



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

ORDER PO-1737

Appeal PA-980327-1

Ministry of Natural Resources



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BACKGROUND:

The appellants in this appeal are consulting engineers and environmental planners. They were retained by a named company to provide professional services with respect to the relocation of a stream. The requester is a municipal institution, who is currently involved in litigation with certain named companies, including the appellants' client, arising out of an agreement of purchase and sale of a landfill site. One of the issues in the litigation relates to the obligations of the appellants' client to expand the landfill site which involves the relocation of the stream.

NATURE OF THE APPEAL:

The requester submitted a request to the Ministry of Natural Resources (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for copies of applications, approvals (including certificates, permits and licences), reports (including design reports) and schematic drawings relating to the stream located at the named waste disposal site.

The Ministry located records responsive to the request and notified four parties whose interests might be affected by the disclosure of the records. Two of the affected parties consented to disclosure of records pertaining to them and two objected to disclosure. After considering the responses of the affected parties, the Ministry issued a decision granting access to some records in whole or in part and denying access to other records, in whole or in part, pursuant to sections 13 and 17 of the Act.

Counsel for two of the affected parties filed an appeal of the Ministry's decision to grant access to any records related to them pursuant to section 17 of the Act. I will refer to these affected parties as the appellants for the purpose of this appeal. The requester did not appeal the Ministry's decision.

During the course of mediation, the requester narrowed the scope of records to which it is seeking access. Further, any duplicates and non-responsive records were removed from the scope of the appeal. Finally, during mediation, the Ministry disclosed to the requester the records which were determined to be not at issue in accordance with its original index.

I sent a Notice of Inquiry to the appellants, the Ministry and the requester. Representations were received from the Ministry and the requester. Although the appellants bear the onus of establishing the application of section 17 to the records in the circumstances of this appeal, they have not submitted representations in response to this Notice. I have considered all of the material in the inquiry file, including the appellants' responses to the Ministry's notification as well as the records themselves in determining this issue.

RECORDS:

The only records at issue in this appeal are the portions of the records of which the appellants object to disclosure. These records comprise the non-severed portions of pages 2-5, 17-20, 25-31, 94-96, 106, 107, 133, 154, 159-162, 164-166 and 178.

The records consist of faxes, correspondence, photographs, minutes of a meeting, a telephone message, a map, a memorandum, an application for work permit, and a form titled "Works within a Waterbody".

DISCUSSION:

THIRD PARTY INFORMATION

In the circumstances of this appeal, the Ministry has decided to disclose the records at issue to the requester. The appellants have appealed the Ministry's decision with respect to some of the records, claiming that they qualify for exemption pursuant to sections 17(1)(a), (b) and (c) of the Act. Therefore the onus is on the appellants, as the only parties resisting disclosure, to establish the requirements of this exemption claim.

Sections 17(1)(a), (b) and (c) of the Act 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 appellants 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, the Court of Appeal for Ontario upheld this office's decision in Order P-373 in which the above three-part test was applied. In that judgment the Court stated (at page 476) 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 appellants state that the records contain scientific and technical information.

The definition of scientific and technical information was established in Order P-454. In this order, former Assistant Commissioner Irwin Glasberg examined these two types of information and 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

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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 this appeal.

The requester submits that the majority of the records do not contain scientific or technical information. In this regard, it argues that the fact that these documents may have been supplied to the Ministry by an engineering firm does not necessarily mean that the documents contain technical or scientific information.

The requester acknowledges that Records 159 - 162 and 178 may contain either scientific or technical information but submits that:

in order to be considered “technical” or “scientific”, documents must contain significant detail of a technical nature or the objecting party must provide evidence that the contents of the document would reveal or describe some technical component of a process, structure or thing.

From a review of the records at issue, it is clear that there was a long and involved approval process regarding the stream relocation with considerable discussions back and forth between various interested parties. In general, the records at issue reflect the on-going discussions between the Ministry, the appellants and other parties relating to this project.

I accept that the records relate to work performed by experts in the field of natural or applied sciences. I am not persuaded that any of this information falls into the “scientific” category as defined above as none of the records contain information relating to the “observation and testing of specific hypotheses or conclusions”. I have examined each record to determine whether it meets the definition of “technical” information as set out above.

The records fall into three general categories of information:

Records which do not contain technical information

Records 2, 106, 133 and 159 - 160 are covering letters and/or facsimile cover sheets which refer to attached documents. These records do not, in and of themselves, contain any technical information. Section 10(2) of the Act requires that, where information which does not fall within an exemption can be reasonably severed from that which is exempt, it should be disclosed to a requester. Therefore, although the documents which are attached to these letters or facsimile cover sheets may contain technical information, each document must so qualify on its own merits. Consequently, I find that Records 2, 106, 133 and 159 - 160 do not contain “technical” information.

Records 17 - 20 are photographs of the stream. Although prepared by the appellants, no doubt as part of the preparation of their work plan for the tributary relocation, there is nothing intrinsically technical about

them. I find that simply being associated with a technical project is insufficient to bring these records within the definition of “technical” information.

Record 96 is a telephone message slip. It does not contain a message but only notes the name of the caller. This information is clearly not “technical”.

