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

ORDER PO-2557

Appeal PA-040060-4

Ministry of the Environment

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NATURE OF THE APPEAL:

BACKGROUND

Wiarton is a town of approximately 2,300 people in Bruce County, Ontario. In 1999, Wiarton and several other surrounding communities were amalgamated into a new municipality – the Town of South Bruce Peninsula.

Wiarton's water supply is treated at a filtration plant, which is located on the shores of Colpoys Bay, an inlet off Georgian Bay. In the summer of 2000, Wiarton was the site of a two-month experiment in which the disinfectant used to treat the town's tap water was changed from chlorine to chlorine dioxide.

Chlorine is the most commonly used disinfectant at water treatment plants in North America. However, according to the Ministry of the Environment (the Ministry), chlorine dioxide is currently used at about 13 per cent of water treatment plants in North America and at numerous plants in Europe. One purpose of using chlorine dioxide as a disinfectant is to kill pathogens that may be resistant to chlorine.

The pilot project in Wiarton was initiated by a chemical company that had developed a new chlorine dioxide generator. Other participants included the civil engineering department of an Ontario university, the Ontario Clean Water Agency (OCWA), the Ministry, and the Town of South Bruce Peninsula, whose elected council had approved the project.

The chemical company's chloride dioxide generator was installed at the town's water filtration plant, and from June 20 to August 22, 2000, chlorine dioxide was used as an alternative disinfectant to treat Wiarton's water supply. The chemical company was responsible for operating and monitoring the chlorine dioxide generator, and the university was responsible for conducting a monitoring study.

In the midst of the experiment, a number of Wiarton residents complained that unexplained bleach spots were appearing on their clothes and towels after being washed using water supplied by the town's filtration plant. Numerous reports appeared in both the national and local media in which Wiarton residents expressed concern about the water experiment and whether it was having an adverse effect on their health. In an article in *The Toronto Star* ("Drinking water experiment upsets residents," August 22, 2000), one resident complained that, "We feel like we've been used like some sort of lab animal."

In response, the university tested samples of clothing provided by Wiarton residents to determine if the bleaching could have been caused by the chlorine dioxide that was in the town's water supply during the two-month trial. They were unable to reproduce the discolouration reported by residents by applying the same chlorine dioxide levels used in the trial.

Both provincial and local government officials assured town residents that the water supply was safe. In addition, the Ministry and the university stated that their monitoring tests showed that the town's water quality remained excellent throughout the trial.

ACCESS REQUEST

A request was submitted to the Ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the complete Ministry and OCWA files relating to the drinking water experiment conducted in Wiarton in the summer of 2000.

The Ministry transferred part of the request to the OCWA for a decision on whether to provide access to some of the requested records. The OCWA provided some records to the requester. In Order PO-2353, Acting Adjudicator Alex Kulynych required the OCWA to conduct additional searches for responsive records.

The Ministry located some responsive records and responded to parts of the request by issuing an interim decision, indicating its intention to provide access to some of the requested information and providing an estimate of the fee it would charge for providing access.

THE INITIAL APPEALS

The requester appealed the Ministry's fee estimate and appeal file PA-040060-1 was opened. This appeal file was closed when the Ministry waived the fee. A second appeal file, PA-040060-2, was opened in which the appellant appealed the Ministry's refusal to disclose information, but was closed when it became clear that the appeal was premature because the Ministry had not yet made a final access decision.

The Ministry subsequently made an access decision, granting full access to the records it had identified as responsive. The requester appealed the Ministry's decision because he believed that additional records existed. As a result, appeal file PA-040060-3 was opened as a reasonable search appeal. During the course of appeal PA-040060-3, the Ministry located an additional 16 records.

Following notification of two affected parties (the lead university professor on the project and the chemical company) pursuant to section 28 of the *Act*, the Ministry issued a decision letter, granting the requester access to two records and refusing him access to the remaining 14 records pursuant to sections 17(1)(a) and (c) (third party information) of the *Act*. The Ministry provided the requester with an index of records describing the subject matter of each record.

With the issuance of this decision letter, the nature of the appeal changed. As a result, appeal file PA-040060-3 was closed with the understanding that the requester would submit a new appeal in order to address any issues raised by the Ministry's decision.

THE CURRENT APPEAL

The requester (now the appellant) appealed the Ministry's refusal to provide access to the 14 remaining records. In addition, the appellant asked the Commissioner's office to review whether

the Ministry has conducted a reasonable search for responsive records. As a result, this office opened the current appeal (PA-040060-4).

To assist the parties in resolving the outstanding issues, this office appointed a mediator. During the course of mediation, the Ministry agreed to conduct an additional search for records. The Ministry located further records, to which it granted full access and sent them directly to the appellant.

Following a review of these records, the appellant advised that he believes more records exist. In particular, he claims that a formal Ministry report and lab results exist that have not been provided to him. Accordingly, the reasonableness of the Ministry's search for responsive records remains at issue in this appeal.

As mediation did not resolve all the outstanding issues, this appeal was transferred to the adjudication stage. Initially, this office sent a Notice of Inquiry, setting out the facts and issues, to the appellant. It invited the appellant to provide representations only on the issue of reasonable search. The appellant submitted representations on that issue and provided several attachments along with his submissions which he felt were relevant to the search issue.

This office then sent a Notice of Inquiry to the Ministry, along with a copy of the non-confidential portions of the appellant's representations, as well as the attachments. It invited the Ministry to provide representations on all issues raised in the Notice of Inquiry, including reasonable search and whether the mandatory exemption in section 17(1) of the *Act* applies to the records at issue. In response, the Ministry submitted representations, which included appendices containing additional evidence.

This office then sent a Notice of Inquiry to two affected parties (the lead university professor on the project and the chemical company), along with a copy of the non-confidential portions of the appellant's representations. The affected parties were invited to provide representations on any issues that they considered to affect their interests. Legal counsel for the university submitted representations on behalf of both the lead professor on the project and the university, but the chemical company did not submit any representations.

This office followed up with the chemical company by telephone to find out if it was planning to submit representations in response to the Notice of Inquiry. A representative of the chemical company stated that it had decided not to submit any representations in this appeal.

The only evidence that I have before me with respect to the chemical company's position on disclosure of the records at issue is a three-page letter that it sent to the Ministry after being notified of the request as an affected party under section 28 of the *Act*. In this letter, the chemical company submits that the exemption in section 17(1) of the *Act* applies to the records at issue.

This office then issued a Supplementary Notice of Inquiry to the appellant, along with the complete representations (including appendices) of the Ministry and the complete representations of the university. The appellant submitted representations in response and raised a new issue. He argued that even if the exemption in section 17(1) of the *Act* applies to the records at issue, the public interest override in section 23 of the *Act* would be applicable. In other words, he submits that there is a compelling public interest in the disclosure of the records that outweighs the purpose of the section 17(1) exemption.

After receiving the appellant's response to the Supplementary Notice of Inquiry, this office then issued a Reply Notice of Inquiry to the Ministry and the two affected parties that invited them to respond to the appellant's representations and provide submissions on whether the public interest override in section 23 of the *Act* applies in the circumstances of this appeal.

The university's legal counsel submitted reply representations. Neither the Ministry nor the chemical company submitted any representations by way of reply.

RECORDS:

There are 14 records remaining at issue in this appeal, which I have summarized in the following chart:

Record Number	Title/Description of record	Mini
1	Proposal to chemical company by university researchers: Wiarton Water Distribution System Monitoring Study [Feb. 14, 2000] (8 pages)	Denie

2	Minutes of Meeting No. 2 [April 26, 2000] (5 pages), plus 9 attachments: -Wiarton Study Timeline (1 page) -Evaluation on the Extent of Possible Interaction between Hypo and ClO_2 (1 page) -Inactivation Calculations for Wiarton (1 page) -Shakedown Update (1 page) -Map of Wiarton (2 pages) -Sample Data Form (1 page) -Wiarton Generator Performance Trial Requirements (1 page) -Methods Comparis	Deni

		on for Measuring Chlorine Dioxide and Chlorine in Water (12 pages) -List of contacts (1 page)	
3		Minutes of Meeting No. 3 [May 17, 2000] (3 pages), plus two attachments: -Measurement of Cl_2 in Water Containing ClO_2 (2 pages) -Shakedown Update (1 page)	Denie
4		Minutes of Meeting No. 4 [May 26, 2000] (3 pages), plus 6 attachments: -Figure 1 – Wiarton Study	Denie

Timeline (1 page)
-Figure 2 – Wiarton Water Filtration Plant [Transition of Chlorine Dioxide for Zebra Mussels Control and Drinking Water Disinfection] (1 page)
-Decay Test for Wiarton Raw Water (2 pages)
-Comparison of Purge vs. Deduction Methods for Measuring Chlorine Using Hach Pocket Meter (2 pages)
-Current Status (1 page)
-ClO_2 Decision Trees – Weeks 1 and 2 (7

		pages)	
5	Minutes of Meeting No. 6 [Aug. 22, 2000] (2 pages), plus 5 attachments: -Annex 1: Newspaper articles on bleach-like stains on laundry (3 pages) -Annex 2: Wiarton S1 Project Review (6 pages) -Annex 3: Wiarton Water Distribution System Monitoring Study (11 pages) -Annex 4: Test of Clothing Discolouration in Laundry Water Containing Chlorine Dioxide (6 pages)		Deni

	-Test of Clothing Discolouration in Laundry Water Containing Chlorine Dioxide (Summary – 2 pages)	
6	Two tests: (1) Decay Test for Wiarton Raw Water (2 pages) (2) Comparison of Purge vs. Deduction Methods for Measuring Chlorine Dioxide Using Hach Pocket Meter (1 page)	Denie
7	Test of Clothing Discolouration in Laundry Water Containing Chlorine Dioxide (Summary	Denie

		– 2 pages)	
8		Test of Clothing Discolouration in Laundry Water Containing Chlorine Dioxide (Full report – 17 pages)	Denie
9		Progress Report 1: Wiarton Water Filtration Plant and Distribution System Monitoring Study ClO_2 ECF Generator Field Trial SPCL Project Number EE000029 (28 pages)	Denie
10		Letter from university professor to chemical company, dated August 18, 2000 (1 page)	Denie
11		Fax from Ministry	Denie

	employee to OCWA, plus two attachments: -Wiarton Water SDS Test (1 page) -Fax from chemical company to Ministry employee (1 page)	
12	Fax from chemical company to Ministry employee with two attachments: -Excerpt from paper – Treatment of fresh water for zebra mussel infestation (1 page) -Tame zebra mussels at lower cost using ClO_2 (26 pages)	Denie
13	ClO_2 Decision Trees –	Denie

		Weeks 1 and 2 (11 pages)	
15	Preliminary Evaluation of Analytical Instruments for the Determination of Low Level of Chlorine Dioxide in Water (13 pages)		Deni

Given the complexity of the records at issue, I have determined that it would be helpful to organize them into two groups, for the purposes of reference in this order.

