



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-388

Appeal Number P-9200588

Ministry of Northern Development and Mines



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# ORDER

## BACKGROUND:

The Ministry of Northern Development and Mines (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to certain funding proposals (the proposals) submitted to the Ministry under the Mine Technology Research Subprogram of the Northern Ontario Development Agreement (NODA), together with the Ministry's evaluations of the proposals.

NODA is a joint undertaking of the Government of Canada and the Government of Ontario, whose purpose is to encourage economic development and diversification in Northern Ontario by the development and implementation of strategies for sustainable development in tourism, forestry and minerals. A Joint Federal/Provincial Management Committee administers the programs operated under NODA. The Mining and Minerals Technology Program Technical Sub-Committee is responsible for administration of the funding program.

The requester specifically sought access to the following proposals and corresponding evaluations: 05, 06, 14, 16, 18, 21, 22, 25, 27, 33, 34, 36, 37, 41, 43, 44, 45, 46, 52, 53, 54, 55, 57, 58, and an unnumbered proposal submitted for the creation of the Canadian Abandoned Mine Agency. All proposals relate to mining and minerals technology. The Ministry provided access to records relating to proposal 22, which involved the requester, and denied access to all other responsive records, pursuant to sections 15(a) and 17(1) of the Act. The requester appealed the Ministry's decision.

Mediation was not successful, and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the appellant, the Ministry and the 14 companies and/or individuals who submitted the particular proposals identified by the appellant (the affected persons). Written representations were received from the Ministry and the appellant. Two affected persons involved with projects 06, 18, 27 and 37 agreed to the release of their proposals and evaluations, and a third affected person objected to the release of the proposal and evaluation relating to his project. None of the other affected persons responded to the Notice of Inquiry.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 15(a) of the Act applies to the records.
- B. Whether the mandatory exemption provided by section 17(1) of the Act applies to the records.
- C. If the answer to Issues A and/or B is yes, whether there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemption.

SUBMISSIONS\CONCLUSIONS:

**ISSUE A: Whether the discretionary exemption provided by section 15(a) of the Act applies to the records.**

Section 15(a) of the Act states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

In order to qualify for exemption under section 15(a) the records must meet the following test:

1. The Ministry must demonstrate that disclosure of the records could give rise to an expectation of prejudice to the conduct of intergovernmental relations; **and**
2. The relations which it is claimed would be prejudiced must be intergovernmental, that is relations between the Ministry and another government or its agencies; **and**
3. The expectation that prejudice could arise as a result of disclosure must be reasonable.

[Order 210]

The Ministry submits that prejudice would result from the release of the information contained in the records. The Ministry's representations, referring to advice received from the Federal Government's co-chairperson of the Mining and Minerals Technology Program Technical Sub-Committee, state that:

release of the information in the records would likely alienate the mining industry in general and discourage its participation in the Northern Ontario Development Agreement, and accordingly the records should not be disclosed. It was felt by [Ministry officials] that due to the very dominant role the federal government plays in this program, if we did not respect their wishes federal-provincial relationships in this area would be seriously prejudiced.

In my view, the Ministry's representations, as well as the Federal Government's position focus on the possibility that release of the records would prejudice the relationship between the mining industry and both levels of government, not the relationship between the federal and provincial governments themselves. Accordingly, I find that the Ministry has failed to establish that an expectation of prejudice to the conduct of **intergovernmental** relations could reasonably be

expected to result from disclosure of the records and, therefore, the records do not qualify for exemption under section 15(a) of the Act.

**ISSUE B: Whether the mandatory exemption provided for by section 17(1) of the Act applies to the records.**

Section 17(1) of the Act provides, in part:

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;

For a record to qualify for exemption under sections 17(1)(a), (b) and/or (c) the Ministry and/or the affected person resisting disclosure must satisfy each part of the following three-part test:

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 17(1) will occur.

[Order 36]

I have examined the project proposals and, in my view, each of them contain scientific, technical and/or financial information, thereby satisfying the requirements for the first part of the section 17 test. As far as the corresponding evaluations are concerned, in my view, only the information relating to the nature of the proposal and/or the requested funding can properly be considered as scientific, technical and/or financial information; the remaining portions of the evaluations fail to satisfy the requirements of the first part of the test.

The Ministry takes the position that the information contained in the proposals and the evaluations was "supplied" by each of the applicants. Although I accept that the proposals were supplied to the Ministry, the information contained in the evaluations was created by Ministry staff, and was not "supplied" by the applicants. It is possible for information which was not actually supplied to the Ministry to be "supplied" for the purposes of section 17(1) if its disclosure would permit the drawing of accurate inferences with respect to information which was actually supplied to the Ministry (Order 203). In my view, the only information contained in the evaluations which would permit the drawing of accurate inferences about information actually supplied to the Ministry is the same portions of the evaluations which I found to contain scientific, technical and/or financial information under my discussion of the first part of the test.

Therefore, I find that the proposals and those parts of the evaluations which contain scientific, technical and/or financial information were "supplied" to the Ministry for the purpose of section 17(1) of the Act.

As to whether these records or parts of records were supplied "in confidence", I find that the request for proposals issued jointly by the Ontario Mining Association, the Ontario Ministry of Northern Development and Mines, and the Federal Department of Energy, Mines & Resources, makes no explicit reference to confidentiality, nor was any evidence submitted during the course of this appeal which would indicate that the Ministry offered any explicit undertaking regarding confidentiality. As far as any implicit expectation of confidentiality is concerned, the Ministry states in its representations:

The practice by both the federal and provincial officials was (and is) to treat proposals in confidence and not circulate them beyond the evaluation process. My understanding is that this practice was well known by the industry participants and accordingly gave rise to the expectation of confidentiality on their part.

The affected persons have provided no evidence to substantiate the Ministry's position. Each of the 14 affected persons was afforded an opportunity to submit representations on this issue; only three responded, and only one of them objected to release of the contents of his proposal. The reasons provided by this affected person make no reference to any expectation or undertaking on the part of the Ministry that the proposal would be treated confidentially.

Based on the evidence before me in this appeal, I find that the Ministry and/or the affected person resisting disclosure have failed to establish that the records or parts of the records which I have found were "supplied" to the Ministry were supplied "in confidence". Therefore, I find that the second part of the test for exemption under section 17(1) of the Act has not been established, and the records should be released to the appellant in their entirety.

Because of the manner in which I have disposed of Issues B, it is not necessary for me to consider Issue C.

**ORDER:**

1. I order the Ministry to disclose project proposals 05, 06, 14, 16, 18, 21, 25, 27, 33, 34, 36, 37, 41, 43, 44, 45, 46, 52, 53, 54, 55, 57, 58 and the unnumbered proposal submitted for the creation of the Canadian Abandoned Mine Agency, to the appellant within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the requester pursuant to provision 1, **only** upon request.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ December 22, 1992