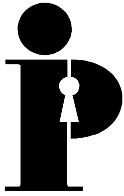

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1175

Appeal P-9600026

Ministry of Labour

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NATURE OF THE APPEAL:

The appellant is a professional engineer with training in metallurgical engineering. He was formerly employed by an oil company (the corporation). In 1988, he resigned from his employment with the corporation. He states that, among other reasons, he resigned because of safety concerns about potential metal stress in a particular piece of machinery at a refinery operated by the corporation. For ease of reference I will refer to this piece of machinery as "the machinery".

After his resignation, the appellant contacted two organizations about his safety concerns arising from the way in which the corporation was operating the machinery. One organization the appellant contacted was the Ministry of Labour (the Ministry), in connection with its mandate under the Occupational Health and Safety Act (the OHSA). He also contacted the Association of Professional Engineers of Ontario. Both organizations looked into the appellant's concerns.

In particular, the Ministry conducted an investigation under the OHSA, and issued a report on the results of this investigation in June 1995. Soon afterwards, under the Freedom of Information and Protection of Privacy Act (the Act), the appellant made an access request to the Ministry for a copy of this report.

The Ministry notified the corporation of the request pursuant to section 28 of the Act. The corporation advised the Ministry that it objects to disclosure, and the Ministry denied access to parts of the report under the exemption in section 17(1) of the Act (third party information).

The appellant filed an appeal of this denial of access.

This office sent a Notice of Inquiry to the Ministry, the appellant and the corporation. Before the due date for representations specified in the initial Notice of Inquiry, a revised Notice of Inquiry was sent to the same parties. In addition to inviting representations on section 17(1), the revised Notice of Inquiry invited the parties to comment on the possible application of the so-called "public interest override" in section 23 of the Act, and on the possible application of section 11 of the Act. The latter section mandates disclosure by the "head" of an institution where such disclosure is in the public interest and the record reveals a grave environmental, health or safety hazard to the public.

In response to the Notices, all three parties submitted representations.

DISCUSSION:

SECTION 11 OF THE ACT

Section 11(1) of the Act states:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable

> and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

In Order 187, then Assistant Commissioner Tom Wright considered whether the Commissioner (or his delegates) have the authority to make an order under section 11 of the Act. He stated:

> Section 11 is a mandatory provision which requires the head to disclose records in certain circumstances. Commissioner Sidney B. Linden in Order 65 ... found that the duties and responsibilities set out in section 11 of the Act belong to the head alone. I concur with Commissioner Linden's interpretation of section 11 and adopt it in this appeal. As a result it is my view that the Information and Privacy Commissioner or his delegate do not have the power to make an Order pursuant to section 11 of the Act.

I agree with this interpretation. Accordingly, it is not possible for me to make an order with respect to the application of section 11.

THIRD PARTY INFORMATION

Section 17(1) of the Act states, in part, 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.

I will analyse whether the undisclosed information is exempt under section 17 under three subject headings, namely “Type of Information”, “Supplied in Confidence” and “Harms”.

Type of Information

In order to qualify for exemption under section 17(1), the information at issue must be “a trade secret or scientific, technical, commercial, financial or labour relations information”.

The undisclosed parts of the report consist of information about the machinery. This information consists of technical descriptions of the machinery, observations about its operations and information about several incidents involving it.

In Order P-454, former Assistant Commissioner Irwin Glasberg discussed the meaning of "technical" information, as follows:

> [i]n my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

I agree with this interpretation. The author of the report is a professional engineer and, in my view, the undisclosed information describes the construction and operation of equipment. I find that all of it qualifies as "technical" information.

Supplied in Confidence

Section 17 requires that the information at issue was "supplied in confidence implicitly or explicitly." I will discuss this requirement in two parts: (1) was the information "supplied", and (2) if so, was it supplied "in confidence, explicitly or implicitly"?

Based on the representations of the corporation, and my review of the undisclosed information in the report, I am satisfied that the corporation supplied it to the Ministry. I will now consider whether it was supplied "in confidence, explicitly or implicitly".

