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

FINAL ORDER PO-1732-F

Appeals PA-990037-1 and PA-990200-1

Ministry of the Environment

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for "all information, data, letters, reports, applications, etc." relating to contamination on the property of a named company (the company) and "remediation" as it may affect the requester's property lying north and west of the property owned by the company. The request also included all records relating to the contamination of the company's property, as well as any records prepared by or for the previous owner of this property.

Pursuant to section 28 of the Act, the Ministry notified the company of the request, stating that it planned to release records provided by the company, and that it would like the company's views regarding disclosure of 17 records identified in an index provided by the Ministry.

In response, the company asked the Ministry to confirm that the only records provided by the company to the Ministry that the Ministry was planning to release were the 17 records identified in the Ministry's index. The Ministry responded by stating that "only those documents that require notice in accordance with the FOI Act were listed on the index". The Ministry further stated that it intended to release "additional records which were ministry generated as well as others received from [the company] or consulting firms" and that these records "do not require notification in accordance with the Act" (the additional records).

The company expressed concern that the additional records contain the company's information, and therefore may qualify for exemption pursuant to section 17(1) of the Act, and requested that the Ministry provide it with notification in accordance with the Act. The Ministry re-stated its position that the additional records did not require notification. The Ministry stated:

> For your information, it is clearly not necessary to provide notice to Ministry generated records, even though they pertain to [the company]. Other documents submitted by [the company] or its consultant are similar to the type of records the Commissioner has ordered released in the past.

The Ministry thereby refused to permit the company to review the additional records or to make submissions with regard to their disclosure.

The company (now the appellant) appealed the Ministry's refusal to provide it with section 28 notice for the additional records (Appeal PA-990037-1).

I sent a Notice of Inquiry on this issue to the Ministry, the appellant and the requester. Following a review of the records and representations received from the three parties, I issued Interim Order PO-1694-I. One of my findings in that order was that the notification requirements of section 28(1)(a) were present with respect to some, but not all, of the additional records, and that the appellant was entitled to notice under this provision and the opportunity to make representations on these records prior to disclosure by the Ministry.

I also noted that the Ministry had issued its decision to disclose the original 17 records (16 in full and one in part), and that this decision was appealed by the appellant (Appeal PA-990200-1).

In Interim Order PO-1694-I, I identified the most appropriate process to be followed in dealing with the unresolved notification issues in Appeal PA-990037-1 as follows:

> Section 28(1) of the Act places a statutory responsibility on the head of an institution, not the Commissioner. The head must identify the required notifications in the context of deciding whether records should be disclosed or withheld to protect third party interests, both personal and commercial. The Commissioner's role is to provide an opportunity for an independent review of a head's decision prior to the actual disclosure of records, should an appeal be made by an affected person or party.
>
> In the unique circumstances of this appeal, I have decided to craft a remedy which will allow for an expeditious determination of the proper treatment of all responsive records, while at the same time permitting the parties, in particular the appellant, an opportunity to make representations on all records for which notification under section 28(1)(a) should have been given. I have decided on this course of action based on the Ministry's clear indication to the appellant that it intends to disclose all records other than the 17 records for which notice was given. In my view, to require the Ministry to apply the interpretation of section 28(1)(a) outlined earlier in this order and provide notification with respect to some of the additional records, would only add unnecessary procedural steps to a matter which will ultimately require consideration by this Office. That being said, I want to be clear that the responsibility to notify when considering access requests under the Act rests with institutions, pursuant to the requirements of section 28. The interpretation I have provided on the application of section 28(1)(a) should assist the Ministry in discharging these statutory responsibilities in future.

Coincidental with the issuance of Interim Order PO-1694-I, I sent a Supplementary Notice of Inquiry to the parties identifying the 43 records for which notification should have been provided to the appellant, and asking for representations from the parties on whether these records qualify for exemption pursuant to sections 17(1)(a), (b) and/or (c) of the Act. These records remained at issue in Appeal PA-990037-1. At the same time, I also sent a Notice of Inquiry to the same three parties in respect of the 17 records in Appeal PA-990200-1, seeking representations on the application of sections 17(1)(a), (b) and/or (c) of the Act to those records.

All other responsive records in Appeal PA-990037-1 did not require notification, and I ordered the Ministry to disclose them to the requester as a provision in Interim Order PO-1694-I. This disclosure has been made.

Representations were received from all three parties for both appeals.

In its representations respecting Appeal PA-990037-1, the appellant consented to disclosure of Records 3, 8, 32, 65, 66, 69, 72 and 79 and partial disclosure of Records 7, 36, 37, 40, 41, 42, 87, 88, 96 and 110 to the requester. A copy of the latter group of records was included with the appellant's representations, with severances indicating the parts covered by the consent.

No issues remained outstanding for the records covered by the appellant's consent. Therefore, in order to avoid unnecessary delay in the disclosure of these records, I ordered the Ministry to disclose them to the requester in Interim Order PO-1712-I. This disclosure has been made.

Therefore, the records remaining at issue in Appeals PA-990037-1 and PA-990200-1, either in whole or in part, will be addressed in this final order and are described in Appendices A and B, attached to this order.

DISCUSSION:

THIRD PARTY INFORMATION

In the circumstances of these appeals, the Ministry has decided to disclose all remaining records to the requester. The appellant has appealed the Ministry's decision with respect to some of the records, claiming that they qualify for exemption pursuant to sections 17(a), (b) and (c) of the Act. Therefore the onus is on the appellant, as the only party resisting disclosure, to establish the requirements of this exemption claim.

