



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

ORDER P-246

Appeal 900290

Ministry of the Environment



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O R D E R

On January 26, 1990, a request was made to the Ministry of the Environment (the "institution") for access to all records relating to a Certificate of Approval issued to Du Pont Canada Inc. (Du Pont) with respect to production of HCFC-123 at its Maitland, Ontario plant. Access to all records with respect to the waste that is produced by the production of HCFC-123 was also requested.

Pursuant to section 28 of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act"), the institution notified Du Pont that it was obligated to release the records unless the company provided information to show that the records fell within the exemption provided in section 17 of the Act. Du Pont responded to the institution verbally and in writing, that the records could be disclosed except for those which had been supplied in confidence.

By letter dated May 28, 1990, the institution advised the requester that the majority of the requested records would be disclosed. Enclosed with the letter was an index indicating the records to which the requester was being denied access, in whole or in part, pursuant to section 17(1)(a) of the Act. On June 25, 1990, a further letter was sent to the requester indicating that the institution was also relying on sections 17(1)(b) and (c), and outlining in greater detail the reasons why access to the records in question was being denied.

On June 25, 1990, the requester appealed the head's decision to deny access to portions of the records. Notice of the appeal was sent to the institution and the appellant.

A copy of the records was received and reviewed by the Appeals Officer. The records at issue, as itemized by the institution, consist of the following:

Record Number

Description

2.5	A ten page laboratory literature search regarding Freon-123,
15	The Maitland Plant Site; the legend was severed,
19	A two page engineering assessment prepared during the review of the air application; two words were severed from paragraph 3 on page 1; table 2 was severed from page 2,
20	A drawing of equipment arrangement prepared by Du Pont,
21	A drawing of equipment arrangement prepared by Du Pont,
37	A one page letter to the Approvals Branch from Du Pont; the last sentence from paragraph 1 was severed,
42	A five page engineering assessment prepared during the review of the waste water application; the second paragraph was severed from page 1; two numbers were severed from the second sentence of the second paragraph and four words were severed from the fourth sentence of the second paragraph on page 4,

22 Page 1 of a General Process Summary ("summary"),
26 Page 5 of the summary; two numbered values were
severed,
28 Page 7 of the summary,
29 Page 8 of the summary,
32 Figure 1 of the summary,
33 Figure 2 of the summary,
48 Revised page 5 of the summary; two number values
were severed.

Attempts at mediation were made but were not successful and the appeal proceeded to an inquiry. An Appeals Officer's Report was sent to the institution, Du Pont and the appellant, outlining the issues in the appeal and inviting representations.

Written representations were received from the institution and Du Pont. No representations were received from the appellant.

The only issue to consider is whether the head has properly applied the mandatory exemption provided by section 17 of the Act to exempt certain of the requested records from disclosure.

The institution has claimed that the records are exempt pursuant to sections 17(1)(a), (b) and (c) of the Act. Section 17 reads, in part, 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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In Order 36, dated December 28, 1988, former Commissioner Sidney B. Linden established the three part test which must be satisfied in order for a record to be exempt under section 17. The test is as follows:

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 subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) claim invalid.

I adopt Commissioner Linden's views for the purpose of this appeal.

In determining whether the first part of the test has been satisfied, I must consider whether disclosure of the information contained in the records at issue in this appeal would "reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information".

In its representations, Du Pont stated:

Some of the records contain technical and scientific information relating to the properties of HCFC-123, as well as the process, equipment and layout of the Maitland plant. In addition, the records contain information about flow rates and annual production figures, which is financial and commercial information.

In a number of previous Orders, it has been determined that a record relating to product information and market considerations is commercial information. [See Orders: #47, 70, 101 and 166]. In my view, information regarding properties of materials and research into exposure of those materials to certain chemicals comes within the meaning of scientific and technical. Therefore, the first part of the test is satisfied.

The second part of the section 17 test raises the question of whether the information contained in the records at issue in this appeal was "supplied in confidence implicitly or explicitly".

In its representations, the institution indicated that many of the records were marked 'CONFIDENTIAL' or 'FOR DU PONT USE ONLY'

and that in all discussions and correspondence with the institution, Du Pont has consistently opposed the disclosure of any information that would explicitly or implicitly identify the production capacity of the HCFC manufacturing facility.

Du Pont has, in its representations, confirmed its treatment of this information as confidential as between itself and its parent company and in its own internal practices:

Du Pont Canada has taken numerous measures to ensure that this information is kept confidential, for example: employees have access to this information on a need-to-know basis, only; speeches and publications are screened to ensure that they do not reveal this information; visitors to the HCFC-123 plant must sign in and out and be escorted at all times; and all third parties who receive this information must sign confidentiality agreements.

Du Pont maintains that the records were provided to the institution with the understanding that they not be divulged to members of the public. The institution confirmed that in all discussions and correspondence, Du Pont has from the very beginning stressed that it considers the information contained in the records to be confidential.

Upon reviewing the records and the representations of the institution and Du Pont, I am of the opinion that Records 2.5, 15, 20, 21, 37, 42, 22, 26, 28, 29, 32, 33, and 48 were supplied directly to the institution explicitly in confidence.

Records 19 and 42 are reports prepared by the institution which summarize or review the parts of the records which I have found were supplied explicitly in confidence. I have stated previously that I will find that information contained in records would "reveal" information "supplied" by a third party, within the meaning of subsection 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution. [See Orders 203 and 218].

In my view, if the severed portions of Records 19 and 42 are disclosed, accurate inferences could be drawn about the information contained in the records which I have found to have been supplied by Du Pont to the institution in confidence. Therefore, disclosure of the severed portions of these records would reveal information which was supplied to the institution in confidence.

I therefore find that part two of the section 17 test has been satisfied.

The third part of the test will be satisfied if it can be demonstrated that disclosure of the information in the records at issue in this appeal could reasonably be expected to result in one of the types of harms specified in (a), (b) or (c) of section 17(1). The onus is on the institution and the affected party to provide detailed and sufficient evidence setting out the facts and circumstances that would lead to a reasonable expectation that harm could occur if the records were disclosed.

The representations indicate that Du Pont has spent over twelve years in research for HCFC-123. The records provide considerable detail as to the steps taken in researching and developing the product. In addition Du Pont has invested millions of dollars in research and development in the product area. In my view, not only could Du Pont lose the benefit of the money it invested should competitors obtain the information in question and replicate the processes developed by Du Pont, but its competitive position could be damaged regarding the marketability of its product. In my view, there is sufficient evidence to support the assertion that disclosure of the record in question might reasonably be expected to significantly prejudice the competitive position of Du Pont.

I find that the third part of the section 17 test has been established.

In summary, I uphold the head's decision to withhold the records at issue in this appeal.

Original signed by: _____
Tom Wright
Commissioner

November 1, 1991

Date