The first group of records was generated primarily by the lead university professor and his team and includes Records 1, 6, 7, 8, 9, 10, 13 and various attachments to Records 2 to 5. I will refer to these as "Group A" records. I would note that the university's legal counsel has provided submissions on Records 1 and 6 to 10, which were provided to him by the Ministry. However, in the interests of fairness, I will consider his submissions to apply to all records that were generated primarily by the professor and his co-researchers (i.e., all "Group A" records).

The second group of records was generated primarily by the chemical company and includes Records 2 to 5 (including various attachments), 11, 12 and 15. I will refer to these as "Group B" records.

Record 14 is a paper, *Chlorine Dioxide Trial as a Post Disinfectant in Wiarton, Ontario*, which the lead university professor and his co-authors presented at an international conference on chlorine dioxide in February, 2001. This record is not at issue in this appeal and does not appear in the above chart because the Ministry disclosed it in full to the appellant.

DISCUSSION:

PRELIMINARY ISSUE: THE EXTENSION OF THE *ACT* TO UNIVERSITIES

In his reply representations, the university's legal counsel points to recent statutory amendments that extended the scope of the *Act* to universities in Ontario. In particular, he submits that the important principle of protecting academic scientific research from "premature disclosure" is

implicit in section "8.1" of the *Act*. He is presumably referring to the new exclusionary provision in section 65(8.1)(a) of the *Act*, which reads:

> This Act does not apply,
>
> > to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution;

The university's submissions on section 65(8.1) of the *Act* are brief and do not assert that this provision applies to the appellant's request or this appeal. However, before addressing the other issues in this appeal, it is important to clarify whether section 65(8.1)(a) has any application.

On June 10, 2006, statutory amendments came into force that extended the access and privacy provisions of the *Act* to universities in Ontario. As noted by the university's legal counsel, these provisions include section 65(8.1)(a), which excludes research records from the scope of the *Act* in prescribed circumstances. In addition, there is an exception to this exclusionary provision in section 65(9) of the *Act*, which states:

> Despite subsection (8.1), the head of the educational institution shall disclose the subject-matter and amount of funding being received with respect to the research referred to in that subsection.

In short, research records that meet the conditions set out in section 65(8.1)(a) are excluded from the scope of the *Act*, but the head of an educational is compelled under section 65(9) to disclose the subject-matter and amount of funding received with respect to such research.

As noted above, the amendments extending the *Act* to universities came into force on June 10, 2006. Consequently, they only apply to requests made on or after that date. The appellant's original request, which has subsequently led to several appeals before this office including this one, was filed with the Ministry on October 3, 2003. Consequently, I find that sections 65(8.1)(a) and 65(9) do not apply to the appellant's request, and they are not applicable to his subsequent appeals that have come before this office, including this one.

THIRD PARTY INFORMATION

The Ministry and the affected parties claim that the mandatory exemption in section 17(1) of the *Act* applies to the records at issue.

General principles

Section 17(1) states:

> 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; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 affected parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

Section 53 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Affected parties who rely on the exemption provided by section 17(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record (Order P-203).

For section 17(1) to apply, the parties resisting disclosure (in this case, the Ministry, the university and the chemical company) 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 order to satisfy Part 1 of the test, the parties resisting disclosure must show that a record contains one or more of the types of information listed in section 17(1).

In my view, the records at issue contain "scientific" and "technical" information but not the other types of information listed in section 17(1), for the following reasons.

Trade secrets

"Trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Summary of the parties' representations

The university's legal counsel submits that the information in Record 1 includes "trade secrets" because it "contains details regarding the technical processes to be used, that can be useful in a trade/business context, that are not generally known, and where the only contemplated disclosure would be in a scientific publication …" He further submits that Records 6 to 10 contain information that constitutes trade secrets on the same basis.

The chemical company did not submit any representations, but in its letter to the Ministry, it did not assert that the records at issue contain "trade secrets" of any sort.

The appellant challenges the university's submission that Records 1 and 6 to 10 contain "trade secrets." In particular, he refers to Order PO-1666, which found that to qualify as a "trade secret," information must not be "generally known in that trade or business."

He cites the university's submissions, which state that the role of the professor's department in the water experiment was to "monitor water quality." The appellant asserts that nothing in these submissions establishes that the processes that were used to "monitor water quality" (and presumably described in Record 1) were anything other than standard methods. Consequently, he submits that this information is not a "trade secret."

Analysis and findings

I have considered the representations of the parties and have reviewed the records at issue. In my view, the records do not contain "trade secrets," for the following reasons.

The Group A records include information that relates to a number of processes, methods and techniques used by the university professor and his team during the Wiarton water experiment. In particular, they contain information relating to the methods they used to monitor water quality during the two-month trial, and to test samples of clothing and towels to determine if the bleaching reported by Wiarton residents could have been caused by the chlorine dioxide that was in the town's water supply.

This office has established in previous orders that to qualify as a "trade secret," information must not be generally known in that trade or business (PO-2010). Consequently, it must be established whether the methods used by the university professor and his team are not generally known in the trade or business of monitoring and testing water.

It is clear from my review of the records that the professor and his co-researchers used standard water monitoring and testing methods. For example, page 5 of Record 1 clearly states that all sampling methods will be as described in the publication, *Standard Methods for the Evaluation of Water and Wastewater* (20th edition). Similarly, page 6 of Record 9 states that the laboratory test methods will follow the standards from the same publication.

Consequently, I find that the university has failed to establish that the information in the Group A records are not generally known in the trade or business of monitoring and testing water. Consequently, I find that these records do not contain "trade secrets."

Some of the Group B records contain information relating to the chemical company's chlorine dioxide generator. However, as noted above, the chemical company did not provide any representations in this appeal and did not state in its letter to the Ministry that the records contain "trade secrets." As a result, there is no evidence before me that would suggest that any of this information relating to the generator constitutes a "trade secret."

In conclusion, I find that none of the records at issue contain "trade secrets."

Scientific and technical information

I will now determine whether the records at issue contain "scientific" and/or "technical" information.

"Scientific information" is information belonging to an organized field of knowledge in 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 a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

"Technical information" is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While 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 [Order PO-2010].

Summary of the parties' representations

In its representations, the Ministry submits that the records themselves "reveal their scientific and technical nature."

The chemical company did not submit any representations, but in its letter to the Ministry, it stated that the information in the records is "scientific and technical information."

The university's legal counsel submits that Records 1 and 6 to 10 contain "scientific and technical information" that has potential commercial value. In particular, he states that the professor and his co-researchers were testing a hypothesis regarding the effectiveness of chlorine dioxide as a post-disinfectant for water treatment. He submits that the records clearly contain "scientific information" because this hypothesis uses elements of natural science (chemistry).

He further states that all of the records contain "technical information." In particular, he reiterates that engineering is an applied science, and submits that the application of specific testing protocols to use chlorine dioxide can be viewed as "technical information."

In his representations, the appellant accepts that portions of the records contain "scientific or technical information."

Analysis and findings

In my view, all of the records at issue contain "scientific" and/or "technical" information, for the following reasons.

With respect to "scientific information," most of the records at issue contain information relating to the two-month experiment in which the disinfectant used to treat Wiarton's drinking water was changed from chlorine to chlorine dioxide. I find that information relating to the elimination of pathogens in drinking water through the use of disinfecting chemicals falls within an organized field of knowledge in the natural sciences (chemistry/biology), which meets the first part of the definition of "scientific information."

However, for information to be characterized as scientific, it must also relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field. The university professor and his team, who are experts in the engineering field, were testing a hypothesis regarding the effectiveness of chlorine dioxide as a disinfectant for drinking water. A number of both Group A and Group B records contain information relating to the observation and testing of this hypothesis. Consequently, I find that these records contain "scientific information."

In my view, many of the records at issue also contain "technical information." The information in these records belongs to an organized field of knowledge that would fall under the general categories of applied sciences and more specifically, the field of engineering (particularly environmental or water resources engineering).

As noted above, while 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.

The drinking water experiment in Wiarton was headed by a chemical company that had developed a new chlorine dioxide generator. During the two-month experiment, the chemical company was responsible for operating and maintaining the generator, and the university professor and his team was responsible for conducting a monitoring study. The experiment was conducted at the Wiarton filtration plant.

Many Group B records contain references to the operation and maintenance of this generator and other equipment at the Wiarton filtration plant. In addition, Records 6 and 15 contain information relating to the instruments (e.g., meters) used to measure chlorine dioxide levels in water. I find, therefore, that these records all contain "technical information" within the meaning of section 17(1).