Sections 17(1)(a), (b) and (c) state:

> 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 the records to qualify for exemption under sections 17(1)(a), (b) or (c), the appellant 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 Ministry 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]

In Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.), the Court of Appeal upheld my decision in Order P-373. In that judgement the Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

Requirement One - Type of Information

The appellant submits that the records contain scientific and technical information, and in some instances commercial information and/or trade secrets.

The appellant relies on the definitions of scientific and technical information established in Order P-454. In that order, former Assistant Commissioner Irwin Glasberg found:

> ... scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific

> hypotheses or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the Act.
> ...
>
> ... 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. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act.

I adopt these definitions for the purpose of these appeals.

The appellant submits that all of the records contain scientific and technical information. The appellant states that the remaining records have been prepared by environmental advisors, specialists and consultants and include water and soil sampling, monitoring reports, proposed remediation plans, reports interpreting monitoring results or commenting on remediation proposals, applications for and documents related to Certificates of Approval, schematic drawings, site plans and incident reports.

The Ministry also submits that the records contain scientific and technical information.

The requester acknowledges that some records may contain scientific and technical information.

Although I accept that some methods employed by the appellant and its consultants were created as a result of scientific development, testing and analysis, I find that none of the actual information in the records themselves relates to "the observation and testing of specific hypotheses or conclusions". Rather, the information reflects the application of these methods in the context of the appellant's remediation efforts. Therefore, I find that the records do not contain "scientific information", as that phrase has been defined in Order P-454.

However, I find that the records contain technical information. Some records were prepared by professionals in the field of environmental engineering and testing and describe the operation of various processes and equipment; others, prepared by Ministry staff, contain information relating to technical processes associated with the appellant's remediation efforts, thereby also meeting the requirements of the definition of "technical information".

Therefore, I find that the first requirement has been established for the records in both appeals.

Requirement Two - Supplied in Confidence

In order to satisfy the second requirement, the appellant must show that the information was **supplied** to the Ministry, either implicitly or explicitly **in confidence**.

Supplied

The Ministry and the requester acknowledge that many of the records were supplied to the Ministry. They submit that records generated or prepared by Ministry employees or officials are not accurately characterized as having been "supplied" for the purposes of section 17(1).

The appellant states that the records were supplied to the Ministry, but its representations focus exclusively on whether the records were supplied **in confidence**. Therefore, my findings on whether the records were supplied are based primarily on my independent review of each of the records, as well as the representations provided by the Ministry.

Records 11, 14, 15, 18, 33, 37, 38, 42, 46, 47, 49, 53, 57, 59, 61, 62, 63, 64, 67, 68, 87, 88, 92, 100, 104, 105, 110, 111 and 140 in Appeal PA-990037-1 and all of the Records in Appeal PA-990200-1 are either records authored by employees of the appellant or records prepared by the environmental consultants retained by the appellant. Some of the records are addressed to the Ministry while others are "cc'd" to the Ministry. All of these records contain information in which the appellant has an interest and were submitted to the Ministry by the appellant. Consequently, I find that this information was "supplied" to the Ministry by the appellant for the purposes of section 17(1).

Records 7, 34, 36, 40, 41, 96, page 3 of Record 40, and the last sentence of paragraph 3 on page 1 of Record 34 in Appeal PA-990037-1 were all prepared by Ministry staff. Previous orders of this Office have determined that information contained in a record that was not actually provided to the Ministry would satisfy the "supplied" part of the section 17(1) test if disclosure of this information would "reveal" information actually supplied to the Ministry. Information would "reveal" information "supplied" by the appellant if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (see, for example, Orders P-36, P-204, P-251 and P-1105). The undisclosed portions of these records contains information which has either been extracted from records supplied to the Ministry by the appellant, or would otherwise reveal information that was originally supplied by the appellant. Consequently, I find that the undisclosed portions of Records 7, 36, 41 and 96, page 3 of Record 40, and the last sentence of paragraph 3 on page 1 of Record 34 in Appeal PA-990037-1 contain information that was supplied to the Ministry for the purposes of section 17(1).

While the remaining portions of Record 34 and pages 1 and 2 of Record 40 in Appeal PA-990037-1, which I have already noted were prepared by Ministry staff, refer to the fact that the appellant had provided the Ministry with information, they contain only information that was generated by Ministry staff setting out the Ministry's position on various issues respecting the appellant's property. Disclosure of these records would not reveal information provided by the appellant or permit the drawing of accurate inferences with

respect to information that was supplied. Therefore, I find that this particular information was not supplied to the Ministry.

In Confidence

In order to establish that the records were supplied either explicitly or implicitly in confidence, the appellant must demonstrate that an expectation of confidentiality existed at the time the records were submitted (Order M-169), and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

(1) Communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the Ministry.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

(Order P-561)

Records 1, 2, 6, 14 and 16 in Appeal PA-9900200-1 are either addressed directly to the requester or have been "cc'd" to the requester or his counsel. Accordingly, I find that the appellant can have no reasonably-held or objective basis for its position that these records were supplied to the Ministry in confidence. They have not been treated in a manner that indicates a concern for their protection from disclosure and, in fact, have been provided to the appellant prior to the existence of any request under the Act. Therefore, I find that Records 1, 2, 6, 14 and 16 in Appeal PA-990200-1 were not supplied in confidence and do not qualify for exemption under section 17(1) of the Act.

