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

ORDER PO-2375

Appeal PA-040222-1

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-2376 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 was a letter dated September 22, 1997 from an official of the Ministry to an individual. The Ministry considered that disclosure of the record may affect the interests of that individual and his company (who are the appellants in this appeal) and sought their views as to whether the record should be disclosed to the requester. Through a lawyer, the individual and his company requested the Ministry not to disclose the record 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 as to why the record should not be disclosed, the Ministry decided to grant the requester access to the record. 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 Adjudicator 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 first provided a Notice of Inquiry setting out the facts and issues in this appeal to the appellants and sought representations from them. I provided a deadline for receipt of these representations. When no representations were received, this office contacted the lawyer who represents the appellants and was advised that they do not intend to provide representations in support of their appeal.

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 June 24, 2004 to the Ministry setting out their reasons for refusing consent to disclosure of the record, the appeal letter, the issues identified in the Mediator's Report, and the contents of the record itself.

The record at issue is a letter dated September 22, 1997 from an official of the Ministry to the individual appellant.

DISCUSSION:

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

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 record at issue contains a description of what a Ministry official observed during a site visit to a property or facility, concerns expressed to the individual appellant arising out of these observations, and the individual appellant's responses to those concerns. In the absence of any explanation by the appellants as to why this constitutes commercial information and based on my independent review of the record, I am not satisfied that this is "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 reviewed the record and find that it does not contain these types of information.

I find therefore that the appellants have not satisfied the first part of the test.

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 appellants states that the information in the record was provided to the Ministry. Much of the information in the record consists of a description of the Ministry's observations and concerns and confirmation that the individual appellant has agreed to take certain corrective actions. This information has not been "supplied" to the Ministry.

In discussions with the Ministry, the individual appellant did disclose certain information. This information was "supplied" to the Ministry. Generally, this consists of all or part of the information set out in the last sentence of each paragraph beginning with a bullet. In light of my conclusion that the information does not meet other parts of the test for protection through section 17, it is not necessary to specify in greater detail which information was supplied to the Ministry.

In confidence

In order to satisfy the "in confidence" component of part two, the party 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' 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 permit and licensing processes is routinely disclosed by government agencies. Other than the appellants' lawyer's bald assertion, no evidence of an intention that the information be kept confidential is provided and there is nothing on the face of the record in question to suggest any such intention.

Although the appellants make a further bald assertion that the information was provided as part of a settlement, there is no information that identifies any specific court proceedings or settlement document. They do not specifically claim a privilege for this information or provide any evidence of a settlement agreement containing a confidentiality clause. Even if it were established on the evidence that the information was provided as part of a settlement, this alone does not establish that the information was supplied in confidence. Moreover, there is nothing on the face of the record in question or any other evidence to substantiate that the information in the record has any relationship to a court proceeding, anticipated proceeding, or settlement.

Because I have found that much of the information was not "supplied" and I am not persuaded that any of the supplied information 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 record contains very little information about the nature of the appellants' business or how it is carried out or whether a business was even in operation at the time the record was created. Other than the bald assertion in item (c) of the appellants' letter to the Ministry, there is no evidence to establish a reasonable expectation of any of the harms set out in sections 17(1)(a) or (c) from disclosure. The record documents the observations made at a site visit by a government official in 1997 and the individual appellant's response to those observations and concerns at that time. The objection to disclosure sent to the Ministry does not assert the harm set out in s. 17(1)(b).

Accordingly, 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. Therefore, part 3 of the test has also not been met. I find that the record is not exempt under section 17(1) and should be disclosed.

ORDER:

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

2. I order the Ministry to disclose the record 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 record disclosed to the requester.

March 11, 2005

John Swaigen
Adjudicator