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

ORDER PO-2376

Appeal PA-040223-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

This is one of three appeals arising out of the same request for access to records in the possession of the Ministry of Natural Resources (the Ministry). As the Ministry issued three decisions and some of the records and appellants differ, this office has treated the appeals as three separate appeals, although there is some overlap among them. Related orders PO-2375 and PO-2377 are being released concurrently with this order.

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of "any correspondence, documents, work orders, incident reports, letters, etc., between [the Ministry], [a named company] and/or any other party relating to spills, contamination and/or any other operational concerns arising from the [named company's] operations at [a named location]".

Among the records that the Ministry identified as responsive to the request were certain letters and attachments described below. The Ministry considered that disclosure of these records may affect the interests of an individual and his company (who are the appellants in this appeal) and sought their views as to whether the records should be disclosed. The individual and his company requested the Ministry not to disclose the records for the following reasons:

> The release/disclosure of such information would be detrimental to the interests of [the individual and his company] for the following reasons:
>
> a) the information requested is of a confidential commercial nature;
>
> b) the information was provided to the government in confidence as part of a permit application process and as part of a settlement of court proceedings; and,
>
> c) the release of such information will significantly prejudice the competitive proceedings and financial position of [the individual and his company] in their ongoing management and operations.

After considering these representations on why the records should not be disclosed, the Ministry decided to grant the requester access to the records. The individual and his company (now the appellants) appealed this decision.

Although the appellants did not specify in their appeal letter which sections of the *Act* they were relying on, the Mediator assigned by this office identified sections 17(1)(a), (b) and (c) as the exemptions upon which the appellants based their appeal in her draft Mediator's Report, which was provided to the parties for comment. The Mediator then identified these provisions in her final report as the exemptions claimed.

Mediation did not resolve the issues in this appeal, so the appeal entered the adjudication stage. I issued a Notice of Inquiry setting out the facts and issues in this appeal and setting out a deadline for the appellants to provide representations.

When the deadline for submission of these representations passed, this Office contacted the lawyer representing the appellants, who advised that the appellants did not intend to provide representations.

I do not find it necessary to seek representations from the Ministry or the requester. In making my decision I have considered the appellants' letter of October 20, 2004 to the Ministry setting out their reasons for refusing consent to disclosure of the records, the appellants' appeal letter, the issues identified in the Mediator's Report, and the contents of the records themselves.

RECORDS:

At issue are two copies of a letter dated August 4, 1972 from the appellant company to the Ministry of Transport; a letter dated January 28, 1997 from the Ministry to the appellants with an attached blank application form and attached letter from the Ministry to lawyers for the appellants dated December 16, 1996; an undated duplicate of the letter dated January 28, 1997; and two copies of a letter from the Ministry to the appellants dated March 25, 1997.

ISSUES:

I will consider whether subsection 1(a), (b), or (c) of the mandatory exemption at section 17 applies to the records.

Section 17(1): the exemption

Section 17(1) states, in part:

> 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;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central

purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The appellants stated in their letter of June 24, 2004 to the Ministry that the information requested is of a "commercial nature".

The types of information listed in section 17(1) have been discussed in prior orders. These orders have described "commercial information" as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

The appellants do not explain how this information relates to the buying, selling or exchange of merchandise or services. Therefore, I base my conclusions on a review of the records themselves.

In the absence of any explanation by the appellants as to why the contents of the records constitute commercial information, and based on my independent review of the records, I am not satisfied that the records contain any commercial information.

The appellants did not allege in their appeal letter that any of the information is a trade secret or scientific, technical, financial or labour relations information. Nevertheless, I have considered whether any of the information in the records falls into any of these categories. I find that the first page of the August 4, 1972 letter, the Plan to Accompany Application under the Navigable

Waters Protection Act, the letter of January 28, 1997, and the first paragraph of the letter of December 16, 1996 contain some information that might be characterized as technical or scientific. The rest of the records contain no scientific, technical, financial or labour relations information.

