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

ORDER P-276

Appeal P-910071

Ministry of the Environment

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O R D E R

On April 23, 1990, a request under the Freedom of Information and Protection of Privacy Act (the "Act") was received by the Ministry of the Environment (the "institution"). The request was for access to the name of the proposed supplier and the name of the proposed fuel in connection with an application by Steetley Lime and Aggregates ("Steetley"), for a Certificate of Approval pursuant to section 8 of the Environmental Protection Act.

Pursuant to section 28 of the Act, the institution notified Steetley that it had received the request, and sought its representations as to disclosure of the record. Following receipt of representations from Steetley, the institution made a decision to refuse to disclose the record, portions of which contain the requested information. On January 30, 1991, during the process of mediating another appeal, the institution changed its position and decided to disclose the relevant portions of the record. The institution notified Steetley of its new decision. On February 7, 1991, Steetley appealed the new decision, submitting that the relevant portions of the record fall within the exemption in section 17 of the Act. Notification of the appeal was sent to the institution, the requester and Steetley.

A copy of the record was received and reviewed by the Appeals Officer. The record consists of documents forwarded to the institution by Steetley in January 1989, in connection with its "Application for a Certificate of Approval (Air)", and in particular, includes the following documents:

1. A completed Application for Certificate of Approval (Air), on the institution's form 1147 (08 88), in which approval for a change of process is sought by Steetley;

2. Steetley's covering letter submitted with that application, dated January 20, 1989 and attachments to that application;

3. Minutes of a meeting between Steetley and its proposed fuel supplier, which were attached to the application; and

4. Four technical data sheets on the fuel, which were attached to the application.

The requested information appears in several places in the record, and the remainder of the record does not respond to the request and is therefore not at issue in this appeal.

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

Written representations were received from the institution, the requester and Steetley.

Because the institution is prepared to disclose the portions of the record containing the requested information, and it is Steetley who is resisting disclosure, the onus is on Steetley to provide detailed and convincing evidence that would satisfy the requirements of the section 17(1)(a), (b) or (c) exemption.

The only issue in this appeal is whether the portions of the record containing the requested information are exempt under section 17(1)(a), (b) or (c) of the Act.

Sections 17(1)(a), (b) and (c) state 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 a three part test, each part of which must be satisfied in order for a record to be exempt under section 17(1)(a), (b) or (c). Subsequent to the issuance of Order 36, section 17(1) was amended to include a new section 17(1)(d). This new section is not covered by the test established in Order 36, and is also not relevant in the circumstances of this

appeal. The test for exemption under section 17(1)(a),(b) or (c) 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.

At page 7 of Order 36, Commissioner Linden set out the requirements for meeting the third part of the test as follows:

> In my view, in order to satisfy the Part 3 test, the institution and/or third party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a) - (c) would occur if the information was disclosed.

It appears from all of the materials submitted in connection with this appeal that Steetley is in the process of negotiating a contract with the potential supplier of the fuel in question. In its representations on the issue of the applicability of section 17(1)(a), Steetley states that:

> Identifying the potential supplier at this point in time could result in Steetley losing that supplier as the economically optimum choice, in that they could refuse to act as the supplier of the fuel, or they could agree to act, but only at a higher price. Disclosure of the name of the potential supplier could also prejudice negotiations with other potential suppliers of waste-derived fuel by prematurely disclosing that Steetley has had discussions with a particular supplier.

The representations and correspondence submitted by Steetley also indicate that suppliers of waste-derived fuel are limited, and that the supply of the fuel itself is limited.

In my view, the evidence submitted represents no more than unsubstantiated generalized assertions of fact amounting, at most, to speculations of possible harm. I am not convinced that the disclosure of the name of the supplier or the fuel involved in Steetley's negotiations in response to a request under the Act could reasonably be expected to interfere significantly with those negotiations or otherwise prejudice significantly the competitive position of Steetley. Accordingly, in my view, the harms mentioned in section 17(1)(a) have not been established.

With respect to section 17(1)(b), Steetley's representations contain no detailed or convincing evidence to raise a reasonable expectation that release of the portions of the record containing the requested information will lead to this type of information no longer be supplied to the institution. Steetley's argument is considerably undermined by the fact that

the institution requires information of this type to be provided as part of the application procedure for obtaining a Certificate of Approval under section 8 of the Environmental Protection Act. I find that a reasonable expectation of the harm mentioned in section 17(1)(b) has not been established.

Steetley's representations in connection with section 17(1)(a) imply that it could incur undue loss as a result of disclosure. Undue loss is one of the harms listed in section 17(1)(c). However, Steetley has not submitted any arguments or evidence specifically for the purpose of establishing the reasonable expectation that it could incur undue loss or that any of the other harms enumerated in section 17(1)(c) would result from disclosure of the portions of the record containing the requested information. I have already found that the evidence provided by Steetley in connection with section 17(1)(a) represents no more than unsubstantiated generalized assertions of fact amounting, at most, to speculations of possible harm. Accordingly, I find that no reasonable expectation of any of the harms mentioned in section 17(1)(c) has been established. Therefore Steetley has failed to satisfy the third part of the three-part test established in Order 36.

Because all three parts of the test must be met for the record to qualify for exemption under sections 17(1)(a),(b) or (c), Steetley has failed to establish that the exemption applies to the portions of the record which contain the requested information.

ORDER:

1. I uphold the head's decision to disclose the requested information to the requester and to that end I order the institution to disclose to the requester the portions of the record which I have highlighted in the copy of the record which is being forwarded to the institution with this Order.

2. I further order the institution not to make this disclosure until thirty (30) days following the date of 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. Provided that 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 portions of the record described in Provision 1 of this Order 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.

Original signed by: February 25, 1992
Tom Mitchinson Date
Assistant Commissioner