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

ORDER PO-2377

Appeal PA-040232-1

Ministry of Natural Resources

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

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-2376 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 the documents at issue in this appeal. The Ministry considered that disclosure of these records may affect the interests of a company and sought that company's views as to whether these records should be disclosed. The affected party requested the Ministry not to disclose the records because:

> We are of the view that the release of this information would be detrimental to our client in that the negotiations reflected in same were in confidence….

After considering the company's representations on why the records should not be disclosed, the Ministry decided to grant the requester access to the records. The company (now the appellant) appealed this decision.

In its initial representations to the Ministry, the appellant had relied upon the exemption in section 21(3) of the Act as well as section 17. However, section 21(3) was not identified as an issue in the Mediator's Report. The practice of this office is that a draft of the Mediator's Report is reviewed by the parties, any necessary changes are made based on their comments, and the final version setting out the issues is provided to the parties. The Notice of Inquiry sent to the appellant also confirmed that s. 21(3) is not in issue. Therefore, section 21(3) is not still in issue in relation to the records in this appeal.

Mediation did not resolve the issues, so the appeal entered the adjudication stage. I decided to first seek representations from the appellant. I first provided the appellant with a Notice of Inquiry setting out the facts and issues in this appeal and sought representations from the appellant. I provided a deadline for receipt of these representations. When no representations were received, this office contacted the lawyer who represents the appellant and was advised that the appellant does not intend to provide representations in support of its appeal.

I do not find it necessary to seek representations from the Ministry or the requester. In making my decision I have considered the appellant's letter of June 24, 2004 to the Ministry setting out its reasons for refusing consent to disclosure of the records, the appeal letter, the issues identified in the Mediator's Report, and the contents of the record itself.

RECORDS:

At issue are a letter from the Ministry to a lawyer representing the appellant dated November 18, 1997; a letter from the Ministry to the appellant's lawyer dated December 16, 1996 with an attached blank application form; and a letter from the Ministry to the appellant's lawyer dated May 23, 2001.

DISCUSSION:

Preliminary Matter

As indicated above, one of the records at issue in this appeal is a letter dated December 16, 1996 with an attached blank application form. This record was also at issue in appeal PA-040223, in which the appellant is also one of the appellants. The requester is the same in both appeals. In order **PO-2376**, released concurrently with this order, I found that the exemption in section 17(1) did not apply to this record, for reasons set out in that order.

In this appeal, the appellant has provided in the second sentence of the appeal letter some minimal additional information which was not provided to this office in the other appeal, and therefore was not taken into consideration in that appeal. Accordingly, I will consider the question of the application of section 17 to this record in this appeal in light of the additional information provided to me.

I will consider whether subsections 1(a), (b), or (c) of the mandatory exemption at section 17 apply to the record.

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

In his letter to the Ministry, the appellant's lawyer states that the record contains information of a commercial nature. He does not explain which portions of the information are commercial in nature or why any of the information falls within this category. I base my findings, therefore, primarily on my independent review of the contents of the records themselves.

The types of information listed in section 17(1) have been discussed in prior orders. Commercial information has been described in the following way:

> *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 application form attached to the letter of December 16, 1996 is a blank form which contains no commercial information. The letter of November 18, 1997 from the Ministry questions compliance with certain plans and permit conditions. It does not appear to me to contain any commercial information. Page 1 of the letter of May 23, 2001 contains information that appears to be commercial in nature as it relates to matters that may reveal information about the commercial viability and production of the appellant's business. Page 2 of that letter does not appear to me to contain any commercial information. For the same reasons, the second last

paragraph of page 2 of the letter of December 16, 1996 appears to contain commercial information. The rest of the letter does not.

The appellant did not allege in his appeal letter that any of the information is a trade secret or scientific, technical, financial or labour relations information. Nevertheless, I have reviewed the records to determine whether they contain these types of information. The first paragraph of the letter of December 16, 1996 contains some information that might be characterized as technical in nature.

I find therefore that the information identified above meets part 1 of the test for exemption from disclosure under s. 17(1). The rest of the information in the records does not qualify for further consideration for exemption.

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 lawyer representing the appellant states that the information in the records was provided to the Ministry. As I have found that certain information meets part 1 of the test, I now consider whether that information meets part 2 of the test. The information on page 2 of the December 16, 1996 letter that is commercial in nature was not supplied by the appellant and therefore does not meet part 2 of the test. Similarly, there is no evidence that the information on page one of that letter that is technical in nature was supplied by the appellant. Some of the information in the second and third sentences of the second paragraph of the letter of May 23, 2001 appears to have been supplied by the appellant, and therefore meets part 2 of the test. The remainder of page 1 does not meet part 2 of the test. I find that the application form was not supplied by the appellant.

Accordingly, I find that information in the second and third sentences of the second paragraph of the letter of May 23, 2001 and information in the first two sentences of the letter of November 18, 1997 meet part 2 of the test and the remaining information in the records does not.

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 appellant's 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 appellant provides some additional information, which I will keep confidential, that discloses details of the nature and timing of the court proceeding and "settlement" in question that were not part of the information before me in the related appeals.

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 permit and licensing processes is routinely disclosed by government agencies. Other than this bald assertion, no evidence of an intention that the information be kept confidential is provided and there is nothing on the face of the records in question to suggest any such intention.

Nor is information obtained in the context of settlement discussions necessarily confidential. Although the appellant asserts that the information was provided as part of a settlement, it does 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 process alone does not establish that the information was supplied in confidence. Moreover, there is nothing on the face of the records in question that indicates that the information in the records was provided in the course of negotiations to settle litigation or as part of settlement agreement.

Because I have found that much of the information was not "supplied" and because I am not persuaded that any of it was supplied "in confidence", I find that the information does not meet part 2 of the test for exemption under s. 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 objection to disclosure sent to the Ministry and the appeal to this office do not assert the harm set out in s. 17(1)(b) and I find no evidence of this harm on the face of the records at issue.

The records contain very little information about the nature of the appellant's business or how it is carried out. Other than the bald assertion of harm, there is no evidence in the letter to the Ministry objecting to disclosure to the requester, in the letter appealing the Ministry's decision, or in the contents of the records in question that satisfies me that there a reasonable expectation of any of the harms set out in sections 17(1)(a) or (c) from disclosure of the information in these records.

Accordingly, part 3 of the test has also not been met.

I find that the records are not exempt under section 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