



**Information and Privacy
Commissioner/Ontario**

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

1992 CanLII 4261 (ON I.P.C.)

ORDER M-29

Appeal M-910070

Etobicoke Board of Education



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ORDER

The appellant submitted a request to the Etobicoke Board of Education (the institution) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of a staff report on poverty in Etobicoke.

The institution subsequently clarified with the appellant that she was seeking the report which contained "information purchased by the Etobicoke Board of Education from [a research company]". After clarifying the request, the institution contacted the research company (the affected party). The affected party refused to consent to the disclosure of the requested information.

The institution denied access to the record pursuant to section 10 of the Act. The requester appealed the institution's decision.

The record was obtained and examined by the Appeals Officer. The record at issue is two pages in length and consists of a table which has three columns. The first column is a list of the elementary school catchment areas in Etobicoke. The second column is a list of the 1990 average household income for each of the catchment areas. The third column is a list of the percentage of households in each catchment area with a 1990 average household income of less than 25,000 dollars.

The institution prepared the record from data provided to it by the affected party and intended to use it to assess and plan for the needs of students from various socio-economic backgrounds. A note on the record reads as follows:

NOTE: This represents 1990 estimates, developed by [the affected party], which are based on census and other sources such as Tax File information combined with demographic and geographic extrapolations.

Mediation of the appeal was unsuccessful and the matter proceeded to inquiry. Notice of Inquiry was sent to the institution, the appellant and the affected party, accompanied by an Appeals Officer's Report which is intended to assist the parties in making their representations. Representations were received from the institution, the appellant and the affected party.

The sole issue arising in this appeal is whether the mandatory exemption provided by section 10(1) of the Act applies.

Section 10(1) reads:

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 if 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; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

As subsection (d) of section 10(1) is not in issue in this appeal, it is only necessary for me to examine the applicability of sections 10(1)(a), (b) and (c).

Section 10 of the Municipal Freedom of Information and Protection of Privacy Act is similar in wording to section 17 of the Freedom of Information and Protection of Privacy Act. In Order M-10, dated April 21, 1992, I adopted the following three part test, first established under the provincial Act, which must be met in order for a record to fall within the exemption found in sections 10(1) (a), (b) or (c):

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 10(1) will occur.

Each part of the test must be satisfied in order for a record to be exempt from disclosure.

It has been established in a number of previous orders that the burden of proving the applicability of the exemption lies with both the institution and the affected party who has resisted disclosure

(Orders 80, 101, 166, 204 and P-228).

Part 1 of the Section 10 Test:

In order to satisfy Part 1 of the test, the record must reveal information that is "a trade secret or scientific, technical, commercial, financial or labour relations information".

Trade Secret

In its representations, the affected party claims that the record contains information which constitutes a trade secret. Neither the provincial or municipal Acts contain a definition of the term "trade secret" and this is the first order under either Act to address this issue. I have considered various meanings that could be given to this term.

"Trade secret" is defined in Webster's Third New International Dictionary as "a formula, pattern, process, or device that is used in one's business and that gives an advantage over competitors who do not know or use it."

In the Uniform Trade Secrets Act, developed in the United States by the Commissioners on Uniform State Laws, the following definition of trade secret was used:

information, including a formula, pattern, compilation, program, device, method, technique or process that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

I have also reviewed a decision of the U.S. Court of Appeal for the D.C. Circuit in the case of Public Citizens Health Research Group v. F.D.A. 704 F. 2d 1280 (D.C. Cir 1983). In that case the court considered the meaning of the term "trade secrets" as it is used in the American Freedom of Information Act and adopted the following definition:

a secret, commercially valuable plan, formula, process, or device that is used for the

making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.

The British Columbia Freedom of Information and Protection of Privacy Act (the B.C. Act) which received third reading on June 25, 1992, and will come into effect in the fall of 1993 contains a definition of "trade secret" which reads as follows:

"trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that

- a) is used, or may be used, in business or for any commercial advantage,
- b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
- c) is the subject of reasonable efforts to prevent it from being generally known, and
- d) the disclosure of which would result in harm or improper benefit.

The Institute of Law Research and Reform, Edmonton, Alberta and a Federal-Provincial Working Party, Trade Secrets, (Report No. 46, July 1986)(the Alberta Report) proposed a Trade Secrets Protection Act. Section 1(b) of the proposed Act contains the following definition of "trade secret":

"trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In deciding which of these definitions is most appropriate for the Ontario Acts I have taken into account one of the stated purposes of the Acts which is "necessary exemptions from the right of access should be limited and specific". As well, the definition must be workable within the context of the three part test that has been established under section 10 of the Act (section 17 of the provincial Act). Finally, I feel that adopting too broad a definition would have the potential for making the other types of information set out in section 10 (section 17 of the provincial Act), such as scientific, or commercial information, redundant.