The Ministry did not provide representations on the issue of confidentiality.

The requester submits that there is no reasonable basis upon which to conclude that the records were supplied in confidence. He states:

> It is my respectful submission that [the appellant] can only argue confidentiality if the environmental contamination is entirely restricted to its own property, no other properties or parties are involved, and there is no expectation that other properties or parties could possible be affected. However, once there is the possibility of or actual off-site environmental and social impacts - as is the case with the present extensive contamination

> of [the requester's] properties ... any claim of confidentiality is unreasonable and cannot be upheld.

The appellant provides very lengthy and detailed arguments in support of its position that the records were supplied to the Ministry either explicitly or implicitly in confidence.

The appellant submits that some records are explicitly identified as "private and confidential" and others are marked "for environmental abatement purposes only". The appellant explains that this latter designation was used "... to indicate that the documents are private and confidential, and submitted to the Ministry on that voluntary, to facilitate the Ministry's understanding of the status of investigations and remediation activities and plans."

The appellant also submits that other records, which are not explicitly identified as being confidential, were supplied to the Ministry implicitly in confidence. According to the appellant, these records were supplied voluntarily with a view to facilitating an understanding of the circumstances surrounding the environmental condition at and around the appellant's property. According to the appellant:

> Where the records were provided within a reasonable period after the creation of the access to information regime in 1990 (sic), [the appellant] told MOE [the Ministry] that the records were provided on the basis of confidentiality and advised MOE of the need to keep the records confidential. ... Neither [the appellant] nor [its named consultant] were ever advised by the Ministry until this process commenced that the material submitted would not be treated confidentially or would be disclosed.

As to records created before the Act came into force, the appellant acknowledges that they contain no explicit reference to confidentiality, but explains:

> ... The fact that most, if not all, of the records from that time frame do not bear the legend of "private and confidential" or "for abatement purposes only" is a reflection not of the fact that the records are not confidential, as they clearly are, but of the fact that confidentiality was obvious to all involved.

The appellant adds that:

> The documents have been treated consistently in a confidential manner by [the appellant] and its agents. It is [the appellant's] standard practice to ensure that all such records are securely stored at the facilities of [the appellant] and its agents and only distributed to personnel who need to have access to the information contained therein as necessary to complete their tasks. All employees of [the appellant] and agents who need to have access to such materials are impressed with the need to maintain their confidentiality. Securitycard access and sign in access are in place where such records are stored, and such records are kept in locked filing cabinets or offices as much as possible.

The appellant submits that it has been, and continues to be, the practice and understanding of its employees and consultants that the records were supplied to the Ministry on the understanding that they were consistently treated in confidence. The appellant points out that had the older records been submitted "... when the application form [for a Certificate of Approval] actually provided a section addressing the confidentiality of documents, these documents all would be submitted with the understanding that they be kept confidential".

Based on the representations provided by the appellant, I accept that the information that was supplied by the appellant to the Ministry, other than Records 1, 2, 6, 14 and 16 in Appeal PA-990200-1, was supplied on the reasonably-held basis that it would be treated confidentially by the Ministry. This expectation was communicated to the Ministry, either explicitly in the case of records marked "personal and confidential" or "for abatement purposes only", or implicitly through what I accept to be the customary practice prior to the enactment of the Act. The appellant has provided representations sufficient to establish that it has consistently treated these records in a manner that indicates a concern for their protection from disclosure, and I accept that they were originally prepared for a purpose which would not entail disclosure. I also accept that these records are not otherwise disclosed or available from sources to which the public has access. Therefore, I find that the requirements outlined in Order P-561 are present, and the second requirement for the section 17(1) exemption claim has been established for all records which satisfy the first requirement, with the exception of the information I have found not to have been supplied in Records 34 and 40 in Appeal PA-990037-1, and Records 1, 2, 6, 14 and 16 in Appeal PA-990200-1 (see also Order PO-1688).

Requirement Three - Harms

To discharge the burden of proof under the third part of the test, the appellant must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could 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 P-373].

Section 17(1)(a)

(I) competitive prejudice

The appellant submits that disclosure of the records would significantly prejudice its competitive position because the appellant's remediation strategies have been designed as a result of a significant investment of time, money and effort by the appellant. The appellant states:

> ... The reports and correspondence which has resulted from these efforts is the property of its authors and [the appellant], and in some instances others...who commissioned and paid for them. Public disclosure of this information would surrender up information in which [the appellant] has made a significant investment of time and money to general public use, and use by [the appellant's] competitors. Competitors facing analogous remediation

> challenges...may well adopt [the appellant's] proposed strategies without the expense of having to consider other options or design their own plan. As a result, the costs of operations for this particular [appellant] facility will be greatly in excess of those of neighbouring facilities, and the [appellant] facility may well be uncompetitive, possibly resulting in its closure or downsizing.
>
> Further it is clear that disclosure of [the appellant's] operational data and practices which are associated with this particular environmental impact..., and the technology employed by [the appellant] for use on its site...will have a significant negative effect on [the appellant's] competitive position. Competitors will be assisted by having information on [the appellant's] design ideas, ideas which [the appellant] purchased from [a named company] and others...
>
> Similarly, competitors could use information about the scope of projects, the tender process, safety requirements for contractors, and the award of projects...to improve their own retainer process for such services and to benefit from [the appellant's] expertise with respect to the employment of an **???** negotiation with such services. The detail included in the [appellant] documents may well alert competitors to the scale of the remediation project required which will again demonstrate the vulnerability of this facility to competition.