Commercial, financial and labour relations information

Although the university's legal counsel submits that the scientific and technical information in the records has "commercial value," he does not assert that the records at issue contain "commercial information." Moreover, neither the Ministry nor the chemical company claims that the records contain "commercial information." None of the parties resisting disclosure claim that the records contain financial or labour relations information.

Consequently, I find that the records at issue do not contain commercial, financial or labour relations information.

Conclusion

I am satisfied that all of the records at issue contain "scientific" and/or "technical" information, but not trade secrets or commercial, financial or labour relations information.

In order to satisfy Part 1 of the section 17(1) test, the parties resisting disclosure must simply show that the records contain at least one of the types of information listed in section 17(1). Consequently, given I have found the records at issue contain "scientific" and/or "technical" information, the Ministry and the affected parties have successfully met Part 1 of the three-part test.

Part 2: supplied in confidence

For section 17(1) to apply, the parties resisting disclosure must also satisfy the second part of the three-part test, which is that the information must have been supplied to the institution in confidence, either implicitly or explicitly.

Summary of the parties' representations

The Ministry states that the 14 records at issue were implicitly supplied to it in confidence. It further submits that both the chemical company and university staff "have informed" the Ministry that they consistently keep this type of information confidential and as a result, they "would have had" the expectation that the Ministry keep the records confidential.

In the background section of his representations, the university's legal counsel states that the work of the professor and his team was undertaken by way of a research contract with the chemical company and was "for analysis of water samples only." He submits that, "It was understood that portions of the data generated would be provided by [the chemical company] to the Ministry for the Ministry's information, and it was implicitly understood that the provision of the information was for the Ministry's use only."

The university's legal counsel further submits that the information in Records 1 and 6 to 10 was supplied to the Ministry in confidence. There was an "implicit understanding" that the data gathered by him and his fellow researchers and the proposed experimental assessments in the records would be kept confidential because it could subsequently be used by him to prepare and submit articles for publication in scientific and other journals.

The chemical company did not submit representations in this appeal, but in its letter to the Ministry, it states that:

- The information in Records 1, 6, 7, 8, 9, 11, 13 and 15 contain information, reports, tests, and proposals prepared and supplied by the university professor and his team solely to the chemical company. The chemical company paid considerable compensation for this information and supplied it to the Ministry in confidence.

- The information in Records 2 to 5 are minutes of "private" meetings between the chemical company and the university professor and his team. These "private" minutes were provided in confidence to the Ministry.

- The information in Records 12 and 15 are documents marked "confidential" or with a confidentiality notice. The information in these records was supplied in confidence to the Ministry.

The chemical company further states in its letter to the Ministry that it has a number of strict policies in place to ensure the information in these types of records is kept confidential.

In his representations, the appellant states that it appears reasonable to assume that the records were "supplied" to the Ministry by either the chemical company or the university professor. However, he disputes that the records were supplied "in confidence" to the Ministry.

The appellant states that this office has held in previous orders that it must be demonstrated that an expectation of confidentiality existed at the time the records were submitted (PO-1732-R, M-169). He submits that the affected parties' expectation of confidentiality has arisen in hindsight rather than at the time the records were submitted. Consequently, he asserts that Part 2 of the section 17(1) test has not been met.

Analysis and findings

Supplied

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].

With respect to whether the records were "supplied" to the Ministry, the university's representations indicate that the Group A records were generated by the professor and his team, and these records were sent to the chemical company, which then shared them with the Ministry.

With respect to the Group B records, it appears that they were generated by the chemical company, which then provided them directly to the Ministry. With the exception of the cover page of Record 11, which is a fax from a Ministry employee to the OCWA, the remaining pages of this record were provided to the Ministry by the chemical company.

As noted above, this office has found that information may qualify as "supplied" only if it was *directly* supplied to an institution by a third party. In my view, even though the university professor and his team provided the Group A records to the chemical company, which then passed them on to the Ministry, it would be contrary to the purpose of the section 17(1) exemption to find that the university professor and his team did not supply the information in these records *directly* to the Ministry simply because it flowed through the chemical company.

The Ministry was a key participant in the water experiment, and, in my view, it was reasonable for the university professor and his team to assume that they were also directly "supplying" the information in these records to the Ministry when they provided them to the chemical company.

I find, therefore, that for the purposes of Part 2 of the three-part section 17(1) test, the university professor and his team "supplied" the information in the Group A records to the Ministry, and the chemical company "supplied" the information in the Group B records (except for the fax cover page of Record 11) to the Ministry.

In confidence

In order to satisfy the "in confidence" component of Part 2 of the three-part test, 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].

As noted above, the Ministry submits that both the university professor and his team and the chemical company "have informed" the Ministry that they consistently keep this type of information confidential and as a result, they "would have had" the expectation that the Ministry keep the records confidential.

In my view, it is clear from the wording in the Ministry's representations that any explicit expectations of confidentiality were expressed to the Ministry long after the records were supplied, and most likely, when the university professor and the chemical company were notified that the Ministry had received an access request under the *Act* for the records. With the exception of Records 12 and 15 and one of the attachments (*Wiarton S1 Project Review*) to Record 5, none of the records are explicitly marked as "confidential."

Although the fax cover page on Record 12 contain a "confidentiality notice," this appears to be a standard clause that appears on the chemical company's faxes, and I do not accept that it signifies a reasonable expectation of confidentiality that was explicit with respect to the information in this record.

However, Record 15 is an internal paper published by the chemical company that is specifically marked "confidential." Similarly, the attachment to Record 5 is labeled as "confidential." I find that the chemical company had a reasonable expectation of confidentiality that was explicit at the time the information in these records was supplied to the Ministry.

Consequently, with the exception of Record 15 and the attachment to Record 5, I find that neither affected party had a reasonable expectation of confidentiality that was explicitly expressed at the time they supplied the records to the Ministry.

However, I accept that both the university professor and his team and the chemical company had a reasonable expectation of confidentiality that was *implicit* at the time the information in the records was supplied to the Ministry.

I find that the university professor and his team had a reasonable expectation of confidentiality based on the commonly accepted principle in the academic world that research data is generally kept confidential until the results are published. This expectation of confidentiality had an objective basis and was implicit at the time the information in the Group A records was supplied to the Ministry.

Moreover, I find that the chemical company had a reasonable expectation of confidentiality based on its policies with respect to the protection of records containing scientific and technical information and the sharing of such information with outsiders. This expectation of confidentiality had an objective basis and was implicit at the time the information in the Group B records (except for the fax cover page of Record 11) was supplied to the Ministry.

Conclusion

I find that the information in the records at issue was supplied to the Ministry in confidence by the university professor and his team and the chemical company.

The university professor and his team had a reasonable expectation of confidentiality that was implicit at the time the information in the Group A records was supplied to the Ministry.

The chemical company had a reasonable expectation of confidentiality that was explicit with respect to Record 15 and the attachment to Record 5, and implicit with respect to the remainder of the Group B records (except for the fax cover page of Record 11) at the time the information in these records was supplied to the Ministry.

Consequently, the Ministry and the affected parties have satisfied Part 2 of the section 17(1) test with respect to the information in these records.

Part 3: harms

General principles

For section 17(1) to apply, the parties resisting disclosure must also satisfy the last part of the three-part test, which is that the prospect of disclosure of the records must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) or (d) of section 17(1) will occur.

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].

Section 17(1)(a) and (c)

The parties resisting disclosure have provided similar arguments with respect to the harms contemplated by both sections 17(1)(a) and (c) of the *Act*. Consequently, I will consider the application of these two provisions together.

In order to satisfy the requirements of section 17(1)(a), the parties resisting disclosure must provide detailed and convincing evidence to establish that disclosure of the information in the records at issue could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

In order to satisfy the requirements of section 17(1)(c), the parties resisting disclosure must provide detailed and convincing evidence to establish that disclosure of the information in the records at issue could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

Summary of the parties' representations

The Ministry did not provide specific representations as to whether section 17(1)(a) and (c) apply to the records at issue. Instead, it submits that the representations of the affected parties (the university professor and the chemical company) would better reflect the possible harms that might result should the records at issue be disclosed.

The university's legal counsel submits that disclosure of the information in Records 1 and 6 to 10 would result in "very significant prejudice" to the competitive position of the professor and his co-researchers [section 17(1)(a)]. In addition, he asserts that disclosure could reasonably be expected to result in undue loss to the professor and his co-researchers and undue gain to their competitors [section 17(1)(c)].

With respect to the harms contemplated by section 17(1)(a), he states that the world of academic scientific publication is a competitive one in which talented researchers compete for limited research funds. He submits that if the research data and experimental assessments in the records at issue are disclosed "in isolation" from the published paper, this will mean that "others may gain access to this information and may use it for their own purposes, integrating it directly into

their own research and potentially using it for scholarly publications of their own or for commercial exploitation."

Moreover, he asserts that the information in the records at issue constitutes the "intellectual property" of the researchers and has potential commercial value that would be undermined if this information was disclosed.

With respect to the harms contemplated by section 17(1)(c) of the *Act*, the university's legal counsel asserts that there would be an "unfair and undue loss" to the researchers, because their research data would be disclosed publicly in partial or incomplete form. This would undermine their ability to choose the manner of scholarly publication. In addition, he submits that there would be an undue gain for their competitors because disclosure would create the risk that the researchers' data would be commercially exploited by others who have not undertaken or invested time, money and intellectual capital into the research conducted.

The appellant rejects the notion that disclosure of the information in Records 1 and 6 to 10 would "significantly prejudice" the competitive position of the university professor and his team. Specifically, he challenges the university's argument that the scientific and technical information in these records has potential commercial value that would be undermined if it were disclosed.

