Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3141

Appeal PA11-510

Ministry of the Environment

November 28, 2012

Summary: A requester sought access to information pertaining to any environmental concerns about a specified property. Notwithstanding the objection of the owner of the neighboring property that the responsive environmental reports contained information that was exempt under section 17(1), the ministry determined that section 17(1) did not apply. The neighboring property owner appealed the ministry's decision. The ministry's decision is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1)(a), (b) and (c), *Environmental Protection Act*, R.S.O. 1990, c. E.19, *Ontario Water Resources Act*, R.S.O. 1990, c. O.40.

Orders and Investigation Reports Considered: P-1235, PO-2490, PO-2558.

OVERVIEW:

[1] The Ministry of the Environment (the ministry) was advised of potential off-site contaminations at two properties and received environmental reports from the respective property owners. A requester sought access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to all available records relating to environmental concerns, orders, spills investigations/prosecutions and waste generator number/classes for one of the two properties.

[2] The ministry identified three reports pertaining to a neighboring property as being responsive to the request and notified the affected property owner under section 28 of the *Act* to obtain their position on disclosure. Relying on section 17(1) (third party information) of the *Act*, the affected property owner objected to the disclosure of any information pertaining to them. Notwithstanding the affected property owner's objection, the ministry decided to disclose the three reports to the requester. The affected property owner (now the appellant) appealed the decision.

[3] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[4] I commenced the inquiry by seeking representations from the ministry on the facts and issues set out in a Notice of Inquiry. The ministry provided responding representations. I then sought and received representations from the appellant. In its representations, the appellant advised that the interests of the author of the reports would be harmed if they were disclosed. Accordingly, I sent a Notice of Inquiry to the author of the reports seeking their position on disclosure. The author of the reports did not provide responding representations.

[5] The only issue to be determined in this appeal is whether the section 17(1) mandatory exemption applies to the three reports.

[6] In the discussion that follows, I uphold the decision of the ministry and find that the three reports do not qualify for exemption under section 17(1) of the *Act*.

RECORDS:

[7] At issue in this appeal are three environmental reports relating to a property owned by the appellant.

DISCUSSION:

[8] The appellant claims that the mandatory exemption at section 17(1) of the *Act* applies to the information remaining at issue. The ministry submits that the appellant has not provided sufficient information or evidence to establish the application of section 17(1) of the *Act*.

[9] Section 17(1), states, in part, as follows:

> 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
>
> …

[10] For section 17(1) to apply, the appellant 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 information must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

[11] The appellant asks that its grounds for appeal and its representations not be shared for reasons of confidentiality. Without revealing the specific details of its representations or the grounds for appeal, all of which I have considered in making my determinations in this appeal, I have summarized some of the appellant's submissions in the decision that follows.

Do the reports reveal information that qualifies as scientific or technical information?

[12] Relying on Order P-1235, the ministry submits that the reports contain information that meets the definition of scientific and/or technical information under section 17(1) of the *Act*.[1]

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[1] *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.

[13] The ministry submits that the reports contain information resulting from technical study by a consulting firm who are experts in the field of "environmental evaluations".

[14] Based on my review of the records, I accept that they contain scientific and/or technical information. Specifically, I find that the records contain explanations and descriptions related to the monitoring and testing of the soil and groundwater of the specified property. I also find that the information relates to the field of environmental testing carried out by experts in the field to determine the presence or absence of contamination by BTEX's and PHC's; and thereby confirm or deny any preliminary hypothesis concerning the specified property. Accordingly, I find that the information contained in all of the reports meets part one of the test under section 17(1).

Were the reports supplied in confidence?

[15] The purpose of section 17(1) is to protect the informational assets of third parties. This purpose is reflected in the requirement under part two that it be demonstrated by the party resisting disclosure that the information was "supplied" to the institution.[2] 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.[3]

[16] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that at the time the information was provided, the supplier of the information had a reasonable expectation of confidentiality, either implicit or explicit. This expectation must have an objective basis.[4]

[17] The appellant submits that the reports were provided in confidence to the ministry. Relying on Order P-1235, the ministry submits that the reports were supplied in confidence. The ministry further submits that:

- it requested a copy of the reports from the appellant;
- the reports were voluntarily supplied to the ministry by the appellant who indicated that they were "confidential"; and
- the records are marked "confidential" on the cover page and on each subsequent page.

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].

[2] Order MO-1706.

[3] Orders PO-2020, PO-2043.

[4] Order PO-2020.

[18] In my opinion, the presence or absence of words such as "Confidential", "Private" or "Privileged" is not determinative of the issue of whether a record is supplied "in confidence". Records may still meet the requirements of this component of part two of the section 17(1) test notwithstanding the manner in which the record is labeled. However, in light of my conclusion on part three of the section 17(1) test below, it is not necessary to make a finding on the "in confidence" component of part two of the section 17(1) test.

Would disclosure of the records give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b) and/or (c) of section 17(1) will occur?

[19] To meet the section 17(1)(a), (b) and (c) harms test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[5]

[20] 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.[6]

[21] The appellant submits that disclosing the reports would cause it undue harm. The ministry submits that it had asked the appellant to provide "detailed and compelling evidence" in support of its claim that harm could reasonably be expected to result from disclosure, but that the evidence provided by the appellant did not meet that criteria.

[22] I am not persuaded that disclosing the information in the three reports could reasonably be expected to result in any of the harms outlined in sections 17(1)(a), (b) or (c) of the *Act*. In this instance, the appellant bears the onus of proving that disclosure could reasonably be expected to give rise to the harms set out in sections 17(1)(a), (b) or (c). The appellant is in the best position to substantiate how disclosure would affect its interests since these sections are intended to protect those interests.

[23] The comments of Assistant Commissioner Brian Beamish in Order PO-2435, involving a request for records from the Ministry of Health and Long-Term Care and the Smart Systems for Health Agency (SHHA), are instructive in understanding this office's approach to the harms issue. He writes:

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[5] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[6] Order PO-2020.

> Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
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> …
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> While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1)(a),(b) and (c), this is not such a case. Simply put, I find that the appellant has not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

[24] In my view, the above-quoted analysis and findings of Assistant Commissioner Beamish in Order PO-2435 apply to this case. The representations of the appellant lack particularity in describing how the harms identified in the component parts of sections 17(1)(a), (b) or (c) could reasonably be expected to result from disclosure in this case.

[25] If the appellant's concerns relate to possible litigation, that is not the type of harm covered by sections 17(1)(a) or (c), and, in any event, the appellant has failed to provide detailed and convincing evidence to establish that this harm could reasonably be expected to result from disclosure of the three reports.[7]

[7] See Order PO-2490.

[26] In my view, the appellant has not provided the kind of detailed and convincing evidence required to support a finding that the information is exempt from disclosure under section 17(1). For this reason, I find that the section 17(1)(a), (b) or (c) harms test has not been met with regard to the information remaining at issue in this appeal.

[27] As all three parts of the test must be met in order for the information to be found to be exempt under sections 17(1)(a), (b) or (c), I find that this exemption does not apply to the three reports at issue in this appeal.

ORDER:

1. I uphold the decision of the ministry and dismiss the appeal.

2. The three reports are to be disclosed to the requester by **January 7, 2013** but not before **December 31, 2012**.

Original signed by: November 28, 2012
Steven Faughnan
Adjudicator