I have considered whether the records fall under any of the other types of information described in section 17(1) and I find that none apply. Therefore, as none of these records contain the types of information outlined in section 17(1) they fail to meet the first part of the test and are not exempt under this section.

Records which refer to technical information

Records 3, 94 - 95 and 178 are letters prepared by one of the appellants. Record 3 contains a summary of topics discussed at a meeting between the Ministry, the appellant and another party as well as a summary of its proposed work plan. Records 94 - 95 and 178 contain references to the technical issue, i.e. relocation of the tributary and the technical work to be done in that regard, but contain no details about the actual technical aspects of the work.

Similarly, Record 25 - 31 is the minutes of a meeting. This document was prepared by one of the appellants but reflects the discussions between both appellants, the Ministry and the Ministry of the Environment. It contains general discussions and references to the technical issues.

Record 154 is an internal Ministry memorandum in which references are made to the design prepared by one of the appellants. The memorandum reflects some concerns about the design but they are not detailed nor are they, in and of themselves, technical in nature.

Finally, Record 161 - 162 is a copy of the Application for a Work Permit. Although the purpose of this form is to document the nature of the work to be done, which I accept in this case is technical, and to obtain the requisite approvals, the information contained on it is very general.

In Order PO-1707, I considered whether certain records similar to some of those referred to above fell within the definition of “technical information”. I came to the following general conclusions regarding these types of records:

[A]lthough the withheld portions of the records refer to activities which, if described, would qualify as “technical” information, the majority of the information at issue does not, in and of itself, describe the construction, operation or maintenance of a structure, process or thing. In my view, a mere reference to a structure, or a comment regarding an activity or result to be achieved does not provide sufficient detail of a technical nature to bring it within the definition, unless there is evidence that the reference itself would reveal or describe some technical component of the process, structure or thing. In my view, that is not the case in these records.

Similar to my findings in Order PO-1707, I find in the current appeal that the records in this category refer to activities which, if described, would qualify as technical information. However, these records do not, in and of themselves, describe the construction, operation or maintenance of a structure, process or thing. Consequently, I find that they do not qualify as “technical” information as defined above and since they fail to meet the first part of the section 17(1) test, they are not exempt from disclosure.

Records which contain technical information

Record 4 - 5 is a document prepared by one of the appellants, who is an engineering professional, and it describes in some detail the proposed work to be performed in relation to the tributary relocation. I am satisfied that the information in this record is sufficiently detailed and that it describes the construction of a structure, process or thing. Therefore, I find that this record contains “technical” information.

Record 164 - 166 is a letter from the federal government to the appellant. The letter was copied to the Ministry. It contains a discussion pertaining to the federal government’s concerns about the drawings prepared by the appellants. In my view, the references to the appellant’s drawings are sufficiently detailed to reveal the specific technical information contained in them. I find that this record also contains “technical” information.

Finally, Record 107 is a map of the area surrounding the stream. I accept that this map was most likely created by a cartographer who is a professional in the applied sciences. Although not squarely falling within the definition referred to above, in my view, an area map is the diagrammatic representation of the natural or physical features of the area, created through the interpretation and drafting of information based on the collection of measurements by a professional in the field of applied sciences. As such, I find that it falls within the general framework established in the above definition. Therefore, I find that it qualifies as “technical” information.

Conclusion

In conclusion, only Records 4-5, 107 and 64 - 166 fall within the definition of technical information. I will consider whether they meet the remaining parts of the section 17(1) test. As none of the other records at issue meet the first part of the test, they should be disclosed to the requester.

Requirement Two - Supplied in Confidence

In order to satisfy part two of the test, the information must have been **supplied** to the Ministry **in confidence** either implicitly or explicitly.

Supplied

In order to meet the second part of the test, it must be established that the information in the records was actually supplied to the Ministry, or its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-203, P-388, P-393).

In responding to the notice sent to them by the Ministry, the appellants simply stated that “the information is scientific and technical and was supplied to the [Ministry] on behalf of our client”.

The requester indicates that it is not in a position to know whether the records were supplied by the appellants to the Ministry.

Records 4 - 5 and 107 were prepared or obtained by the appellants and were attached to letters sent to the Ministry from the appellants. I am satisfied that Records 4 - 5 and 107 were supplied to the Ministry by the appellants. Although Record 164 - 166 was generated by the federal government and sent directly to the Ministry, I am satisfied that its disclosure would reveal information actually supplied by the appellants.

In Confidence

In Order M-169, Adjudicator Holly Big Canoe made the following comments with respect to the issue of confidentiality in section 10(1) of the municipal Act (which is the equivalent of section 17(1) of the Act):

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the institution 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 person prior to being communicated to the government organization.
- (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]

I agree with this approach.

With respect to the issue of confidentiality, the requester asserts that the scheme of the Act and other legislation, in particular the Environmental Bill of Rights (the EBR), reflects a strong policy choice in favour

of greater transparency in decision-making affecting the environment. The requester refers to the preamble of the EBR and states:

[T]he legislature states that the people of Ontario have a common goal to protect, conserve and restore the natural environment and that the people should have the means to ensure that this goal is achieved in an effective, timely, open and fair manner.