The appellant points out that these records all pertain to the testing and monitoring of public drinking water. He asserts that the university has not provided evidence to show that anything other than standard methods were used for such testing and monitoring. Consequently, he submits that any claim of harm to the "commercial value" of this information is unsubstantiated.

With respect to the harms contemplated in section 17(1)(c) of the *Act*, the appellant challenges the university's claim that disclosure of the information in the records would cause him and his team to suffer an "unfair and undue loss" because disclosure of the information in partial form would undermine their ability to choose the manner of scholarly publication and open up a risk of commercial exploitation by others who did not undertake the work.

The appellant asserts that the university professor and his co-researchers have published or presented a total of six papers, all in 2001-2002. Moreover, he states that the Wiarton experiment ended more than six years ago, and the university professor has not provided any evidence to show that he or his co-researchers are contemplating the publication of additional papers. Consequently, he submits that the university has not provided cogent evidence to back its claim that the professor and co-researchers would suffer "undue loss" if the records are disclosed.

The chemical company did not submit any representations in this appeal. In the letter that it submitted to the Ministry after being notified under section 28 of the *Act*, the chemical company provided brief submissions on section 17(1)(a) but did not assert that section 17(1)(c) applies. In particular, it submits that disclosure of the information in the records at issue would prejudice its competitive position.

It further states that it paid "considerable compensation" to the university for the information and if the information was released to the public, it would no longer have "exclusive ownership" of the records or be the exclusive publisher. In addition, it submits that disclosure may induce the university to no longer work with the company, which would cause additional harm to the company's competitive position.

Analysis and findings

I have reviewed the records at issue in detail and considered the representations of the parties. In my view, the parties resisting disclosure have failed to establish that sections 17(1)(a) or (c) apply to the information in these records, for the following reasons.

Poaching of research information

It is evident from the appellant's representations that he wishes to scrutinize the information in the records at issue for the purpose of assessing whether the residents of Wiarton were exposed to unsafe levels of chlorine dioxide or its disinfection byproducts during the course of the experiment. Consequently, it is possible that if the information in the Group A records at issue is disclosed, the appellant or other individuals may analyze and otherwise makes use of this information in their own research or scholarly publications.

However, the university has not adduced the necessary detailed and convincing evidence to show that this could reasonably be expected to "significantly prejudice" the competitive position of the professor and his co-researchers [section 17(1)(a)].

In the academic world, priority of publication for one's own research is one of the key principles underpinning competition between researchers who work in the same field. The appellant has provided me with evidence that shows that the university professor and his co-researchers have already published or presented a total of six papers relating to the use of chlorine dioxide in Wiarton, all in 2001-2002.

Given that the professor and his co-researchers have already published or publicly presented their Wiarton chlorine dioxide research extensively and in various forms, it is simply not credible that disclosure of the scientific and technical information in the Group A records could reasonably be expected to "significantly prejudice" their competitive position in the academic world.

Moreover, I am not persuaded by the university's submission that disclosure of the information "in partial form" would undermine the ability of the professor and his co-researchers to choose the manner of scholarly publication for their research, and this could therefore reasonably be expected to result in an "undue loss" for them [section 17(1)(c)].

Both the professor and his co-researchers have already exercised their ability to choose the manner of scholarly publication for their research by publishing or presenting it in six different papers. Even if other individuals analyzed or otherwise used the scientific and technical information from the Group A records in their own published works, it is not credible that this could reasonably be expected to result in an "undue loss" for the professor and his co-researchers, because they have already exercised their ability to choose the forums in which to publish their research.

Commercial exploitation

I am also not persuaded by the university's submission that disclosure of the information in the Group A records would create the risk that it would be commercially exploited by others, which could reasonably be expected to "significantly prejudice" the competitive position of the professor and his co-researchers [section 17(1)(a)] or result in an "undue loss" to them or an "undue gain" for any of their competitors [section 17(1)(c)].

Although the university's legal counsel asserts that the information in the records at issue constitutes the "intellectual property" of the professor and his co-researchers, he has not provided any detailed and convincing representations to support this argument, such as the legal basis for making an intellectual property claim.

In addition, it is clear from both the records at issue and the parties' representations that the university professor and his co-researchers have already been financially compensated for the scientific and technical information that they provided to the chemical company. Record 1, which is the proposal that the university professor and his co-researchers submitted to the chemical company, includes a requested budget. Moreover, in its letter to the Ministry, the chemical company confirms that it paid "considerable compensation" to the university for the scientific and technical information in the records.

Given that the university professor and his co-researchers have already received "considerable compensation" for providing the information in the records to the chemical company, I do not find it credible that the disclosure of such information could reasonably be expected to "significantly prejudice" their competitive position [section 17(1)(a)] or result in an "undue loss" to them [section 17(c)]. On the contrary, they have already significantly exploited any commercial value that may be derived from the information in the records by selling it to the chemical company.

I am also not persuaded that disclosure of the information in the Group A records could reasonably be expected to result in an "undue gain" for individuals who compete with the professor and his co-researchers [section 17(1)(c)]. Although the university's legal counsel asserts that there is a risk that the data could be commercially exploited by others, he does not provide detailed and convincing evidence to explain how this could reasonably be expected to occur. In my view, the risk identified by the university's legal counsel amounts to speculation of possible harm, rather than the detailed and convincing evidence that must be adduced.

Loss of exclusive ownership of data

In my view, the chemical company has similarly failed to provide the "detailed and convincing" evidence required to establish that the harm contemplated by section 17(1)(a) of the *Act* could reasonably be expected to occur.

Although the company claims disclosure of the records would affect its "exclusive ownership" of the records and its ability to be the exclusive publisher, it has not provided the kind of detailed and convincing evidence required to explain how the publication of this information by others could reasonably be expected to "significantly prejudice" the company's competitive position in the marketplace.

Moreover, the chemical company's letter makes no reference to the actual substance of the records at issue, particularly those I have organized into Group B, to support its assertion that disclosure could reasonably be expected to "significantly prejudice" the company's competitive position.

For example, the company's letter does not provide any detailed explanation as to how disclosure of the specific information in Records 2 to 5, which contain the minutes of meetings that took place between the project participants and various attachments, could reasonably be expected to "significantly prejudice" the company's competitive position.

Similarly, the letter does not provide any detailed explanation as to how disclosure of the information in the two articles on controlling zebra mussels (Record 12) or the report that evaluates the "analytical instruments" for measuring chlorine dioxide levels (Record 15) could reasonably be expected to "significantly prejudice" the company's competitive position.

Compromised working relationship

I am also not persuaded by the chemical company's assertion that disclosure may induce the university to no longer work with the company, which would cause additional harm to the company's competitive position. There is nothing in the university's submissions that suggests that this could reasonably be expected to occur.

Moreover, even if this speculative scenario took place and the university professor and his co-researchers chose to not work with the company on future projects, the chemical company has not adduced sufficiently detailed and convincing evidence to explain how this could reasonably be expected to "significantly prejudice" the company's competitive position in the marketplace.

In short, I find that the university and the chemical company have failed to submit the detailed and convincing evidence required to establish that disclosure of the information in the records at issue could reasonably be expected to result in the harms contemplated by sections 17(1)(a) and (c) of the *Act*.

Section 17(1)(b)

In order to satisfy the requirements of section 17(1)(b), the parties resisting disclosure must provide detailed and convincing evidence to establish that:

- disclosure of the information in the records at issue could reasonably be expected to result in similar information no longer being supplied to the Ministry, **and**

- it is in the public interest that similar information continue to be so supplied.

Summary of the parties' representations

In its representations, the Ministry submits that the affected parties could reasonably be expected to limit the amount of research information that they would voluntarily provide to the Ministry in the future if the information in the records at issue is disclosed. Moreover, it claims that disclosure may have a "chilling effect" on other third parties in Ontario, who may not be prepared to share research data with the Ministry. The Ministry asserts that it has an interest in ensuring that such information continues to be supplied to it on a voluntary basis.

The university's legal counsel submits that disclosure of the information in Records 1 and 6 to 10 would have a "chilling effect" on researchers, who would be reluctant to provide scientific, technical or trade secret information to government agencies. He further asserts that researchers would tend to shift the focus of their research contracts to private sector entities not subject to the *Act*, and this would not be in the public interest. Consequently, he asserts that the harms contemplated in section 17(1)(b) could reasonably be expected to occur if the information in the records at issue is disclosed.

In his representations, the appellant challenges the submissions made by both the Ministry and the university's legal counsel that disclosure of the information in these 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 similar information continue to be so supplied.

In particular, he disputes the university's submission that researchers would tend to shift the focus of their research contracts to private sector entities if the information in the records was disclosed. He submits that this is a "befuddling submission," because the involvement of the university researchers in the Wiarton experiment was, in fact, through a research contract with a private sector entity (the chemical company). He further submits that any concerns that other researchers would shift the focus of their work from the public to the private sector are "dubious and highly speculative."

The appellant also points out that the Ministry's Environmental Assessment and Approvals Branch issued a Certificate of Approval that imposed conditions on the Wiarton experiment. Consequently, he submits that if the Ministry is concerned that information may not be supplied

to it, it can impose information sharing conditions in the Certificate of Approval or use statutory means to compel parties to supply such information.

In its letter to the Ministry, the chemical company submits that disclosure of the information in the records at issue could result in similar information not being supplied to the Ministry, because the company could no longer be assured that the provision of valuable scientific and technical information would be kept confidential. Consequently, future projects and research beneficial to the Ministry and the public could be jeopardized.

Analysis and findings

I have reviewed the records at issue and considered the representations of the parties. In my view, the parties resisting disclosure have failed to establish that the harm contemplated by section 17(1)(b) of the *Act* could reasonably be expected to occur, for the following reasons.