The Ministry submits:

> It is the Ministry's position that the records at issue contain scientific and technical information which satisfies the first part of the Commissioner's section 17(1) test. Some of the records marked confidential were supplied to the Ministry explicitly in confidence (part two of the test), but the release of the record would not create a harm as outlined in the Act (part three of the test).
>
> In regard to the third part of the test, the Ministry has no specific knowledge of the prejudice to the [appellant's] competitive position or contractual or other negotiations or the harms or benefits that would ensue from disclosure of these records.
> ...
>
> The Ministry stands by its earlier decision to provide full access to the additional records.

The requester argues that there is no evidence that disclosure would prejudice significantly the competitive position of the appellant. He states:

> ... Given the obvious wealth of [the appellant], I do not expect that the contamination of this area will in any way affect their global competitive position. If evidence is alleged to exist, I submit that it must be beyond mere assertions by their solicitors and must be substantiated by strong evidence.

Records 12 and 13 in Appeal PA-990200-1, and the same information contained in parts of Records 42 and 68 in Appeal PA-990037-1 consist of very specific information and details regarding an oil/water separator unique to the appellant's facility. I am satisfied that this separator was designed specifically for the appellant. In my view, this technical information has particular commercial sensitivity which would be of interest and value to other companies operating in competition with the appellant on similar environmental abatement undertakings. The appellant has provided the required level of detailed and convincing evidence to establish a reasonable expectation of harm to its competitive position through disclosure of this information, and I find that the third requirement of the section 17(1)(a) exemption claim has been established for Records 12 and 13 in Appeal PA-990200-1, and the same information contained in parts of Records 42 and 68 in Appeal PA-990037-1.

One page of Record 111 contains a list of the various companies that submitted bids for a different project tendered by the appellant. In my view, disclosure of this information would reveal very specific information about the companies with whom the appellant does business or who have competed to gain the opportunity to do business with the appellant.

As far as the rest of the records are concerned, they all deal with the issue of the testing and monitoring of contamination to the environment on and around the appellant's property, as well as the proposed plans and actual work done to deal with this problem. I do not accept the appellant's position that disclosure of this kind of information could prejudice its competitive position in the marketplace. The fact that the appellant is involved with the Ministry in remediation efforts on the property is already known, and is described in some detail through records such as Certificates of Approval which the Ministry states are routinely disclosed to the public. A great deal of information concerning these efforts has already been disclosed, either through actions and decisions made under the Act or outside the Act in the context of the ongoing dispute between the appellant and the requester. I am not persuaded that the disclosure of additional records, many of which bear significant similarities to previously disclosed documents, could reasonably be expected to prejudice significantly the competitive position of the appellant. Therefore, with the exception of Records 12 and 13 in Appeal PA-990200-1, and the same information contained in parts of Records 42 and 68 in Appeal PA-990037-1, I find that none of the other records qualifies for exemption under the competitive prejudice part of section 10(1)(a) (see also Order PO-1688).

(ii) negotiation interference

The appellant has two main arguments on this part of section 17(1)(a), one which focuses on the current negotiation process underway between the appellant and the requester in the context of their dispute, and the other dealing with the impact of disclosure on potential future negotiations for the sale of its property.

On the first point, the appellant states that it is engaged in a dispute with the requester regarding compensation in exchange for access to the requester's property for the purposes of completing the remediation plan. According to the appellant, this is a negotiation "that has as its anticipated end-result the settlement of a law suit not yet commenced but clearly contemplated". The appellant submits that disclosure of records, particularly expert reports, would have a serious impact on these negotiations, and that any

disclosure that does take place should be made in the context of the pending litigation. The appellant submits:

> In litigation, both parties have prescribed rights with respect to disclosure of information and there is a deemed undertaking that the information is not to be used for ulterior purposes. By interposing the *Act* in this process, the Ministry will assist the requester ... in circumventing the standard procedural protections which would be afforded to any party in a litigious proceeding, not the least of which is the deemed undertaking to not use the information supplied through documentary or oral discovery for purposes other than those authorized under the *Rules of Civil Procedure*.

The appellant submits that if the records are disclosed, the negotiations will be significantly impacted and the requester will be provided, essentially free of charge, with records that the appellant has had to pay for. The appellant argues that such disclosure could make the negotiations more difficult and interfere with the resolution of important issues of access, as the requester may use the information to extract concessions in the negotiations.

The requester acknowledges that disclosure of the records will be of assistance to him, but submits that this would simply "balance the table" and ensure greater equity and fairness. In the requester's view, current negotiations with the appellant are proceeding poorly, and disclosure of records at this point could only help. The requester submits:

> ... disclosure will help in our negotiations and will enable us to determine whether it is more appropriate for [the appellant] to clean their own property before commencing further excavation and disruption on the [requester's] properties.

It is important, at this point, that I make it clear that any decisions made by me under the Act have no bearing on the resolution of any dispute that exists between the requester and the appellant.

The relationship between the access provisions contained in the Act and the civil litigation process is addressed in section 64(1) of the Act. This provision states that:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

The application of section 64(1) was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:

> ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the Freedom of Information and Protection of Privacy Act, 1987 is unfair ... Had the legislators intended

> the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists, and, in my view, subsection 14(1)(f) or section 64 cannot be interpreted so as to exempt records of this type without offending the purposes and principles of the Act.

I adopt this approach for the purposes of this appeal.