The requester concludes:

Absent compelling evidence that the documents were supplied in confidence, the Requesting Party submits that the transparency of regulatory decision-making affecting the environment requires that documents submitted to the Ministry be available to members of the public.

The Ministry refers to the Work Permit Application (Record 161- 162) which states that the information obtained on the application is a public record, which is accessible on request. The Ministry takes the position that any information relating to the work to be done was supplied on the explicit understanding that it would be available to the public. The Ministry relies on Order P-1111, in which its decision to release records relating to a work permit on the grounds that section 17(1) did not apply was upheld. The Ministry also suggests that the fact that two other affected parties consented to disclosure of the information pertaining to them is an indicator that the information was not supplied in confidence.

The appellants do not directly address the issue of confidentiality, however, in responding to the Ministry's notification they briefly describe their concerns regarding disclosure of the information at issue. In this regard, they refer to the litigation in which their client is currently involved.

In my view, the fact that other affected parties consented to disclosure of records pertaining to them is not, in and of itself, an indicator that there was no expectation of confidentiality during the approvals process. I do not find this argument helpful in the circumstances of this appeal.

Similarly, the fact that the appellants and/or their client may now be involved in litigation perhaps explains why they do not wish the records to be disclosed, but in my view, it does not address their expectations at the time they were involved in the approvals process. Therefore, I do not find this information helpful in determining whether the appellants had a reasonable expectation of confidentiality when the records were supplied to the Ministry.

In Order P-1111, I considered a number of documents connected to an Application for a Work Permit to construct a dock. I made the following comments regarding the issue of whether the documents were supplied in confidence under section 17(1):

In its representations, the Ministry indicates that the records at issue relate to an application by the appellant for approval under the Public Lands Act for dock repairs. The Ministry takes the position that the information in the records at issue could not have been provided in confidence. In this regard, the Ministry refers to a statement on the Work Permit application (Record 6 - page 11) which provides that:

[T]he information obtained on this application is a public record which is accessible upon request.

The Ministry concludes that because of this statement, any information relating to the work to be done was supplied on the explicit understanding that it would be available to the public.

The Application for Work Permit is a multi-part form designed to obtain specific information about the applicant, the proposed site on which work is to be done and the type of work proposed to be done. The form contains a number of cautions to applicants, one of which is the statement referred to above. The form also lists the types of information and/or documents which are to be attached in order for the application to be processed, such as sketches or drawings and evidence that notice of the proposed work has been provided to at least the two immediately adjacent neighbours.

While many of the records at issue would fall within the types of information referred to in the application (Records 5, 6, 8, 11 and part of Record 4), it is my view that correspondence between the Ministry and an individual would not. However, I have no evidence before me that the appellant had any expectation that his correspondence with the Ministry was provided or would be held in confidence. Nor is this expectation apparent on the face of the records.

In my view, the reasoning in Order P-1111 is applicable in the circumstances of this appeal. The Application of a Work Permit clearly states that "all information obtained on it" is to be considered in the public realm. From a review of Records 4 - 5, 107 and 164 - 166, I accept that it is likely that this information could be obtained on or as part of the Application. However, I have insufficient evidence before me to conclude that this information was obtained on the Work Permit or as part of the required documentation. Therefore, I am not prepared, on this basis alone, to find that there was no expectation of confidentiality on the part of the appellants at the time the records were supplied to the Ministry.

That being said, I have come to the same conclusion as in Order P-1111 regarding the records.

In my view, the Ministry's approach to issues pertaining to the natural environment is consistent with the requester's view concerning environmental issues. I accept that there is a trend in government to offer greater transparency regarding environmental issues. The practices of the Ministry in making Work Permit information public reflects a policy decision in this direction. Based on the Ministry's representations, I am

satisfied that it did not by its own practices create a general expectation that the information supplied by the appellants would be treated confidentially.

Nevertheless, I must still determine whether the appellants had a reasonably held expectation that they were supplying the information at issue to the Ministry in confidence. As I indicated above, the appellants did not submit representations on any of the issues in this appeal. In responding to the Ministry, the appellants did not indicate that they had any expectation of confidentiality at the time the records were supplied. In reviewing the records, there is no notation or other indication on their face which would indicate that the appellants were supplying them with any expectation of confidentiality. In the absence of representations from the appellants on this issue, I am not able to determine based on the information in the inquiry file and the records themselves that they held any expectation of confidentiality at the time the documents were submitted to the Ministry or the basis for such an expectation.

Consequently, I conclude that the appellants have failed to establish that they supplied Records 4 - 5, 107 and 164 - 166 to the Ministry in confidence nor is such an expectation evident from the records or other information in the inquiry file. As the second requirement has not been met for these records they are not exempt under section 17(1) of the Act and they should be disclosed to the requester.

ORDER:

1. I uphold the Ministry's decision to disclose the records at issue in this appeal to the requester.
2. I order the Ministry to disclose the records at issue to the requester by providing it with a copy by January 14, 2000 but not before January 7, 2000.
3. In order to verify compliance with 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 2.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ December 7, 1999