With respect to projects affecting public drinking water, it is undeniably in the public interest that any scientific and technical information relating to those projects continue to be supplied to the Ministry [the second requirement of section 17(1)(b)]. However, I am not persuaded that disclosure of the information in the records at issue in this particular appeal could reasonably be expected to result in researchers or private companies not supplying similar information to the Ministry [the first requirement of section 17(1)(b)].

The Ministry has a duty to safeguard the environment, which includes protecting Ontario's drinking water. The purpose of supplying scientific and technical information relating to an experiment on public drinking water is to enable the Ministry to ensure that the environment and public health are adequately protected.

In my view, it is not reasonable to expect that researchers or private companies would no longer supply similar information to the Ministry if the information in the records at issue is disclosed, because the Ministry has the authority to prevent such experiments from proceeding. The implementation of the Wiarton water experiment required that the Ministry's Environmental Assessment and Approvals Branch approve an amendment to the Certificate of Approval for the Wiarton water filtration plant. Consequently, it is clear that experiments on public drinking water cannot proceed without the Ministry's "stamp of approval."

It is simply not plausible that researchers or private companies who wish to benefit from the use of a publicly regulated site for an experiment would no longer provide information voluntarily if the information in this appeal is disclosed. If they did so, the Ministry could simply stop the experiment from moving forward. I do not, therefore, accept the submissions of the Ministry, the university and the chemical company that if the information in the records at issue is disclosed, this would have a "chilling effect" on third parties, who would refuse to supply similar information to the Ministry.

I would point out as well that both university researchers and private companies benefit from participating in projects on publicly regulated sites, such as water filtration plants. These sites provide a unique "real world" environment for conducting research and testing emerging technologies (e.g., the chemical company's new chlorine dioxide generator). However, the reasonable trade-off for using publicly regulated sites to conduct such experiments is that university researchers and private companies are expected and required to submit information to the public bodies responsible for protecting the environment and public health (i.e., the Ministry).

Moreover, I agree with the appellant that even if the Ministry is concerned that information may not be supplied to it voluntarily in future projects if the information in this appeal is disclosed, the Ministry has the authority to impose information sharing conditions in a Certificate of Approval before an experiment proceeds. In addition, the Ministry has the authority to compel the production of information under the *Environmental Protection Act*, and could use these powers as a last resort if the parties conducting an experiment refuse to supply scientific and technical information voluntarily.

In short, I find that the Ministry and the affected parties have failed to provide the detailed and convincing evidence required to show that the harm contemplated in section 17(1)(b) of the *Act* could reasonably be expected to occur if the information in the records at issue is disclosed.

Conclusion

The Ministry and the affected parties have failed to establish that the section 17(1) exemption applies to the information in the records at issue. As no other exemptions have been claimed, I will order that the records at issue be disclosed to the appellant in their entirety.

PUBLIC INTEREST OVERRIDE

Technically, it is not necessary for me to consider whether the public interest override in section 23 of the *Act* applies in the circumstances of this appeal, because I have already found that the section 17(1) exemption does not apply to the information in the records at issue.

In my view, however, this appeal raises important issues relating to the safety of public drinking water. Consequently, in the interests of completeness, I will consider whether the public interest override in section 23 of the *Act* would have applied in the event I had found that some or all of the information in the records at issue was exempt under section 17(1).

General principles

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Summary of the parties' representations

The appellant's representations

The appellant submits that there is a compelling public interest in the disclosure of the records at issue that outweighs the purpose of the section 17(1) exemption.

In his representations, he cites various passages from the reports of the Walkerton Inquiry and refers to several orders of this office, including Orders PO-2308, PO-1805 and PO-1803.

To further support his submission that the public interest override applies in the circumstances of this appeal, the appellant provides detailed background information on the public health concerns raised by using chlorine dioxide as a disinfectant in drinking water. In addition, he links these concerns to the situation in Wiarton during the two-month experiment, particularly with respect

to the damage that appeared on the laundry of some of the town's residents. Finally, he comments on the influence of the Wiarton experiment on recent public policy developments in Canada regarding the use of chlorine dioxide in public drinking water.

Public health concerns

With respect to the public health concerns raised by using chlorine dioxide as a disinfectant in public drinking water, the appellant cites the findings of Justice Dennis O'Connor in Part Two of the *Report of the Walkerton Inquiry*, who cautioned that chlorine dioxide and its disinfection byproducts (DBPs) are considered to have "adverse health effects," and the use of chlorine dioxide as a disinfectant "may be limited by its production of DBPs."

The appellant further states that the United States, unlike Canada, regulates the amount of chlorine dioxide that may be used in drinking water. In particular, a maximum of 0.8 mg/L (milligrams per litre) of chlorine dioxide is permitted in drinking water leaving a treatment plant. This level is referred to as the "maximum residual disinfectant level" (MRDL).

He points out that exceeding the MRDL in the U.S. is a "Tier 1 violation" under the federal Public Notification Rule, and that public notice is required within 24 hours of such a violation. He cites the wording from a template that public bodies must include in any notice issued to the public if they find that maximum safety limit for chlorine dioxide in public drinking water has been exceeded:

> Some infants and young children who drink water containing chlorine dioxide in excess of the MRDL could experience nervous system effects. Similar effects may occur in fetuses of pregnant women who drink water containing chlorine dioxide in excess of the MRDL. Some people may experience anemia.

The Wiarton experiment

The appellant then proceeds to comment on what happened in Wiarton during the two-month experiment in the summer of 2000, in which the disinfectant used to treat the town's tap water was changed from chlorine to chlorine dioxide. In particular, he focuses on the public controversy that erupted after some town residents reported that unexplained damage was appearing on their laundry.

He cites newspaper articles and other evidence that show that the university professor and his team conducted laboratory tests on laundry after the controversy erupted and were apparently successful in duplicating the laundry damage phenomenon, but only when the levels of chlorine dioxide were *above* the safe level for consumption (presumably 0.8 mg/L).

The appellant points out that notwithstanding these results, public officials insisted that chlorine dioxide levels in Wiarton's drinking water remained below the established safe limit for

consumption throughout the trial, which led to them to the conclusion that chlorine dioxide could not have been responsible for the laundry damage.

The appellant submits that in the years since the Wiarton experiment, no proper explanation has been provided for what transpired:

> The fact remains that laundry damage – and other problems – occurred in Wiarton, and that the researchers could only duplicate the laundry damage when drinking water contained chlorine dioxide in excess of 0.8 mg/L, the MRDL ... A reasonable question, then, is whether the methods used to measure chlorine dioxide levels in Wiarton's drinking water were accurate.

The appellant further submits that the Wiarton water treatment plant operators used the so-called "DPD method" to measure chlorine dioxide levels on a periodic basis, even though at least one university expert that he cites has claimed that this method produces "inaccurate and misleading" results for measuring chlorine dioxide levels in water.

In short, the appellant submits that there is a compelling public interest in disclosing the monitoring test results and related information in the records at issue:

> Putting the laundry itself aside, these data evoke a reasonable public health concern. If laundry damage could only be duplicated when levels of chlorine dioxide exceeded the MRDL of 0.8 mg/L, what levels of chlorine dioxide were citizens exposed to?

Public policy developments

Finally, to illustrate that there is a compelling public interest in the disclosure of the records at issue that outweighs the purpose of the section 17(1) exemption, the appellant refers to recent public policy developments in Canada regarding the use of chlorine dioxide in public drinking water and argues that these developments were influenced by the Wiarton experiment.

The appellant states that in March 2006, Health Canada published an update to its *Guidelines for Canadian Drinking Water Quality* that includes proposed guidelines for the use of chlorine dioxide in Canada. In particular, he claims that Health Canada chose not to impose a specific numeric guideline on the "maximum acceptable concentration" (MAC) of chlorine dioxide in drinking water.

He further states that Health Canada's proposed guidelines cite the academic literature on the Wiarton experiment. However, he submits that at least one academic article wrongly claims that "no customer taste and odor complaints were reported during the study period," and other articles published by the university researchers and the chemical company fail to mention additional problems that arose during the Wiarton experiment, such as laundry damage.

Furthermore, the appellant states that the second step in the development of drinking water standards involves the provinces and territories, which decide whether to adopt Health Canada's guidelines in their jurisdictions. He points out that Ontario's Advisory Council on Drinking Water and Testing Standards has agreed to endorse Health Canada's guidelines pertaining to chlorine dioxide use.

The appellant questions whether Health Canada's proposed guidelines would have been different if it had been presented with all relevant data relating to the Wiarton experiment:

> Had the [academic article co-authored by the university professor] deigned to mention the problems encountered in Wiarton, would Health Canada have concluded that chlorine dioxide "maintained water quality" in Wiarton? Had the full account of problems been published in the Wiarton academic papers, would Health Canada have concluded that no guidelines for chlorine dioxide levels in Canadian drinking water was needed?

For these reasons, the appellant submits that there is a compelling public interest in disclosure of the 14 records at issue, and this interest outweighs the purpose of the section 17(1) exemption.

The university's representations

The university's legal counsel submits that the appellant's arguments concerning the potential application of the public interest override are flawed, and that the criteria for the application of section 23 of the *Act* have not been met.

He states that there is no dispute that safe drinking water is in the public interest. However, he submits that the appellant has failed to establish how that public interest actually relates to the records at issue, particularly in light of a published paper that "permits full public debate and discussion."

He further states that in assessing whether there is a compelling public interest in disclosure of the records at issue, it must be determined whether doing so would advance the central purpose of the *Act*, namely to shed light on the operations of government so that citizens may make their views known or exercise other important democratic rights.

He submits that all of the documents pertain to a scientific hypothesis that has already been published in an academic paper which is available for public scrutiny. He further asserts that if members of the public believe that chlorine dioxide is not an effective water disinfectant, they can conduct or sponsor their own research or can engage in debate with the OCWA or any relevant branch of government as to the strengths of the hypothesis.