The Act contains an exhaustive list of the exemptions which are available to an institution should it wish to deny access to a particular record. A discrete settlement privilege does not exist under the Act, and litigation privilege is only available in the context of the discretionary exemption contained in section 19, which is not an issue in this appeal. (Order P-609)

Section 64(1) provides that, for the purposes of any potential lawsuit, a party's rights to obtain discovery or to require production of documentary evidence are preserved, whether or not there is any entitlement to access under the Act. (Order M-741). Consequently, simply because a possibility of litigation exists, this, in itself, is insufficient to trigger the application of either section 17(1)(a) of the Act with respect to any negotiations that may occur as a result.

I have compared the records that have been disclosed to the requester both before and during the processing of these appeals and those that have been withheld, and I have great difficulty distinguishing among them. For example, Records 3 and 13 in Appeal PA-990037-1 are monitoring reports that have been disclosed to the requester, but Records 47 and 49 in the same appeal and Record 5 in Appeal PA-990200-1 are also monitoring reports which the appellant objects to disclosing.

While I acknowledge that there is an ongoing dispute between the requester and the appellant, I am not persuaded that the appellant has established that disclosure of the records that remain at issue in these appeals could reasonably be expected to interfere significantly with any negotiations which may take place in the context of this dispute.

The appellant argues that the requester "intends to use the information to engage the media in the dispute, thereby brining significant pressure to bear on [the appellant], and to feed further demands for information, investigation and clean up, and to extract concessions from [the appellant]". I have not been provided with any evidence to substantiate an intention on the part of the requester to use the media in his negotiations with the appellant, and I give no weight to this argument. Further, while demands for "information, investigation and clean up" may impact on the business activities of the appellant, I am not persuaded that these demands, should they occur, could reasonably be expected to interfere significantly with any negotiations between the parties.

Finally, the appellant points out that litigation with the requester appears likely, and the undisclosed records could play a part in "the settlement of a law suit not yet commenced but clearly contemplated". Given the costs and time involved in civil proceedings, and the apparent acknowledgement that these records could

assist in settlement discussions, I do not accept that disclosure could reasonably be expected to have an adverse impact on any negotiations conducted in this context.

On a larger scale, the appellant submits that disclosure may interfere with further negotiations for the sale of the appellant's site due to the stigma of environmental contamination. The appellant goes on to argue that disclosure could result in competitors and customers perceiving that, due to the appellant's significant remediation costs, it is striving to keep its costs down and is, therefore, vulnerable to negotiations on price and volume for its products and other such perceptions.

There has already been a significant degree of disclosure to the requester both before and during the processing of these appeals. Some of these documents, such as Certificates of Approval for the remediation activities undertaken by the appellant, are, according to the Ministry, publicly available records, which would presumably come to the attention of any potential purchaser as part of a basic due diligence exercise. With the exception of certain identified records that otherwise qualify for exemption, I am not persuaded that the disclosure of the additional records that remain at issue could reasonably be expected to interfere significantly with any potential negotiations for the sale of the appellant's property.

Therefore, I find that none of the other records qualifies for exemption under the negotiation interference portion of section 17(1)(a).

Section 17(1)(b)

Records qualify for exemption under section 17(1)(b) if disclosure of the information contained in the records could reasonably be expected to result in similar information no longer being supplied to the Ministry, where it is in the public interest that the supply of this type of information continue.

The appellant argues that the records were not provided to the Ministry as part of a statutory requirement but rather voluntarily to facilitate a co-operative approach geared to investigating and resolving the issues of environmental impact as quickly and efficiently as possible. The appellant submits that it would not otherwise have provided such detailed information which it was not required to provide to the Ministry. The appellant states that if the records are disclosed it will be unwilling to provide such information to the Ministry in future and, as a result, the Ministry would have less accurate and detailed information on which to base its decision.

In this regard, the appellant submits:

> The harm that would result from not providing such information is self-evident in this case. The provision of such information is clearly in the public interest (P-841). The issues surrounding petroleum storage and handling and the effect on the environment are clearlyof concern to a great many individuals. The legislature has decided what information the government should have to track the activities of petroleum companies and the environmental impact of such activities in this regard. However, the additional information

> provided by [the appellant] voluntarily assists the MOE in understanding how the ground of the [appellant's] site became contaminated and the extent of the contamination, and provided it with information to use in its attempt to understand these issues and surrounding issues. Given the expense of obtaining such information through its own resources, the MOE is not likely to be able to obtain similar information which is not voluntarily provided. Restricting the flow of information to the Ministry is not conducive to ensuring that it works effectively. Consequently, **the public interest is best served by encouraging private actors such as [the appellant] to make the broadest disclosure possible to the MOE so the public has access to the maximum amount of information in this important area**, and so that the limited resources of the MOE are not expended unnecessarily in perpetually trying to recreate information otherwise available to it for the small price of maintaining the confidentiality of such information [my emphasis].

The requester argues that there is no evidence that disclosure would prevent or deter the appellant from providing comparable information in future. He submits:

> It is my understanding that in the present case, [the appellant] was always aware of the possibility that if they did not conduct the necessary sampling or conduct the remediation, the MOE could - and would - issue a formal Order. [The appellant] provided the information voluntarily simply to avoid the publicity and the costs associated with appealing a Ministry Order.
>
> ...
>
> Notwithstanding my comments, with regards to s. 17(1)(b), it is our respectful submission that it is largely up to the MOE as to whether they would be concerned that disclosure at this time and of this nature would deter further disclosure by [the appellant]. I expect that the Ministry has not expressed any such concern.

