states:
>
> > Paragraph 20(1)(b) [of the Federal Act] relates not to all confidential information but only to that which has been 'supplied to a government institution by a third party'. Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed.

In addition, even if you could successfully argue that the information had been provided by your organization, there is

nothing in The Low-rise Rehabilitation Program or elsewhere to indicate that the information gathered on an inspection must be kept confidential by the institution.

Because all three parts of the test must be met in order for the record to qualify for exemption under subsection 17(1), it is not necessary for me to consider part three of the test.

I find, therefore, that you have failed to establish that the records at issue in this appeal meet the requirements for exemption under subsection 17, and I order the institution to disclose the records to the requester in their entirety. 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 you sufficient opportunity to apply for judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on me and/or the institution 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.

Yours truly,

Sidney B. Linden
Commissioner

cc: The Honourable John Sweeney, Minister of Housing
Mr. Howard Jones, FOI Co-ordinator
Requester