I find therefore that the appellants have met part 1 of the test for exemption of these records under section 17(1), only in relation to the technical or scientific information identified above.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

The appellants state that the records contain information provided to the Ministry. They do not specify which information was provided by them. Except for the letter from the appellant company to the Ministry of Transport dated August 4, 1972, the records are communications from the Ministry to the appellants primarily providing information to the appellants rather than recording information supplied by the appellants. The letters of December 16, 1996 and January 28, 1997 do refer to a proposal or proposals by the appellant corporation, but it is unclear what, if any, information from those proposals is contained in the letters.

I find that the letter of August 4, 1972 from the appellant company to the Ministry of Transport contains information supplied by the appellants. In the absence of any evidence other than the bald assertion in the appellants' letter to the Ministry, and based on my independent review of the records, I am not satisfied that any of the other information in the records was "supplied" to the Ministry.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or

explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The appellants have provided no representations as to which parts of the information in the records were intended to be kept confidential. The appellants' lawyer states that the information was provided to the government in confidence as part of a permit application process and as part of a settlement of court proceedings.

The fact that information is provided to government as part of a permit application process is not determinative of whether it is confidential. Much information provided in support of permitting and licensing processes is routinely disclosed by government agencies.

Nor is the fact that information is supplied in the context of settlement discussions determinative of whether there is an expectation of confidentiality. In this case, there is limited evidence of any settlement discussions. The letters of January 28, 1997 and March 25, 1997 each refer once to the completion of court proceedings. The letter of December 16, 1996, although related in time to court proceedings mentioned in other records, makes no reference to court proceedings or settlement discussions. The blank application form attached has no information relating to court proceedings or settlement of them. The letter of August 4, 1972 appears unrelated to the court proceedings referred to in other records and contains no information that would link it to any other court proceedings. Although the appellants make a bald assertion that the information was provided as part of a settlement, there is no information that identifies any specific settlement document. There is no reference in any of the documents to settlement discussions. The litigation in question had been terminated long before the requester's access request.

The appellants do not specifically claim a privilege for this information or provide any evidence of a settlement agreement containing a confidentiality clause. The fact that information is provided as part of a settlement alone does not establish that the information was supplied in confidence. Moreover, there is nothing on the face of the records in question that suggests that

the information in it has any relationship to a settlement. The contents of the various letters do not suggest to me that the court proceedings and their resolution had any impact on the permit process, and it appears that the usual permit processes continued to apply to the appellants.

One of the appellants has provided additional information about the nature of the "settlement" and court proceedings in relation to one of the records at issue in this appeal in another appeal. In the appeal resulting in order PO-2377, released concurrently with this order, the corporate appellant provides some minimal further information about the letter of December 16, 1996 and attached application form, which are also at issue in that appeal. Accordingly, I have considered the possible application of section 17(1) to this record taking into account that additional information in preparing order PO-2377. However, as the appellants have chosen not to provide the information in this appeal, it would be unfair to the requester to consider it here.

Therefore, because I have found that much of the information was not "supplied" and I am not persuaded that any of the information supplied was supplied "in confidence", I find that the information does not meet part 2 of the test for exemption under section 17(1).

Part 3: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The appellants have not asserted that disclosure of the records could reasonably be expected to result in similar information no longer being supplied and there is nothing in the records themselves to suggest this. Therefore, I find that section 17(1)(b) does not apply.

Although the appellants assert that "the release of such information will significantly prejudice the competitive proceedings and financial position of [the individual and his company] in their ongoing management and operations", they provide no description of which information in the records this refers to and no explanation of the nexus between the disclosure of information in the records and the contemplated harms. Nor does a review of the records themselves reveal this to me. In particular, the only record which I have found to contain any information supplied by the appellants, the August 4, 1972 letter, appears to be devoid of any information that could result in any of the contemplated harms.

There is no "detailed and convincing" evidence, or indeed any direct evidence at all, to support a finding that any of the harms in sections 17(1)(a), (b) or (c) is made out. I find, therefore, that the appellants have not met part 3 of the test under s. 17(1).

I find that the records are not exempt under s. 17(1) and should be disclosed.

ORDER:

1. I uphold the decision of the Ministry to disclose the records.

2. I order the Ministry to disclose the records to the requester by sending a copy by April 15, 2005 but no earlier than April 8, 2005.

3. To verify compliance with this order, I reserve the right to require the Ministry to provide to me a copy of the records disclosed to the requester.

March 11, 2005

John Swaigen
Adjudicator