The Ministry submits that it would prefer to work cooperatively with industry but the Environmental Protection Act (the EPA) provides Ministry staff with the authority to obtain the types of records at issue in these appeals.

I do not accept the appellant's position. As evidenced by the bolded portion of the quote from its representations above, the appellant appears to acknowledge the public is best served by having access to the maximum amount of information in the area of environmental contamination and clean-up efforts. This view is reflected in the provisions of the EPA, which provide the necessary authority to the Ministry to ensure that the public is fully informed of issues impacting on the environment. I find that, while there is a public interest in having the type of information at issue in this appeal continue to be supplied to the Ministry, given the statutory authority available to the Ministry, disclosure of information at issue in this appeal could not reasonably be expected to result in information of this nature no longer being supplied in future.
Decision makers have taken a similar approach in previous orders of this Office. In Order P-1595, Adjudicator Laurel Cropley stated:

> The Ministry advises that the Environmental Protection Act (the EPA) requires that certain types of information be made available to the public.
>
> In particular, section 19(1) of the EPA provides that Certificates of Approval are to be made available to any person making an inquiry (Records 6 and 8 in Appeal P-9800126). The Ministry indicates that Record 21 (Appeal P-9800081) and Records 9 and 10 (Appeal P-9800126) contain assessments and/or a summary of the process and impact on the environment by the engineering staff at the Approvals Branch of the Ministry and that this information is similar to that included in the Certificate of Approval.
>
> Further, the Ministry indicates that, based on section 168 of the EPA, information about contaminants released to the environment are considered public information. Records 7, 8, 9, 18, the second page of Record 19 and Record 20 (Appeal P-9800081) all contain information about the environmental impact of operating the crematoria units. Record 4 (Appeal P-9800126) is the "supporting information" submitted with the application for a certificate of approval and contains information about heat requirements and the environmental impact of operating the crematoria. Record 14 (Appeal P-9800126) contains two assessments conducted in 1984 by the Ministry's Toronto regional engineer which pertain to the environmental impact of operating the crematoria units.

In Order PO-1666 Adjudicator Cropley added:

> With respect to section 17(1)(b) ..., the Ministry acknowledges that it would prefer to work co-operatively with the industry, however, it submits that the EPA provides the authority for it to obtain this type of record in any event.
>
> I have considered the arguments raised by both the Ministry and the Company. I would like to point out that both parties have provided extensive and detailed submissions on this issue. Although the Company has strenuously objected to the disclosure of the records, I am not persuaded that the harms which it believes will come to pass should they be disclosed could reasonably be expected to occur. In particular, I am not convinced that the Company, or any other similar company in the industry would no longer supply this type of information to the Ministry. The EPA clearly requires specific types of information and establishes the legal authority to obtain it. Although, as the Ministry indicates, it would prefer to have this information provided voluntarily, it indicates that it is prepared to compel its production under the authority of the EPA, if necessary. Consequently, I find that section 17(1)(b) does not apply.

Also, in Order M-1143 I concluded:

> I do not accept the appellant's submissions on section 10(1)(b) [the equivalent provision to section 17(1)(b) in the municipal statute], for a number of reasons. First, the appellant does not provide arguments or evidence to support this claim. Second, even if the appellant were to decide to no longer voluntarily provide similar information to the City in future, in the absence of evidence from the City to the contrary, I am not persuaded that this would affect the public interest. The public interest in this matter relates to the City's satisfactory and complete investigation of the alleged environmental contamination, which presumably could and would be completed regardless of whether the appellant were to provide the type of information contained in the records at issue in this appeal. Third, the City has decided to disclose the records to the requester and chose not to provide representations in this appeal, both of which are strong indicators that the harm contained in section 10(1)(b) is not present in the circumstances.
>
> Therefore, even if some of the records had satisfied the requirements of parts one and two of the test, which is not the case in this appeal, I find that the requirements of the part three of the section 10(1)(b) test have not been established.

Accordingly, I find that none of the records qualifies for exemption under section 17(1)(b).

Section 17(1)(c)

Records qualify for exemption under section 17(1)(c) if disclosure of the information contained in the records could reasonably be expected to result in undue loss to the appellant or undue gain to any person or organization.

The appellant's submissions on section 17(1)(c) are similar to those raised on the competitive prejudice portion of section 17(1)(a). Some of the representations deal with records I have already found qualify for exemption under section 17(1)(a) and I won't address them further here. On other aspects of this exemption claim the appellant submits:

> The potential value of the [appellant's] site for [the appellant] and subsequent owners of the site would be significantly affected by the undue public exposure and resultant stigma associated with the property. Other parties with adjacent properties ... might be exposed to similar stigma or same issues resulting from an inflammatory dissemination of this sensitive information. [The appellant] and others might be named in further lawsuits as a result of the unjustified effect that the publication of the records might have on neighbouring property values, even where there is no information either that those properties are contaminated or that such contamination is related to or attributable to [the appellant] or its activities.
>
> In addition, disclosure of the records will increase exponentially the ability of the requester and his client to make unwarranted and fruitless inquiries and demands of [the appellant] as a result of which it will inevitably incur significantly increased professional expenses, as well

> as significantly reduced ability to devote the necessary time and energy to the true tasks at hand. This constitutes another form of "undue harm".

