



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

ORDER P-703

Appeal P_9400085

Ministry of Environment and Energy



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ORDER

NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of records from the Ministry of Environment and Energy (the Ministry) relating to a named recycling company (the Company) from June, 1992 to the present. In particular, the appellant indicated that he was seeking information which would be located in the files of three Ministry employees. The Ministry notified the Company of the request pursuant to section 28(1) of the Act. The Company objected to the disclosure of any information relating to it. Despite the Company's objections, the Ministry decided to grant partial access to the appellant. The Ministry relies on the following exemption in denying access to portions of three records:

- third party information - section 17

In appealing the Ministry's decision to deny access under section 17, the appellant indicated that he believes that further responsive records exist.

A notice of inquiry was provided to the appellant, the Company and the Ministry. Representations were received from all three parties.

DISCUSSION:

THIRD PARTY INFORMATION

The information which the Ministry has withheld under section 17(1) consists of the following:

- information (on Record 2) relating to Materials and Recycling Markets which is contained in the message section of a facsimile sent to the Ministry from the Company
- portions of two sentences (on Record 6, which is a Ministry generated memorandum) which contain customers' names
- a portion of one sentence (on Record 16, which is a Ministry generated report) which contains a customer's name

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the institution and/or the affected party 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.

I have reviewed the information contained in the records at issue. I am of the view that the names of customers and information which relates to the materials in which the Company deals and its markets are all commercial information, and therefore, part one of the test has been met.

With respect to part two of the test, I am satisfied that Record 2 was supplied to the Ministry by the Company and that both Records 6 and 16 would reveal information which was supplied by the Company. There is nothing on the face of the records which would indicate that the particular information contained in them was supplied explicitly in confidence. Based on the Ministry's and Company's representations relating to the competitive nature of the business and the confidentiality requirements of section 168 of the Environmental Protection Act, however, I am satisfied that the information was supplied implicitly in confidence and part two of the test has been met.

With respect to part three of the test, the Ministry submits that disclosure of the information would compromise the Company's competitive position and interfere with the Company's contractual negotiations (section 17(1)(a)), which would result in undue loss for the Company (section 17(1)(c)). I am satisfied that disclosure of information relating to materials, markets and customers would provide information to competitors which would adversely affect the Company's ability to control its market and negotiate to its advantage. In my view, disclosure of this information could reasonably be expected to result in the harms set out in section 17(1)(a).

All three parts of the test have been met and the severed portions of Records 2, 6 and 16 are exempt from disclosure under section 17 of the Act.

REASONABLE SEARCH

In his representations, the appellant indicates that the index of records provided to him by the Ministry only identifies records dating from January, 1993. He also indicates that in his letter of request, he specified that files should be located in the office of a particular individual, but the index does not mention any files relating to this individual. He then provided information which led him to believe that the Ministry should have further records in the custody of the three named employees relating to the Company from at least as early as June, 1992.

Where the requester provides sufficient details about the records which he is seeking and the Ministry indicates that additional records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence which shows that it has made a **reasonable** effort to identify and locate records responsive to the request.

In its representations, the Ministry outlined its record-keeping practices. Rather than individual employees maintaining separate files, all records are kept in central files only. The Ministry outlined the steps taken to search the two central files in which responsive records might be located. In addition, the Ministry indicated that the three individuals named in the request were

asked about files in their possession. Each one indicated that they did not maintain any files in their offices and that all information would be found in the central files. The Ministry's representations include sworn affidavits from two of the employees which confirm the steps taken by the Ministry to locate responsive records.

The Ministry advised that although records exist which pre-date the June, 1992 date as set out in the request, no records were located between June, 1992 and January, 1993. The Ministry also indicated that a span of inactivity on a file is not uncommon in certain circumstances, and explained how these circumstances applied in this case.

Having reviewed the representations of the parties, I am satisfied that, in the circumstances of this appeal, the Ministry has taken all reasonable steps to locate any records which would respond to the appellant's request and I find that the search conducted by the Ministry was reasonable.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ June 15, 1994