In the circumstances of this appeal, several provisions of the OHSA have a bearing on this question. Section 63(1)(a) of the OHSA prohibits inspectors from disclosing information obtained during inspections under the OHSA. Similarly, section 63(1)(c) of the OHSA prohibits disclosure of information about secret manufacturing processes obtained under the provisions of the OHSA.

The existence of these confidentiality provisions in the OHSA raises another issue, namely, whether they prevail over the access provisions of the Act. Section 67(2) of the Act lists confidentiality provisions in other statutes which prevail over the Act. The provisions of the OHSA referred to in the preceding paragraph are **not** mentioned in section 67(2) of the Act. Accordingly, they do **not** prevail over the Act. Therefore, I must decide the issue of access by determining whether section 17(1) applies, and if so, whether section 23 overrides its application.

In connection with the application of section 17(1) of the Act, the confidentiality provisions in the OHSA **are** relevant to the issue of whether the corporation supplied the information at issue to the Ministry in confidence, and I will consider these provisions in deciding this issue.

Because of the confidentiality provisions in the OHSA, summarized above, I am satisfied that the corporation had an expectation of confidentiality with regard to the information it supplied, and

that this expectation had a reasonable basis. This view is supported by the fact that the corporation advised the Ministry of its objection to the disclosure of this information before the appellant submitted his access request. Therefore, I find that the information at issue was supplied to the Ministry implicitly in confidence.

Harms

In order to be exempt under section 17(1)(a), (b) or (c), it is necessary to demonstrate that disclosure of the information at issue could reasonably be expected to result in one of the harms mentioned in these sections.

The corporation argues that disclosure of **any** of the information at issue could harm its competitive interests since "... it could be used by competitors to gain valuable competitive information relating to the operation of [the machinery], which if adopted by our competitors could place [the corporation] at a competitive disadvantage." This argument relates to section 17(1)(a).

Based on the nature of the information and the representations submitted by the corporation, I am satisfied that, with two exceptions, disclosure of the information at issue could reasonably be expected to significantly prejudice the corporation's competitive position. Therefore, with respect to most of the information at issue, the requirements for exemption under section 17(1)(a) have been met, and the exemption applies.

The exceptions to this finding consist of two separate passages in the report. The first of these appears on page 3, and sets out the explanations provided to the investigator in connection with two incidents involving the machinery which occurred in 1983 and 1988. The second passage appears on page 5 and represents the investigator's conclusions about the appellant's chief concern. Neither of these passages contains information which could be "adopted by competitors", and in my view, the evidence provided does not establish that disclosure of either of the two passages could reasonably be expected to cause significant prejudice to the corporation's competitive position. Moreover, the corporation has not referred to any negotiations which could be harmed by disclosure of these passages. Therefore, I find that section 17(1)(a) does not apply to them.

I will also consider whether section 17(1)(b) or (c) could apply to these same passages.

The harm mentioned in section 17(1)(b) would be established if it is demonstrated that disclosure could reasonably be expected to "result in similar information no longer being supplied to the institution". The OHSA confers investigative powers on the Ministry and also provides for sanctions in the event of non-compliance with its provisions. Moreover, the information in question explains why the two incidents took place and what was done in response to them. In view of the investigative scheme in the OHSA, the sanctions set out in the OHSA for non-compliance and the nature of the passages in question, I am not persuaded that an order requiring their disclosure could reasonably be expected to result in similar information no longer being provided to the Ministry. Therefore, I find that section 17(1)(b) does not apply to these two passages.

The harm mentioned in section 17(1)(c) would be established if it is demonstrated that disclosure could reasonably be expected to "result in undue loss or gain to any person, group, committee or financial institution or agency". With respect to the passages which I have found not to qualify under section 17(1)(a) or (b), I am also not satisfied that section 17(1)(c) applies. As noted above, the passages in question explain why two incidents involving the machinery took place, and the investigator's conclusions about the appellant's concerns.