The university's legal counsel also submits that previous orders of this office have established that the public interest override does not apply where there are other public processes within which the public interest can be expressed or engaged (Orders P-123/124, P-391, M-539). In

addition, he asserts that other orders have established that the public interest override does not apply where a significant amount of public information has already been disclosed that is adequate to address public interest considerations (Orders P-532 and P-568). He submits that these situations are "directly analogous" to the circumstances in this appeal.

In short, he submits that the appellant has failed to establish there is a compelling public interest in disclosure of the records at issue.

The university's legal counsel further submits that even if there was a compelling public interest in disclosure of the records at issue, it would not be sufficient to override the section 17(1) exemption. He asserts that guidance as to the "balancing of these interests" can be found in the recent amendments that extended the *Act* to universities, and particularly section "8.1" [i.e., section 65(8.1)(a)], which excludes research records from the scope of the *Act*:

> It is conceded that this exemption came into effect only after the records in the instant case had been provided to the [chemical company]. However, if all research records created by university employees are now clearly exempt, this is a strong indication of the very important public policy in supporting a culture of public dissemination through publication of research results through accepted academic channels, rather than via interim reports and material that was never intended for, nor presented in a form suitable for, public scrutiny.

Analysis and findings

I have considered the representations of the parties and have reviewed the records at issue. In my view, even if I had found that the section 17(1) exemption applies to some or all of the information in the records at issue, there is clearly a compelling public interest in the disclosure of these records that outweighs the purpose of the exemption, for the reasons set out below.

As noted above, two requirements must be met to establish that the public interest override in section 23 of the *Act* applies to the records at issue:

- there must be a compelling public interest in disclosure of the records; **and**
- this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

It is evident from the appellant's representations that he wishes to scrutinize the information in the records at issue for the purpose of assessing whether the residents of Wiarton were exposed to unsafe levels of chlorine dioxide or its disinfection byproducts during the course of the experiment. In addition, he questions whether the public bodies involved in the Wiarton experiment took adequate steps to ensure that public health concerns were addressed.

As noted above, in considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the records and the *Act*'s central purpose of shedding light on the operations of government [Order P-984].

The records at issue were generated primarily by the university professor and his team and the chemical company, not by the main government entities involved in the experiment (the Ministry, the OCWA and the Town of South Bruce Peninsula). In my view, however, it is clear that the disclosure of these records, in conjunction with other information that has already been disclosed to both the appellant and the broader public, would shed light on whether the public bodies involved in the Wiarton experiment took adequate steps to ensure that public health concerns were addressed.

I agree with the appellant that the findings of the Walkerton Inquiry are also an important factor to consider in determining whether a compelling public interest exists in the circumstances of this appeal. In May 2000, the drinking water system in the town of Walkerton became contaminated with deadly bacteria. Seven people died, and more than 2,300 became ill. The Ontario government subsequently appointed the Honourable Justice Dennis O'Connor to lead a Commission of Inquiry into the circumstances that led to the tragedy in Walkerton and to make recommendations with respect to the safety of public drinking water in Ontario.

After conducting his inquiry, Justice O'Connor released two reports that were widely praised and that led to the strengthening of the statutory regime governing public drinking water in Ontario. In the second part of his report, he emphasized the importance of transparency and providing citizens with access to information relating to the safety of public drinking water:

> … because of the importance of the safety of drinking water to the public at large, the public should be granted external access to information and data about the operation and oversight of the drinking water system. *In my view, as a general rule, all elements in the program to deliver safe drinking water should be transparent and open to public scrutiny.* (Emphasis added.)

In short, I find that the Walkerton Inquiry established the general rule that citizens should be provided with the maximum amount of information with respect to programs to deliver safe drinking water. In my view, it is important to take this general rule into account in determining whether there is a compelling public interest in disclosure of the records at issue in this appeal, because they also deal with the safety of public drinking water.

I have also considered the evidence submitted by the appellant, including letters, newspaper articles and other materials that demonstrate that the Wiarton water experiment generated significant public health concerns, particularly after some residents noticed bleach-like stains appearing on their laundry.

On August 21, 2000, a number of Wiarton residents sent a collective letter to the Town of South Bruce Peninsula that stated, in part:

> Since the beginning of July, we have experienced severe damage to clothing laundered in Wiarton water and have noticed strong chlorine smells when running our household taps. If our water is damaging our clothes, what is it going to do to our health? The very obvious damage to fabric makes it difficult for us to have confidence in our water safety. Some of us are choosing to consume bottled water until this situation is rectified.

Moreover, numerous reports appeared in both the national and local media in which Wiarton residents expressed concern about the water experiment and whether it was having an adverse effect on their health. In an article in *The Toronto Star* ("Drinking water experiment upsets residents," August 22, 2000), one resident complained that, "We feel like we've been used like some sort of lab animal." An article in *The Globe and Mail* ("Town awash in new water fears," August 23, 2000), described a town resident who held up his daughter's damaged shirt and stated, "If it does this to our clothing, what the heck is it doing to our bodies?"

In response, the university professor and his team tested samples of clothing provided by Wiarton residents to determine if the bleaching could have been caused by the chlorine dioxide that was in the town's water supply during the two-month trial. According to the Ministry's representations, the professor and his team were unable to reproduce the discolouration reported by residents by applying the same chlorine dioxide levels used in the trial.

The wording of section 23 of the *Act* makes it clear that any public interest in disclosure must be "compelling." The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. In my view, the evidence submitted by the appellant demonstrates that the Wiarton experiment clearly roused strong interest and attention in the community, particularly with respect to accessing information about whether citizens were exposed to unsafe levels of chlorine dioxide.

In my view, the maximum disclosure principle established by the Walkerton Inquiry, the evidence submitted by the appellant, and the substance of the records themselves clearly demonstrate that there is a compelling public interest in the disclosure of these records.

This office has found in previous orders that a compelling public interest does not exist if a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]. However, I am not persuaded by the submission of the university's legal counsel that a paper published by the lead university professor and others "permits full public debate and discussion" and, therefore, a significant amount of public information has already been disclosed that is adequate to address public interest considerations.

I have reviewed the paper that the university's legal counsel is apparently referring to, *Chlorine Dioxide Trial as a Post Disinfectant in Wiarton, Ontario* (Record 14), which was disclosed to the appellant by the Ministry. This paper provides readers with the assurance that "the town of

Wiarton was provided with likely the best quality drinking surface water in Ontario during the period of the trial." However, it contains no information relating to the public health concerns that erupted during the two-month experiment, particularly with respect to the damage that appeared on the laundry of some Wiarton residents.

Three of the Group A records (7, 8 and 10) contain scientific and technical information relating to the specific tests that the university professor and his team conducted to determine whether the laundry damage could have been caused by the chlorine dioxide that was in the town's water supply during the two-month trial. Given the public health concerns that arose during the experiment, I find that there is clearly a compelling public interest in the disclosure of these records.

The remainder of the Group A records (Records 1, 6, 9, 13 and various attachments to Records 2 to 5) contains scientific and technical information relating to the methods the professor and his team used to measure the levels of chlorine dioxide in Wiarton's water during the experiment. Given the public health concerns that arose during the experiment, I find that there is also a compelling public interest in the disclosure of these records.

The Group B records, which were generated primarily by the chemical company, include Records 2 to 5 (including various attachments), 11, 12 and 15. The chemical company did not provide any representations in this appeal. Consequently, there is no evidence before me from the chemical company that would rebut the public interest arguments made by the appellant with respect to these records.

Records 2 to 5 contain the minutes of meetings (plus various attachments) that took place between the project participants both before and during the two-month experiment. These records show how the planning for the Wiarton experiment unfolded, the key decisions that were made, and how the project participants reacted to the public controversy that erupted. Given the public health concerns that arose during the experiment, I find that there is clearly a compelling public interest in the disclosure of these records.

Record 11 contains documents relating to some of the early discussions that took place between the chemical company, the Ministry and the OCWA in 1999. Record 12 contains two articles that the chemical company sent to the Ministry about controlling zebra mussels. Record 15 is a chemical company paper that evaluates the "analytical instruments" for measuring chlorine dioxide levels. In my view, these three records also show how the planning for the Wiarton experiment unfolded and the types of issues that were being considered by the project participants. Given the public health concerns that arose during the experiment, I find that there is also a compelling public interest in the disclosure of these records.

Purpose of the exemption

I have found that there is a compelling public interest in disclosure of the records at issue However, for section 23 to apply, it must also be shown that this compelling public interest outweighs the purpose of the exemption that has been claimed.

The section 17(1) exemption is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 affected parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

Even if I had found that the section 17(1) exemption applies in the circumstances of this appeal, the public health concerns that underlie the compelling public interest that exists would clearly trump the need to protect the competitive position of the university professor and his co-researchers in the academic environment or the chemical company's competitive position in the marketplace.

I am not persuaded by the university's submission that guidance as to the "balancing of interests" in the public interest override can be found in the recent amendments that extended the *Act* to universities, and particularly section 65(8.1)(a), which excludes research records from the scope of the *Act*. This provision came into force long after the appellant's original request. Consequently, it has no application in the circumstances of this appeal.

Conclusion

Even if I had found that the section 17(1) exemption applies to some or all of the information in the records at issue, the public interest override in section 23 of the *Act* would be applicable and require that the records at issue be disclosed to the appellant.

SEARCH FOR RESPONSIVE RECORDS

The appellant claims that the Ministry did not conduct a reasonable search for the records he is seeking, and that additional records exist.

General principles

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Summary of the parties' representations

The appellant's representations

The appellant has provided extensive and detailed representations that identify specific records that he believes should exist beyond those located by the Ministry. In addition, he provides specific reasons why he believes such records exist.

