



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

# **ORDER P-513**

## **Appeal P-910252**

### **Ministry of Environment and Energy**



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# ORDER

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 the written action plan, (Record 1); the contingency plan, (Record 2); the report, (Record 3); and, the written progress reports (Record 4); submitted by a named company which operates a pulp-mill in Ontario, pursuant to a Control Order issued by the Ministry on October 23, 1989 under the Environmental Protection Act (the EPA).

The Ministry notified the named company of the request under section 28 of the Act. The named company objected to the disclosure of Records 1, 2 and 4; however, the Ministry decided to grant the requester access to all of the records, with the exception of figures 2 and 3 in Record 2. The named company (hereafter called the appellant) appealed the Ministry's decision to disclose Records 1, 2 and 4 on the basis that the mandatory exemption under section 17(1) applies to the records.

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 and the requester. Representations were received from the appellant and the Ministry only.

A Control Order is issued by the Ministry under section 7 of the Environmental Protection Act (the EPA) when an inspection report of the Ministry indicates that a contaminant discharged into the natural environment is a contaminant the use of which is prohibited by regulations or is being discharged in contravention of the EPA or its regulations. Under the EPA, a Control Order is a document which the Ministry is required to make public. The Ministry is also required to notify the municipality in which the contaminant is discharged of the Control Order. The records at issue were submitted to the Ministry as required by the Control Order.

The records at issue in this appeal may be described as follows:

Record 1 is a four-page document which identifies the specific equipment or process changes required to comply with the Control Order, the benefits of such changes and the timetable for their implementation.

Record 2 consists of 67 pages and three appendices. It describes the plans, equipment, and procedures required to prevent or contain chemical spills from the mill into the natural environment. As indicated above, Figures 2 and 3 in this record, which are the blue prints that reveal security patrol checkpoints and environmental tour routes, have been withheld by the Ministry and are not the subject of this appeal. Appendices A, B, and C are entitled, respectively, "Regulation 309 - Driver Training Manual", "Chlorine Institute Emergency Kit 'C' for Chlorine Tank Cars and Trucks", and "[the appellant's] Evacuation Plan".

Record 4 consists of three progress reports covering the period of October 23, 1989 through December 31, 1990 (a total of seven pages, including the covering

pages) which provide the Ministry with a status report of changes taking place at the appellant's mill to put the contingency plan into effect.

The sole issue in this appeal is whether the mandatory exemption provided by sections 17(1)(a) and/or (c) of the Act apply to the records. These sections 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;

For a record to qualify for exemption under sections 17(1)(a), or (c) the party 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 subsection 17(1) will occur.

[Order 36]

### **Part One**

The information contained in the records relates to processes, equipment, and plans required to prevent or alleviate effects of the discharge of contaminants into the natural environment and reports outlining the steps taken and the results achieved to meet the requirements of the Control Order. In my view, this information is "technical" information and satisfies part one of the test.

## **Part Two**

With respect to part two of the test, the appellant must meet two requirements. It must prove that the information was **supplied** to the Ministry and that it was supplied **in confidence**, either explicitly or implicitly.

All of the records at issue were supplied by the appellant to the Ministry pursuant to the requirements of the Control Order and I am satisfied that the "supplied" part of this test is satisfied.

With regard to the issue of whether the records were supplied in confidence, the appellant states that all of the records were supplied implicitly in confidence while the Ministry's position is that only Record 2 was supplied implicitly in confidence. Although the evidence I have received on this issue is not totally convincing, I am prepared to accept that the appellant's expectation of confidentiality at the time he supplied the records were reasonable.

## **Part Three**

In order to satisfy part three of the test, the party resisting disclosure, in this case the appellant, 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).

I have received representations from the appellant that the release of the records could reasonably be expected to result in the types of harm identified in section 17(1)(a) and (c) of the Act. With regard to Record 1, the appellant submits:

The disclosure of Record 1 may reasonably be expected to result in the dissemination of the contents thereof to the media by the requester or other environmental organizations which would likely result in Industry competitors acquiring knowledge of the specific process used by the [appellant] in the operation and production of pulp at the Mill. Such disclosure would provide the [appellant's] competitors with an economic advantage while resulting in a corresponding loss to the [appellant] caused by the ability of competitors to determine the financial obligations required of the [appellant] in order to comply with the Control Order.

With respect to all of the records, the appellant submits:

More importantly, the appellant submits that the negative publicity likely to result from the disclosure of this information will cause significant interference with the regulatory process. Such interference threatens the ability of the appellant to negotiate and obtain acceptable regulations and Environmental Permits that would allow the appellant to continue operating the mill.

The appellant's representations place heavy emphasis on the possible misuse and/or misinterpretation of the information. The appellant indicates that information in these records was prepared specifically for the use of the Ministry to determine compliance with the Control Order, and therefore, meets only the needs and expectations of the Ministry. It states that in some cases (i.e. Record 4), because the record was prepared exclusively for the Ministry, the information "is otherwise incomplete and subject to misinterpretation by any third party who may come into its possession."

The appellant states that environmental organizations which are actively campaigning to completely eliminate the discharge of a particular contaminant into the natural environment will use the information contained in the record for the purpose of launching a negative campaign against the appellant and the pulp industry as a whole and for lobbying government to ban the use of the chemicals. This in turn, the appellant submits, threatens its ability to negotiate and obtain acceptable regulations and environmental permits that would allow the appellant to continue operating the mill.

In my view, the appellant's concern that the information in the record could be misinterpreted by others does not appear to be well founded; according to the appellant's own submission, the contents of the records could only reveal that the appellant has complied with or exceeded the requirements of the Control Order. It is not reasonable, therefore, to expect that groups advocating the total ban of certain contaminants or the establishment of lower levels of allowable discharge than is presently permitted by the regulations would use the contents of the records to advance their argument. I cannot see how it is possible that the contents of the record can be misused or misinterpreted in order to advocate a legislative change.

In my view, the appellant's representations have failed to give any specific reasons why disclosure of the record is likely to result in "negative publicity" against the appellant.

In addition, I have not been provided with sufficient evidence which supports the appellant's claim that the record contains information which reveals specific processes used by the appellant in the operation of the mill or the production of pulp. The Ministry, in explaining its decision to grant access to the records, states that information in the records such as equipment type,

machinery lay-out and threshold levels is very general or has already been published in Pulp & Paper Canada, 1989 Annual & Directory, which provides a detailed description of equipment, process flow diagram, and production capacity for the appellant's mill. It submits:

In comparing the contingency plan with the published data, the Ministry is of the opinion that there is no additional information, if disclosed, that would benefit a competitor, or be a detriment to [the appellant].

In summary, I have carefully reviewed the records and the representations of the appellant, and in my view, the appellant has failed to establish that the disclosure of the information in the records could reasonably be expected to result in any of the types of harms enumerated in

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sections 17(1)(a) or (c) of the Act. While the appellant's representations provided considerable detail regarding the controversy surrounding the use of certain chemicals in the paper and pulp industry and the campaign that advocacy groups are waging to have them banned, I find that the appellant has failed to provide clear and specific evidence linking a reasonable expectation of harm to the release of specific information in the records.

Accordingly, I find that the appellant has failed to satisfy the third part of the test for exemption under section 17(1) with respect to Records 1, 2 (with the exception of Figures 2 and 3 which are not at issue in this appeal) and 4. These records should be released to the requester.

### **ORDER:**

1. I uphold the Ministry's decision.
2. I order the Ministry to disclose to the requester the records which I found not to be exempt within 35 days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
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 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Asfaw Seife  
Inquiry Officer

\_\_\_\_\_ August 6, 1993