The requester's representations on this issue include the following:

> With regard to s. 17(1)(c), as with s. 17(1)(a), disclosure will be of assistance to us. However, I have no evidence that could remotely support a suggestion that such disclosure would cause an "undue" loss to [the appellant] or an "undue" gain to [the requester]. If the disclosure of information results in eventual compensation to [the requester], the loss to [the appellant] and gain to [the requester] could never be regarded as"undue".
>
> It is my respectful submission that "undue" suggests "unearned", "unreasonable", "inequitable" or "unfair" consequences. Again, other than vague assertions, [the appellant] could not have any concrete evidence to suggest that *possible* compensation to [the requester] that *might* evolve from the disclosure is in any way unearned, unreasonable, inequitable, or unfair.

I do not accept the position put forward by the appellant. The fact that the appellant is involved in remediation efforts to deal with contamination on its property, as well as the ongoing dispute involving the appellant and requester regarding the impact of this contamination on the requester's adjacent property, is already known. The environmental problem involving the appellant's property is also a matter of public record through the existence of various documents, such as Certificates of Approval, on file with the Ministry. In my view, the basis for any potential loss associated with knowledge of the existence of contamination of the appellant's property cannot reasonably be associated with disclosure of the remaining records. This knowledge is already present through the existence of public records associated with the appellant's abatement efforts and through the disclosure of records to the requester, either directly by the appellant, with the appellant's consent, or as a result of the provisions of Interim Orders PO-1694-I and PO-1712-I.

As far as the appellant's second argument is concerned, the appellant has provided no evidence to support his position that disclosure of the remaining records will lead to further demands for information. If fact, the scope of the requester's request already covers all records relating to the appellant's remediation efforts. Any expenses incurred as a consequence of responding to requests for records under the Act do not constitute an "undue harm" as that term is used in section 17(1)(c).

Accordingly, I find that none of the records qualifies for exemption under section 17(1)(c).

In its representations, the appellant suggests that other parties identified in certain records should have been provided with notice of these appeals, pursuant to section 50(3) of the Act. The records referred to by the appellant are either environmental engineering consulting reports, or the specifications of a particular oil/water separator.

In light of my decision regarding records containing the specifications of the oil/water separator, and having reviewed the various records and types of records disclosed to the requester in the context of his ongoing dealings with appellant and/or the processing of the various appeals relating to the request made under the Act, I have determined that further notifications are not required.

In summary, I find that Records 12 and 13 in Appeal PA-990200-1, and the same information that forms part of Records 42 and 68 in Appeal PA-990037-1 and the list of bidders contained on one page of Record 111, qualify for exemption under section 17(1)(a) of the Act. All other records, or parts of records, do not qualify for exemption under sections 17(1)(a), (b) or (c), and should be disclosed.

ORDER:

1. I order the Ministry **not** to disclose Records 12 and 13 in Appeal PA-990200-1, and the same information that forms part of Records 42 and 68 in Appeal PA-990037-1 and the list of bidders contained on one page of Record 111.

2. I uphold the Ministry's decision to disclose the remaining records, with the exception of the information withheld by the Ministry in Record 9 of Appeal PA-990200-1 which the requester did not appeal.

3. I order the Ministry to disclose the records in accordance with its original decisions and as indicated in Provision 2 of this order, by sending the requester a copy of these records by **December 24, 1999** but not before **December 20, 1999**.

4. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the requester pursuant to Provision 3.

Original signed by: November 19, 1999
Tom Mitchinson
Assistant Commissioner

APPENDIX "A"

INDEX OF RECORDS REMAINING AT ISSUES IN PA-990037-1			
RECO	**NO. OF PAGES**	**DESCRIPTION**	**ORDER**
7	4	FAX to the named environmental company from the Ministry dated December 22, 1997 regarding proposed soil remediation project	Disclose in full
11	6	Letter to the appellant from the named environmental company dated August 28, 1997 regarding "additional investigation and remediation activities planned for the Offsite West area"	Disclose in full
14	7	"Meeting Notes" dated June 19, 1997	Disclose in full
15	1	"Total BTEX Concentrations" Table dated June 6, 1997	Disclose in full
18	3	Letter to the Ministry from the appellant dated June 11, 1996 regarding "Risk Management/Remediation Program"	Disclose in full
33	2	Letter to the Ministry from the appellant dated July 3, 1994 regarding "Groundwater Monitoring and Proposed Workplan"	Disclose in full
34	1	Letter to the appellant from the Ministry dated May 17, 1994 regarding "Groundwater Monitoring"	Disclose in full
36	2	Letter to the appellant from the Ministry dated February 8, 1994 with attached Ministry memorandum dated January 24, 1994 regarding "Groundwater Monitoring"	Disclose in full
37	15	Letter to the Ministry from the appellant, with attachments, dated March 11, 1994 regarding "Groundwater Monitoring"	Disclose in full
38	3	Letter to the Ministry from the appellant dated August 9, 1993 regarding proposed actions	Disclose in full
40	3	Letter to the appellant from the Ministry dated August 25, 1992 with attached Ministry memorandum dated August 17, 1992 regarding "proposed remedial action"	Disclose in full
41	2	Letter to the appellant from the Ministry of Consumer and Commercial Relations dated January13, 1992 regarding contaminated soil removal	Disclose in full
42	10	Letter to the Ministry from the appellant, with attachments, dated January 2, 1992 regarding "Assessment of Sub-surface Contamination"	Disclose in part