(1) Formal Ministry report on the Wiarton experiment

The appellant has provided me with a document, *Statement Regarding Ministry of Environment Involvement in the Wiarton Chlorine Dioxide Production Trial and Monitoring – Summer 2000*, in which Dr. Tony Edmonds states, "My results are still being collated but will be incorporated into a formal Ministry report this year." (Appellant's emphasis.)

At the time of the Wiarton experiment, Dr. Edmonds was a senior water treatment specialist with the Ministry's Standard Development Branch. He acted as the Ministry's liaison officer for the project.

The appellant further cites a letter that he received from the OCWA's Manager of Corporate Planning and Communications that states:

> … [OCWA] has provided the complete contents of the file related to the Wiarton water trials, with the exception of the Ministry of the Environment/[chemical company] Report. Since this report originated with the Ministry, the Ministry and not OCWA would review this document to determine if it can be disclosed under the Freedom of Information and Personal Privacy Act [sic]. (Appellant's emphasis.)

The appellant states that the Ministry did not provide him with a "formal Ministry report" on the Wiarton experiment.

(2) OCWA briefing notes

The appellant has provided me with a copy of a briefing note, dated August 22, 2000, that the OCWA prepared for the Ministry. He states that the Ministry did not provide him with this record. He further submits that since the OCWA is a Crown Corporation reporting to the Minister, it is highly probable that this briefing note was provided to the Minister's office.

He also provided me with a briefing note, *Chlorine Dioxide and Wiarton Drinking Water*, dated August 18, 2000, that was prepared by Dr. Edmonds and approved (but not signed) by an Assistant Deputy Minister. The appellant states that since an Assistant Deputy Minister approved this briefing note, it is possible that the final, signed copy resides within the Minister's office.

The appellant submits that even though there is a reasonable basis for concluding that these "responsive records" exist within the Minister's office, the Ministry has refused to conduct a search in this area.

(3) Selection of project location

The appellant has provided me with a fax, dated June 15, 1999, that the chemical company sent to Dr. Edmonds which deals with possible "test locations" for the company's new chlorine dioxide generator.

The appellant submits that the Ministry has not provided him with any records with respect to the chemical company's request "to be allowed to field test" its chlorine dioxide generator. He further submits that the Ministry has not provided him with any records that document how the OCWA was asked to participate in the project.

(4) Project conditions/written agreements

The appellant states that Dr. Edmonds met with two OCWA employees on June 10, 1999 (one year before the Wiarton experiment) to establish "conditions" for the project, including "reporting" requirements. He submits that several of these conditions involved agreements "in writing," but none of the agreements have been provided by the Ministry.

(5) Proposal outline/correspondence with municipality

The appellant submits that Dr. Edmonds and the chemical company prepared a "proposal" that they submitted to the Town of South Bruce Peninsula for the Wiarton experiment. He has provided me with the resolution approved by the town's elected council, which states:

> That Council approve the chlorine dioxide trial for the Wiarton Treatment Plant as proposed by [the chemical company] and the Standards Branch of the Ministry of the Environment as set out in the proposal outline dated June 10, 1999.

The appellant states that the Town of South Bruce Peninsula, the OCWA and the Ministry have all been unable to locate this proposal. He further states that the Ministry has not provided him with any correspondence between its staff and the town.

(6) Resources/bench testing

The appellant states that on October 25, 1999, the Ministry's Environmental Assessment and Approvals Branch received an application from Dr. Edmonds for a Certificate of Approval to permit the addition of chlorine dioxide at the Wiarton water treatment plant.

The appellant has provided me with a copy of a memorandum from Dr. Edmonds to this branch, dated October 22, 1999, that states, "Prompt attention to this application would be appreciated because my section is putting in resources to assist OCWA and [the chemical company] …" (Appellant's emphasis.)

The appellant submits that the Ministry has not provided him with any records on the "resources" contributed by the Ministry to the Wiarton project.

The appellant has also provided me with an "Approval Status Record" from a branch engineer who approved the trial, which states:

> According to Tony who has performed bench testing, the water has low ClO_2 demand as disinfectant, does provide a persistent residual without chlorite levels elevating and is known not to form other by-products for which there is a health based limit. (Appellant's emphasis.)

The appellant submits that the Ministry has not provided him with any of the "bench testing" results performed by Dr. Edmonds.

(7) Plans/Ministry staff visits

The appellant states that Dr. Edmonds updated the Town Council of South Bruce Peninsula in June 2000 and provided them with an information sheet which states:

> The Ministry of Environment has reviewed the plans for the chlorine dioxide test at Wiarton and is confident that proper control and safety is and will be maintained. Specialist ministry staff who are familiar with water treatment will visit regularly during the test. (Appellant's emphasis.)

The appellant submits that the Ministry has not provided him with any records of the "plans" it reviewed. He further submits that the Ministry has not provided him with any records relating to the visits of specialist Ministry staff.

(8) Public notification

The appellant has provided me with a briefing note, *Chlorine Dioxide and Wiarton Drinking Water*, dated August 18, 2000, that was prepared by Dr. Edmonds and states:

> Wiarton council considered informing the Wiarton public of the trial by individual notice with water bills but decided … this was likely to cause undue emphasis and concern. They decided to notify the public by advert in the local newspaper. This was done on two occasions in advance of the trial. (Appellant's emphasis.)

The appellant submits that the Ministry has not provided him with any records of public notification via newspapers or other means.

(9) Missing data: Chlorine dioxide analyser

The appellant states that during the experiment, a "continuous chlorine dioxide analyzer" was used to monitor the levels of chlorine dioxide leaving the Wiarton water treatment plant and entering the distribution system. However, neither the OCWA nor the Town of South Bruce Peninsula provided the data that was generated from this equipment during the two-month trial.

He further states that this data is likely in the form of an electronic data set or a chart that provides measured chlorine dioxide levels with regular frequency (e.g., every five minutes).

The appellant submits that the Ministry has not provided him with any records relating to data generated by the continuous chlorine dioxide analyzer, even though this data was central to the experiment.

(10) Missing data: Chlorine dioxide, chlorite and chlorate

As noted above, the appellant provided me with a document, *Statement Regarding Ministry of Environment Involvement in the Wiarton Chlorine Dioxide Production Trial and Monitoring – Summer 2000*, in which Dr. Edmonds also states:

> I have personally carried out testing before, during and after the trial at seven domestic locations in Wiarton and Oxedon and at the plant and police station … at no time did I find an excessive quantity of chlorine dioxide or its byproducts anywhere in the water at any of the locations that I tested. (Appellant's emphasis.)

The appellant states that when Dr. Edmonds refers to "chlorine dioxide or its byproducts," he is describing chlorine dioxide and its disinfection byproducts, namely "chlorite" and "chlorate."

The appellant submits that the Ministry has not provided him with any data on levels of chlorine dioxide, chlorite or chlorate measured by Dr. Edmonds in Wiarton's drinking water.

(11) Missing data: Trihalomethanes and haloacetic acids

The appellant points out that Dr. Edmonds also stated the following in the same document cited above:

> I confirm that the success of the trial in that my analyses show the chlorine by-products of health concern were absent from the water during the trial. (Appellant's emphasis)

The appellant states that when Dr. Edmonds refers to "chlorine by-products,' he is describing the disinfection byproducts of chlorine, which include trihalomethanes and haloacetic acids.

The appellant submits that the Ministry has not provided him with any data on the levels of trihalomethanes or haloacetic acids measured by Dr. Edmonds in Wiarton's water during the two-month experiment.

(12) Missing data: Samples taken at seven locations

The appellant reiterates that Dr. Edmonds stated that "he personally carried out testing before, during and after the trial at seven domestic locations … and at the plant and police station."

The appellant submits that the Ministry has only provided him with two incomplete sets of samples corresponding to two days of the experiment.

(13) Responses to media inquiries

The appellant states that newspaper articles reported on the widespread problems encountered by Wiarton residents during the experiment.

He further states that other media outlets also reported on the controversy and cites an email, dated August 21, 2000, from the OCWA after it received an inquiry from CBC Newsworld:

> As referred by Dr. Tony Edmonds of [the Ministry], any calls relating to the approval of the chlorine dioxide trial are referred to Jim Smith, Director of the [Ministry's] Standards Development Branch.

The appellant submits that the Ministry has not provided him with records relating to any media inquiries that it received. In addition, he submits that he has not been provided with any records mentioning Jim Smith.

(14) Records relating to the survey of Wiarton residents

The appellant points out that Town Council of South Bruce Peninsula passed a resolution at meeting #16 on August 29, 2000 that stated:

> That O.C.W.A. [the Ontario Clean Water Agency] and all associated groups in the Wiarton water study … be instructed to do a comprehensive survey of households within the Wiarton water system to determine the extent to which clothing discolouration and other problems have occurred, and that the survey be conducted within 14 days of the adoption of this resolution, and the results of the survey be made public and communicated to the Council.

The appellant provided me with a collection of responses to the survey by Wiarton residents that was disclosed to him, presumably by the OCWA.

He submits that the Ministry has not provided him with any records relating to this survey (e.g., an analysis).

The Ministry's representations

In its representations, the Ministry sets out the efforts it made to search for records responsive to the appellant's request.

After receiving his request, the Ministry's Freedom of Information (FOI) office asked the following offices to conduct searches for the records: Southwestern Regional Office in London, Owen Sound District Office, and Environmental Assessment and Approvals Branch.

Of these three offices, only the Owen Sound District Office located records responsive to the appellant's request. The Ministry subsequently disclosed 150 pages of records to the appellant.

The appellant then asked the Ministry to locate Dr. Edmond's file and to search for additional records at the Environmental Assessment and Approvals Branch, the Communications Branch, and the Integrated Divisional System.