In my opinion, each of these definitions has its limitations. Initially, I felt that the definition employed by the U.S. Court of Appeal was best-suited to the Ontario Acts. A major reason for this is that the definition was developed in the specific context of freedom of information legislation. However, on further reflection I feel that the use of the term "trade commodities" in the definition is a potential source of confusion and would itself have to be defined.

As far as the definition contained in the B.C. Act is concerned, to a large extent, it appears to incorporate all the elements of the three part test which has been established under section 10 and 17 of the Ontario Acts. Accordingly, I believe that this definition is not appropriate for the Ontario Acts.

Although the definition contained in The Uniform Trade Secrets Act may be the most easily understood I have decided to opt for the "made in Canada" definition contained in the Alberta Report. This definition does cause me some of the same concerns as those I have with the definition in the B.C. Act, however, I feel that my concerns can be adequately addressed by the careful application of the three part test for exemption under section 10 (section 17 of the provincial Act).

I will now apply the definition contained in the Alberta Report to the record at issue in this appeal in order to determine if disclosure of the record will reveal a "trade secret".

In its representations, the affected party claims that the record contains information which constitutes a trade secret because it represents the result of the application of highly technical population and income forecasting models. The affected party states that it has invested in background research and product development to create the two techniques used to produce the income estimates and that these techniques allow it to sell the results to its customers.

The information in the record at issue may be considered to be a "compilation". However, in my opinion, the affected party has not provided sufficient information to support the position that the information at issue was the "subject of efforts which are reasonable under the circumstances to maintain its secrecy". In its representations, the affected party states that the information in the record is protected by copyright and maintains that "There has never been an issue of confidentiality in this case".

Section 3(1) of the Copyright Act defines copyright as:

the sole right to produce or reproduce the work ... in any material form whatever, to perform ... the work or any substantial part thereof in public, or ... to publish [an unpublished] work ..., and includes the sole right ...to authorize any such acts.

I think that it is important to note that providing **access** to information under the Municipal Freedom of Information and Protection of Privacy Act does not constitute an infringement of copyright. Specifically, sections 27(2)(i) and (j) of the Copyright Act provide that disclosure of information pursuant to the federal Access to Information Act or any like Act of the legislature of a province does not constitute an infringement of copyright.

Sections 27(2)(i) and (j) of the Copyright Act read as follows:

The following acts do not constitute an infringement of copyright:

- (i) the disclosure, pursuant to the Access to Information Act, of a record within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like material;
- (j) the disclosure, pursuant to the Privacy Act, of personal information within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like information;

As the Act is a "... like Act of the legislature of a province ..." **disclosure** of copyrighted information is not an infringement of copyright.

The affected party states that it would agree to the release of the information in the record if a royalty fee was collected from the appellant by the institution. In its representations, the institution states that the affected party did not raise any issue of non-disclosure with the institution until after the affected party became aware of the appellant's request. In my view, this does not demonstrate efforts which are "reasonable under the circumstances" to maintain secrecy.

The affected party also submits that the record at issue constitutes a "trade secret" because it contains the result of the application of population and income forecasting formulas or models. Even if these models or formulas themselves would qualify as "trade secrets", the record does not contain these models or formulas themselves, nor, in my view, would disclosure of the record permit accurate inferences to be drawn regarding the nature of the models or formulas which were applied to obtain the information in the record.

Therefore, the affected party has not established that the disclosure of the information contained in the record would "reveal" information that is a "trade secret" for the purpose of section 10 of the

Act.

Commercial Information

In its representations, the institution states that because the information was purchased by the institution from the affected party, it is commercial information for the purposes of the section 10 exemption.

The information contained in the record is a table of statistical data concerning households and income levels in various areas of Etobicoke, compiled for the purpose of determining the allocation of public funds. In my opinion, simply because the information was purchased from the affected party does not make it "commercial information" for the purposes of section 10 of the Act.

Technical, Scientific or Financial Information

Because section 10(1) is a mandatory exemption, I have reviewed the record to determine if it contains one of these other types of information. In my view, the information is not technical, scientific or financial information of or relating to the affected party.

Accordingly, the information contained in the record does not reveal any of the types of information listed in section 10 and the first part of the section 10 test has not been met. Because the first part of the test has not been met, it is not necessary for me to consider whether the second and third parts of the test have been met. Therefore, I find that the exemption does not apply to the record.

ORDER:

1. I order the institution to disclose the record.
2. I order that the institution not disclose the record in issue until thirty (30) days following the date of the issuance of this order. This time delay is necessary to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/ Ontario and/or the institution within this thirty (30) day period, I order that the record in issue be disclosed within thirty-five (35) days of the date of this order.
3. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

4. In order to verify compliance with this order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1, upon request only.

Original signed by: _____
Tom Wright
Commissioner

_____ July 30, 1992