



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

# **ORDER P-584**

**Appeal P-9300341**

**Ministry of Environment and Energy**



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# ORDER

## BACKGROUND:

The Ministry of Environment and Energy (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for Ministry records relating to two named properties located in the City of North York. The Ministry located individual environmental audit reports for each property which were responsive to the request. The Ministry further determined that the interests of a named company might be affected by disclosure of the information. The Ministry notified the named company pursuant to section 28 of the Act, and requested representations with respect to release of the information contained in the records.

The named company objected to the release of the audits to the requester. In its representations to the Ministry, the named company provided the background to the creation of the records, the circumstances under which the records were submitted to the Ministry and the perceived consequences of disclosure of the records to the requester.

The Ministry decided, after considering the representations made by the named company, to release the information. The named company, hereafter referred to as the appellant, appealed the Ministry's decision to disclose the records on the basis that the mandatory exemption under sections 17(1)(a), (b) and (c) of the Act applies to the records. In addition, the appellant submits that the audits were prepared for counsel with a view to litigation and are, therefore, subject to solicitor-client privilege.

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

The records at issue consist of the following documents (using the numbering provided by the Ministry):

17. Draft Phase I and II Environmental Audit - respecting a named address on Yonge Street - Re-printed on Feb. 25, 1993.
19. Fax to Gary Miller (MOE) from an employee (CRA Consulting Engineers) dated Feb. 23, 1993, with Site Assessment for several named addresses on Yonge Street attached.
22. Environmental Assessment printed on Feb. 23, 1993 respecting several named addresses on Yonge Street.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 17 of the Act applies to the records.

- B. Whether the common law doctrine of solicitor-client privilege is applicable to the records at issue.

## **SUBMISSIONS/CONCLUSIONS:**

### **ISSUE A: Whether the mandatory exemption provided by section 17 of the Act applies to the records.**

Sections 17(1)(a), (b) and (c) of the Act 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;

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 of the section 17(1) test**

The information contained in the record is the result of a technical study of the subject properties undertaken by a firm of consulting engineers who are experts in the field of environmental testing and analysis. The record details a number of analytical tests undertaken at the subject lands and states the conclusions of its authors as to certain environmental issues. I am satisfied that the first part of the section 17(1) test has been met as the disclosure of the record would reveal technical information.

### **Part two of the section 17(1) test**

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.

The records at issue were commissioned and paid for by the appellant. When it became apparent to the appellant that contamination of the natural environment existed on the subject properties, it contacted the appropriate governmental agencies, including the Ministry, to alert them as to the nature of the problem. The subject records were then furnished to the Ministry by the appellant at the request of the Ministry. Although the Ministry has the statutory authority under section 18 of the Environmental Protection Act to compel the production of such information, it was provided by the appellant voluntarily. I am satisfied that the information contained in the records was, accordingly, supplied by the appellant.

In its representations, the Ministry acknowledges that all information supplied to it concerning environmental matters is considered to be "implicitly supplied in confidence". In situations where the contamination of the environment which is brought to the attention of the Ministry is not "grave" in nature, it is the policy of the Ministry not to disclose more than a summary of its information to the public. Accordingly, I am satisfied that, in these circumstances, it was the understanding of the appellant and the Ministry that this information had been supplied implicitly in confidence.

### **Part three of the section 17(1) test**

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 sections 17(1)(a), (b) and (c) of the Act. In respect of section 17(1)(a), the appellant submits:

Disclosure of the records will prejudice [the appellant] in the contractual negotiations for the acquisition of [a named address]. The owner of that property agreed, in accepting the original offer to purchase, that it would not receive the [a named address] Audit. The disclosure of the [a named address] Audit would now allow the owner to get around the terms of an agreement it had accepted. In addition, the possession of the information in the [a named address] Audit assists [the appellant] in its negotiations for the acquisition of [a named address]. It

would now significantly prejudice [the appellant's] negotiating position for the acquisition of [a named address] were the [a named address] Audit disclosed;

The appellant has not, however, demonstrated in sufficient detail how prejudice to its contractual position could reasonably be expected to result from the disclosure of the information contained in the records. The exact nature of the prejudice to its contractual negotiations which would transpire has not been shown. Accordingly, I am unable to agree that section 17(1)(a) of the Act has any application in this appeal.

Insofar as section 17(1)(b) of the Act is concerned, the appellant submits:

... that [the appellant] supplied the records, in confidence, to the MOEE solely for the purpose of assisting the MOEE in investigating what appeared to be conditions posing a risk to public health and safety. [The appellant] was under no obligation to do so. [The appellant] would have been very reluctant to disclose the two audits had the MOEE revealed that it would disclose them. It is submitted that members of the public, like [the appellant], should be encouraged to disclose information to the MOEE to protect public health and safety. The disclosure of these two audits would discourage the public from doing so. To disclose the record is, therefore, not in the public interest;

While I agree that it is in the public interest that members of the public, like the appellant, should continue to supply information of this sort to the Ministry, I am not satisfied that the disclosure of the records in this appeal will result in similar information no longer being supplied by members of the public. As stated earlier, the provisions of section 18 of the Environmental Protection Act may be utilized by the Ministry to compel parties to disclose information about contamination to the natural environment. In my view, it is in the interests of property owners to disclose such information and the release of these records will not significantly affect the existing practice.

The appellant has also made representations concerning the application of section 17(1)(c) of the Act. It submits:

... disclosure of the records will cause [the appellant] financial harm in two ways. The first is that it will prejudice its negotiation for the acquisition of [a named address] on the most advantageous terms. The second is that it will prejudice [the appellant's] chances of success in any litigation to recover damages for the contamination caused to [several named addresses].

Again, the appellant has failed to describe in sufficient detail the nature of the financial harm which it may suffer should the records at issue be disclosed. I am unable to agree that there exists a sufficient connection between the disclosure of this information and the harm described above.

Accordingly, I find that sections 17(1)(a), (b) and (c) of the Act have no application to the records at issue in this appeal.

**ISSUE B: Whether the common law doctrine of solicitor-client privilege is applicable to the records at issue.**

In its representations, the appellant contends that the records at issue in this appeal are subject to the common law solicitor-client privilege and are, accordingly, exempt from disclosure. Neither the Ministry, nor the appellant, through its counsel, raised the application of the discretionary exemption provided by section 19 of the Act. The Ministry has taken the position that only the exemptions provided by the Freedom of Information and Protection of Privacy Act may be utilized to exempt a requested record from disclosure in the context of a request under the Act. I agree, and find that the common law solicitor-client privilege which is claimed by the appellant has no application to the records at issue in this appeal.

**ORDER:**

1. I uphold the decision of the Ministry to disclose the records at issue in this appeal.
2. I order the Ministry to disclose to the requester Records 17, 19 and 22 within fifteen (15) days of 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 requester pursuant to Provision 2, **only** upon request.

**POSTSCRIPT:**

In its representations, the appellant raises the question of whether the disclosure of the records would be contrary to public policy. It is my view that the points raised in this portion of its representations have been adequately addressed in my review of the application of section 17(1)(b) of the Act.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

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November 24, 1993