



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

# **ORDER P-512**

**Appeal P-9200718**

**Ministry of Environment and Energy**



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# ORDER

## BACKGROUND:

The Ministry of the Environment (now the Ministry of Environment and Energy) (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information submitted by a company regarding a mining proposal. The Ministry identified four records as responsive to the request, notified the mining company of the request and gave it the opportunity to make representations concerning the disclosure of the records. The mining company objected to disclosure of the four records. The Ministry granted access to one record, and denied access to three records pursuant to sections 15(a) of the Act. The Ministry indicated that sections 17(1)(a) and (c) of the Act also applied to one of the three records to which access was denied. The requester appealed the Ministry's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, the mining company and two First Nations bands involved in the negotiations surrounding the mining company's proposal. Written representations were received from the Ministry only.

In the Ministry's representations it withdrew its objection to the release of two of the records in question, Records 1 and 3, for which it had only claimed exemption under section 15(a). Record 1 is a letter from the mining company to the Minister of the Environment, and Record 3 is the Mine Project Proposal report.

Because the Ministry did not inform the parties of this change in its position and the mining company had objected to disclosure of these two records in response to the Ministry's original notice, a supplemental notice of inquiry was sent to all parties to the appeal advising them of the Ministry's withdrawal of its objection to the release of the two records. The mining company advised that it did not object to the disclosure of Records 1 and 3. As both the Ministry and the mining company do not object to the disclosure of Records 1 and 3, I am ordering that Records 1 and 3 be disclosed.

The following discussion will therefore only deal with Record 2 which is the "Summary of the Terms of Agreement" between the mining company and the two First Nations bands. The Ministry is claiming the application of exemptions under sections 15(a) and 17(1)(a) and (c) of the Act to deny access to this record.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 17(1)(a) or (c) of the Act applies.
- B. Whether the discretionary exemption provided by section 15(a) of the Act applies.
- C. Whether section 23 of the Act applies.

## **SUBMISSIONS/CONCLUSIONS:**

### **ISSUE A: Whether the mandatory exemption provided by section 17(1)(a) or (c) of the Act applies.**

Sections 17(1)(a) and (c) of the Act read:

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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency

In order for a record to qualify for exemption under section 17(1)(a) or (c) the Ministry and/or the mining company 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) or (c) of subsection 17(1) will occur.

[Order 36]

In its representations, the Ministry states that it considers the record to be commercial information as it forms the basis of an agreement between the mining company and the First

Nations bands. It advises that the agreement outlines the benefits to the First Nations bands, subject to final agreement, in return for their support of the mining project. The mining company also submits that the record contains information of a commercial undertaking between the two parties.

In my view, commercial information is information which relates to the buying, selling or exchange of merchandise or services. I have reviewed the information contained in the record and am satisfied that it qualifies as commercial information and, therefore, the first part of the test has been met.

Having examined the record and the representations of the Ministry and the mining company, I am satisfied that the information contained in the record was supplied to the Ministry by the mining company and, therefore, the "supplied" aspect of part two of the test has been satisfied.

In regards to whether the information was supplied in confidence, the Ministry and the mining company maintain that the record was supplied to the Premier and the Minister implicitly in confidence. Both parties state that normally, development projects are submitted to Ministry staff who would undertake a review. In this case, the company directly approached the Premier and the Minister in an effort to persuade them that the revised mining project would not require a hearing under the Environmental Assessment Act. The mining company approached the Minister who would ultimately be responsible for the decision to designate or not designate that the project be subject to a full hearing under the Environmental Assessment Act.

The Ministry states that the mining company advised them that the records were intended as a brief for discussion purposes with the Premier and his Ministers and must not be considered as a project report or definitive environmental study in any way. In its representations, the mining company submits that the information was supplied in confidence to the Minister in a meeting on May 22, 1992.

I accept that there was a certain degree of confidence implicit in the submission of such an agreement to the Ministry and, accordingly, I find that the second part of the section 17(1) test has been met.

In order to satisfy the third part of the test, the Ministry and/or the mining company 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 one or more of the harms described in section 17(1) would occur if the information was disclosed (Order 36).

The Ministry states that the mining company indicated that disclosure of the records may affect the sensitive relationship between the company and the two First Nations bands. The mining company advised the Ministry that:

... terms of an important working agreement with the First Nations have been developed and negotiations are continuing toward a formal agreement. Any misuse of this information by opposing parties could have serious consequences on this relationship and the future welfare of the First Nations communities.

The Ministry submits that the record at issue reveals these terms, and as a result, disclosure of the record could seriously jeopardize the mining company's ability to negotiate the final formal agreement.

The Ministry states that it agrees that the relationship between the mining company and the First Nations has always been sensitive and is even more sensitive at this time because of the Province of Ontario's agreement to enter into discussions with the First Nations on a government to government basis.

In its representations, the mining company states that the agreement is a draft only, and negotiations are still in progress. The company submits that any outside interference at this stage could seriously disrupt the negotiations, making it very difficult to come to mutually agreeable terms.

Having reviewed the representations and the contents of the record, I am satisfied that in the circumstances of this appeal, there is sufficient evidence to indicate that disclosure of the record could reasonable be expected to prejudice or interfere significantly with the negotiations between the affected parties. Accordingly, I find that part three of the test for exemption under section 17(1) of the Act has been satisfied. Because all three parts of the test have been met, I find that the mandatory exemption provided by section 17(1)(a) applies to Record 2.

Because of the manner in which I have disposed of Issue A, it is not necessary for me to consider the application of section 15(a) under Issue B.

**ISSUE C: Whether section 23 of the Act applies.**

Under Issue A I found Record 2 exempt under section 17(1). Section 23 of the Act states:

An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

The Act is silent as to who bears the burden of proof in respect of section 23. Where the application of section 23 has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record before making submissions in support of their contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

The appellant submits that he represents a group which is trying to get all jurisdictions to take an ecosystem approach to managing the environment that the mining proposal will affect. The appellant believes that the Ministry is not co-operating in this matter by withholding information. The appellant also submits that since the group was the first party to request that the mining proposal be designated under the Environmental Assessment Act, it should not have to fight for public information from the Province of Ontario.

The Ministry advises that the public should be made aware of the environmental impact of any project undertaken by this company or any other third party. Since the terms of agreement between the two parties do not contain an environmental impact statement, the Ministry believes that there is no need for this record. In addition the Ministry states that, should there be a formal application from the company, the Ministry would involve the public in the process.

It has been stated in a number of previous orders that, in order to satisfy the requirements of this section, there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption (Orders 24, 163, 183).

In the circumstances of this appeal, I am not convinced that there is a compelling public interest sufficient to outweigh the purpose of the exemption under section 17.

### **ORDER:**

1. I order the Ministry to disclose Records 1 and 3 within 15 days of the date of this order.
2. I uphold the Ministry's decision not to disclose Record 2.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ August 5, 1993