As a result, the Ministry asked its "primary program areas" to conduct more searches and also asked additional offices to search for responsive records, including the Safe Drinking Water Branch, the Standards Development Branch (where Dr. Edmonds worked in 2000) and the Communications Branch.

A client services representative in the Environmental Assessment and Approvals Branch searched an electronic database for all certificates of approval. She located an application relating to a certificate of approval that was issued on December 6, 1999 with respect to the Wiarton experiment. She asked staff to retrieve the actual Certificate of Approval from the Records Centre and forwarded the entire file to the Ministry's FOI office.

A supervisor in the Safe Drinking Water Branch conducted two detailed searches and located additional records which he forwarded to the Ministry's FOI office.

The manager of the Water Standards Section in the Standards Development Branch conducted a search for the Wiarton project file that was the responsibility of Dr. Edmonds. He located this file after contacting Dr. Edmonds, who is now employed by the OCWA. These additional records were forwarded to the Ministry's FOI office.

The Water Standards section manager also informed the FOI office that the Ministry's email software was upgraded from Groupwise to Microsoft Outlook and because substantial correspondence is through email, some records could have been lost.

The Ministry's communications FOI liaison officer conducted a search of paper and electronic records, including the transfer list for records sent to the Record Centre for storage. She was unable to find any responsive records. She also contacted the Ministry's media relations officer, who stated that he had no responsive records.

The Ministry's FOI office also contacted Jim Smith, former director of the Standards Development Branch, who stated that all records that he may have had as the director were left at the branch.

The Ministry then issued a supplementary decision letter that granted the appellant access to some of the records that were located but that denied him access to the 14 records at issue in this appeal.

At the request of the appellant, the Ministry asked its Legal Services Branch to search for any records related to the Wiarton experiment. A counsel in the branch asked all legal counsel and staff to search for records and report back to her. No records relating to the Wiarton experiment were located in the Legal Services Branch.

An FOI liaison officer at the Ministry's Laboratory Services Branch, which conducts some of the Ministry's laboratory sampling, undertook a search of its "LIMS database" based on key word searches ("Tony Edmonds" and "Wiarton"). It located 15 analyses, nine of which had already been disclosed to the appellant. The Ministry disclosed the additional six sample analyses to the appellant.

In its representations, the Ministry also provides a response to the list of specific records that the appellant believes should exist beyond those located by the Ministry. In particular, the manager of the Water Standards Section in the Standards Development Branch provides the following response:

> II. Missing Records
>
> 1. MOE Report

We maintain our position … in response to the implication that the [Ministry] prepared a report with [the chemical company] that there was no such report published by the [Ministry]. We have confirmed this with Dr. Edmonds.

2. OCWA Briefing Note

A search in the [Ministry] did not turn up the signed August 22, 2000 OCWA briefing note. Discussions with our [Assistant Deputy Minister's] office assured us that paper copies of briefing notes are not kept past three years.

3. Project Location

Dr. Edmonds's role in this project was to provide technical assistance. Many of the discussions Dr. Edmonds was involved in were verbal and were not documented.

4. Project Conditions

Dr. Edmonds acted as facilitator during negotiations between [the chemical company], OCWA and the Town of Wiarton and offered to provide technical support from the [Ministry]. The [Ministry] was not an official partner in any of the ensuing agreements.

5. Approval – Town Council

Again, Dr. Edmond's role was to provide technical advice.

6. Approval – MOE

All documented results for this experiment residing within the [Ministry] have been provided.

7. Approval – Town Council 2000

All records residing within the [Ministry] have been provided.

8. Resident Notification

Records of public notification would be held by the Town of Wiarton.

III. Missing Data

All data residing within the [Ministry] has been provided.

The appellant's reply representations

In his reply representations, the appellant focuses on the "paucity of drinking water data provided by the [Ministry]."

He rejects the Ministry's assertion that it has provided "all data" to him and reiterates that he has not been provided with any water quality testing data collected by Dr. Edmonds for chlorine dioxide, chlorite, chlorate, trihalomethanes, or haloacetic acids:

> It would be invaluable to an assessment of citizen exposure to chlorine dioxide and DBPs if the [Ministry] could release its own testing data supporting its assessment that "water quality remained excellent throughout the trial."

He further submits that if the Laboratory Services Branch conducts only some of the Ministry's sampling (as stated in the Ministry's representations), it would be reasonable to expect the Ministry to search other branches that also undertake sampling.

The appellant also questions whether the Ministry used enough "key words" to search its "LIMS system" for responsive records. He submits that additional key words that the Ministry should use include the former and present names of the chemical company, "Anthony" (as opposed to "Tony" Edmonds), South Bruce Peninsula (as opposed to "Wiarton"), and Matt Uza (a drinking water specialist at the Ministry who made several site visits to Wiarton with Dr. Edmonds).

With respect to the Ministry's refusal to search the Minister's office for records, the appellant submits that the Ministry has cited no provision in the *Act* that would justify this refusal.

Analysis and findings

As noted above, a reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

It is evident, based on the Ministry's representations, that its staff have devoted significant time and resources to search for records responsive to the appellant's request. Experienced employees in numerous branches of the Ministry have searched for records relating to the Wiarton experiment. In my view, they have made significant efforts to locate records that would satisfy the appellant's request.

The appellant has provided detailed representations that identify specific records which he believes should exist beyond those located by the Ministry. In particular, he has made effective use of the records that have already been disclosed to him to demonstrate that additional records may exist relating to the Wiarton experiment.

In my view, the Ministry has provided credible reasons to explain why most of these records likely do not exist or are not in its custody or control. For example, the appellant submits that a "formal Ministry report" on the Wiarton experiment should exist, based on references to it in other records. However, the Ministry spoke to Dr. Edmonds, who stated that no such report was ever produced.

With respect to the briefing notes sought by the appellant, I am not persuaded that it would be useful to conduct a search of the Minister's office for these records or any other records relating to the Wiarton experiment. This experiment took place in the summer of 2000, which was when there was a Progressive Conservative government in power in Ontario. In my view, it is highly unlikely that the office of the current Liberal Minister of the Environment would continue to have any records of this nature from her Conservative predecessor, particularly briefing notes.

Moreover, I would point out that some of the additional records sought by the appellant may be found in the records at issue in this appeal that I am ordering be disclosed. For example, the appellant asserts that the Ministry has not provided him with any records with respect to the chemical company's request "to be allowed to field test" its chlorine dioxide generator. However, one of the pages attached to Record 11 appears to contain this type of information.

I agree with the appellant, however, that it is troubling that the Ministry has been unable to locate most of the records relating to the water testing carried out by Dr. Edmonds before, during and after the Wiarton experiment. Moreover, I am concerned that the Ministry has not been able locate any records containing data that was collected from the continuous chlorine dioxide analyzer that was installed at the Wiarton water treatment plant. Although the records at issue indicate that the chemical company's staff recorded information from this device, it is reasonable to ask whether this data was shared with other project participants, including the Ministry.

In my view, the most effective way to conduct an additional search for such records would be for the Ministry to again contact Dr. Edmonds (who is apparently now employed at the OCWA) and ask him to provide any information he may have with respect to the potential existence and location of these particular records.

I would note as well that the Ministry states in its representations that its Laboratory Services Branch conducts only "some" of the Ministry's sampling. This raises the possibility that records relating to the water testing carried out by Dr. Edmonds may be found in other branches of the Ministry that engage in water sampling or environmental testing. Consequently, I will order the Ministry to identify any such branches and to conduct further searches for those records.

Finally, I agree with the appellant that the Ministry may not have used enough "key words" to search its "LIMS system" for responsive records. Consequently, I will order that the Ministry conduct a further search of this database that includes the former and present names of the chemical company, "Anthony" (as opposed to "Tony" Edmonds), South Bruce Peninsula (as opposed to "Wiarton"), and Matt Uza (a drinking water specialist at the Ministry who made several site visits to Wiarton with Dr. Edmonds).

In summary, I find that the Ministry has made strong efforts to search for records responsive to the appellant's request. However, I am not satisfied that these efforts have reached the threshold of a reasonable search with respect to potential records relating to the water testing carried out by Dr. Edmonds before, during and after the Wiarton experiment and the data generated by the continuous chlorine dioxide analyzer that was installed at the Wiarton water treatment plant. Consequently, I will order that the Ministry carry out additional searches for these records.

ORDER:

1. I order the Ministry to disclose the 14 records at issue to the appellant by **April 27, 2007** but not before **April 23, 2007**.

2. In order to verify compliance with provision 1, I reserve the right to require the Ministry to provide me with a copy of the records that it discloses to the appellant.

3. I order the Ministry to conduct further searches for records relating to the water testing carried out by Dr. Tony Edmonds before, during and after the Wiarton experiment and the data generated by the continuous chlorine dioxide analyzer that was installed at the Wiarton water treatment plant. In particular, I order the Ministry to:

   (a) Provide Dr. Edmonds with a copy of this order and ask him to provide any information he may have with respect to the potential existence and location of records relating to headings (9), (10), (11) and (12), which are found on pages 39 and 40 of this order.

   (b) Identify any other branches of the Ministry that engage in water sampling or environmental testing and conduct further searches for responsive records in these branches.

   (c) Conduct a further search of the "LIMS system" that includes the following search terms: the former and present names of the chemical company, "Anthony" (as opposed to "Tony" Edmonds), South Bruce Peninsula (as opposed to "Wiarton"), and Matt Uza.

4. If, as a result of these further searches, the Ministry identifies additional records responsive to the request, I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with sections 26, 27 and 28 of the *Act*, treating the date of this order as the date of the request. I also order the Ministry to provide me with a copy of any new decision letter that it issues to the appellant.

Original signed by: March 21, 2007
Colin Bhattacharjee
Adjudicator