One possible way of establishing a reasonable expectation that disclosure could result in undue loss to the corporation relates to damage to the corporation's competitive position. I canvassed this above in my discussion of section 17(1)(a) and concluded that disclosure could not reasonably be expected to produce this result, and this conclusion applies equally under section 17(1)(c). The other possible way of establishing the application of section 17(1)(c) in this case relates to damage to the corporation's reputation. Given the nature of the two passages in question, I am not satisfied that disclosure of these passages could reasonably be expected to produce this result.

In my view, disclosure of this particular information is unlikely to cause undue loss to the corporation or any other entity, nor undue gain.

Since none of the harms in section 17(1)(a), (b) or (c) applies to the passages in question, they are not exempt under any of these sections. Since no discretionary exemptions have been claimed for this information, and no mandatory exemption applies, it should be disclosed. I have highlighted these two passages on a copy of the record which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the Act states as follows:

> 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 machinery whose operation is of concern to the appellant has had two significant failures within the last thirteen years. The appellant submits that accidents of this type can lead to the release of hazardous substances into the environment, and I accept his evidence in this regard. Moreover, an accident at the refinery in December 1993 required the evacuation of nearby residents from their homes. The disclosed portion of the record indicates that this was not caused by the issues which are of concern to the appellant, but in my view, the necessity of evacuation illustrates the level of danger which can arise from accidents in such a facility.

In Order P-270, Commissioner Tom Wright found that certain information related to safety concerns about nuclear energy was not exempt under section 17. However, he went on to consider whether section 23 **would** have applied to require disclosure of this information if he had found it to be exempt. He stated:

> In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.
>
> I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.
>
> In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.
>
> The question which remains is whether that public interest is so compelling as to clearly outweigh the purposes of the section 17 exemption? In my view, the purpose of the section 17 exemption is the protection of third party information supplied to an institution in confidence, so that the third party's interests will not be harmed by disclosure.
>
> I feel that, in view of the considerations which I have set out above, the public interest in the disclosure of the information would be sufficiently compelling as to clearly outweigh the purposes of section 17.

I agree with these conclusions. In my view, although the consequences of a petrochemical accident are not as obviously disastrous as those which could generally be expected to result from an accident involving nuclear energy, there is nevertheless a compelling public interest in ensuring the safe operation of petrochemical facilities.

I have found that two passages in the record which explain the incidents in 1983 and 1988 and the corporation's response to them, as well as the investigator's conclusions about the appellant's concerns, are not exempt. In view of the documented incidents which have occurred, and the public interest in the safe operation of petrochemical facilities, I find that there is a public interest in the disclosure of these two passages, which outweighs the purpose of the exemption. Therefore, if I had found that this information was exempt under section 17(1), I would have applied section 23 to it, and ordered disclosure. I am reinforced in this conclusion by Commissioner Wright's comment in Order P-270 that disclosure would be in the public interest even where its effect would be to provide assurances "... that the institution and others are aware of safety related issues and that action is being taken."

The information which I **have** found to be exempt under section 17(1) is technical information which is not specifically related to the documented incidents involving the machinery. Given the fact that the Ministry has investigated the appellant's concerns, I find that the public interest in disclosure of this technical information would **not** outweigh the purpose of the exemption. Therefore, section 23 does not apply to the other undisclosed information.

In this case, I have indicated that, if I had exempted the parts of the record which explained the incidents in 1983 and 1988, and the investigator's conclusions about the appellant's concerns, I would have applied section 23 and ordered disclosure of that information. In this regard, I note that the appellant is a private individual. In my view, cases where disclosure to a **private** individual would be in the **public** interest would most likely be rare. However, given the appellant's demonstrated history of reporting his concerns about the machinery to public bodies with investigative powers in this area, I believe that this would be such a case, with respect to the information which is being disclosed.

ORDER:

1. I uphold the Ministry's decision to deny access to the undisclosed parts of the record, **except** the parts which are highlighted on the copy which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order the Ministry to disclose to the appellant the parts of the record which are highlighted on the copy of the record which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order, by sending a copy to the appellant on or before **June 11, 1996** but not earlier than **June 6, 1996**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the institution to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: May 7, 1996
John Higgins
Inquiry Officer