INDEX OF RECORDS REMAINING AT ISSUES IN PA-990037-1

RECO	NO. OF PAGES	DESCRIPTION	ORDER
46	9	Letter to the Ministry from the named environmental company dated March 24, 1998 with attached application for amendment to Certificate of Approval	Disclose in full
47	16	Letter to the Ministry from the named environmental company dated January 29, 1998 with attached "Groundwater Treatment Monitoring Report" dated January 29, 1998	Disclose in full
49	19	Letter to the Ministry from the named environmental company dated March 11, 1997 with attached "Groundwater Treatment Monitoring Report" dated March 11, 1997	Disclose in full
53	12	Letter to the Ministry from the named environmental company dated April 24, 1996 with attached application for Certificate of Approval	Disclose in full
57	13	"Meeting Notes" dated November 26, 1997	Disclose in full
59	7	"Evaluation of Groundwater Elevations" report prepared by a named consulting engineers company dated November 28, 1990	Disclose in full
61	85	"Environmental Assessment" report prepared by a third named environmental company dated August, 1990	Disclose in full
62	1	Site Plan drawing dated June, 1991	Disclose in full
63	1	Schematic drawing not dated	Disclose in full
64	1	Site Plan drawing dated June, 1991	Disclose in full
67	5	Letter to the Ministry from the appellant dated April 6, 1990 regarding" Oil Water Separator Analysis"	Disclose in full
68	4	"Separator Design Calculations" dated April 2, 1990	Disclose in part
87	3	Letter to the Ministry from the named environmental company dated March 24, 1998 with attached "Application for Amendment of Permit to Take Water"	Disclose in full
88	14	Letter to the Ministry from the named environmental company dated April 24, 1996 with attached "Application for Permit to Take Water"	Disclose in full
92	29	Letter to the Ministry from the appellant dated October 24, 1995 with attached "Site Monitoring Report" dated October 18, 1995	Disclose in full

INDEX OF RECORDS REMAINING AT ISSUES IN PA-990037-1			
RECO	**NO. OF PAGES**	**DESCRIPTION**	**ORDER**
96	2	Letter to the named environmental company from the Ministry dated April 27, 1995 regarding "Temporary Treatment System for the Proposed Pump Test Program"	Disclose in full
100	1	"Temporary Treatment System for Pump Test"schematic drawing dated April 25, 1995	Disclose in full
104	1	"Plan and Details" drawing dated May 3, 1990	Disclose in full
105	3	Letter to the Ministry from the appellant, with attachment, dated November 30, 1990 regarding "temporary Measures to the Operation of the Oil Water Separator"	Disclose in full
110	2	Letter to the Ministry from the appellant dated June 27, 1990 regarding "Bulk Terminal Assessment" update	Disclose in full
111	5	Letter to the Ministry from the appellant, with attachments, dated May 7, 1990 regarding "Bulk Terminal" environmental assessment update	Disclose in part
140	3	Appellant's internal accident report dated March 25, 1976 regarding drainage runoff	Disclose in full

APPENDIX "B"

INDEX OF RECORDS PA-990200-1

RECORD	NO. OF PAGES	DESCRIPTION	ORDER
1	5	Letter from the company to the Ministry dated September 18, 1998 with attached letter of September 18, 1998	Disclose in full
2	5	Letter to the company from a named environmental company, dated July 8, 1998 regarding "Offsite West pond water sampling program"	Disclose in full
3	7	Letter to the company from the named environmental company, dated February 20, 1998 regarding "additional investigation and remediation activities planned for the Offsite West area"	Disclose in full
4	5	Letter to the company from the named environmental company dated September 24, 1997 regarding "additional investigation and remediation activities planned for the Offsite West area"	Disclose in full
5	8	Letter to the Ministry from the company dated December 5, 1994 with attached Site Monitoring Report dated November 8, 1994	Disclose in full
6	43	Letter to the requester from the company dated November 1, 1994 with two attached Site Monitoring Reports dated October 31, 1994	Disclose in full
7	6	Letter to the company from the named environmental company dated October 11, 1994 regarding a proposed work plan	Disclose in full
8	2	Letter to the Ministry from the company dated October 7, 1994 regarding "Proposed On-site and Off-site Action Plan"	Disclose in full
9	34	Letter to the company from the Ministry dated September 23, 1998 with attached Application for Certificate of Approval and related documents	Disclose in part
10	12	Letter to the Ministry from the company dated April 9, 1995 with attached letter dated April 7, 1995 from the named environmental company to the company regarding "Environmental Risk Management Plan"	Disclose in full
11	38	"Assessment of Subsurface Contamination" report prepared by	Disclose in full

INDEX OF RECORDS PA-990200-1

RECORD	NO. OF PAGES	DESCRIPTION	ORDER
		a second named environmental company dated August 12, 1991	
12	4	"Enhanced Gravity Separator" equipment specifications	Withhold in full
13	21	"Proposed Oil/Water Separator" report prepared by a second named consulting engineers company dated August 20, 1991	Withhold in full
14	8	Letter to the Ministry from the company dated October 16, 1995 with attached letter to the company from the named environmental company regarding "Risk Management Plan"	Disclose in full
15	15	Letter to the Ministry from the company dated May 9, 1995 with attached "Site Investigation Report" prepared by the named environmental company dated May 5, 1995	Disclose in full
16	12	Letter to the Ministry from the company dated April 9, 1995 with attached "risk management plan" prepared by the named environmental company dated April 7, 1995	Disclose in full
17	1	FAX from the named environmental company to the Ministry dated April 25, 1995 regarding "Temporary Treatment System for the Proposed Pump Test Program"	Disclose in full