

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4465

Appeal PA23-00117

Ministry of the Environment, Conservation and Parks

December 12, 2023

Summary: The appellant sought access, under the *Act*, to information from the Ministry of the Environment, Conservation and Parks (the ministry) related to the emission capacity of a proposed asphalt plant to be operated by the affected party. The ministry located a report containing this information and ultimately decided to grant access to it in full. The affected party appealed the ministry's decision claiming that certain emission rate information is exempt under the mandatory third party information exemption in section 17(1) of the *Act*.

In this order, the adjudicator finds that the affected party has not established that section 17(1) applies to the report. She upholds the ministry's decision to disclose the report to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 17(1), and 52(13); O. Reg. 419/05 under *Environmental Protection Act*, R.S.O. 1990, c. E.19, section 22.

Orders Considered: Orders PO-1688 and PO-4000.

OVERVIEW:

[1] A named company (the affected party) applied to the ministry for an Environmental Compliance Approval (ECA) for air and noise under Part II.1 of the *Ontario Environmental Protection Act*¹ to permit its operation of a proposed hot mix asphalt plant (the plant). As part of the ECA application, it submitted an emission

¹ *Environmental Protection Act*, R.S.O. 1990, c. E.19.

summary and dispersion modelling report (the report) to the ministry. The requester sought access to information related to the emission capacity of the proposed asphalt plant.

[2] In particular, the requester made a two-item request to the Ministry of the Environment, Conservation and Parks (the ministry) under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* seeking access to:

1. Non-redacted version of [a specific Emission Summary and Dispersion Modelling Report (the report)].
2. Copies of any other email, correspondence, memoranda, reports, maps, or data submitted by [the affected party] or its consultants to [the ministry] in relation to [the plant].

[3] Following notification to the affected party, the ministry issued a decision granting partial access to the records responsive to both items in the appellant's request.

[4] The ministry explained that it withheld some information pursuant to sections 17(1) (third party information) and 22(a) (publicly available information) of the *Act*. The ministry provided the requester with instructions for how to access the publicly available responsive information.

[5] The requester (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC) to deny access under section 17(1) to portions of the report responsive to item 1 of his request. A mediator was assigned to attempt a resolution of this appeal.

[6] During mediation, the appellant raised the possible application of the public interest override in section 23 of the *Act*² and confirmed that it is not pursuing access to the information that has been withheld pursuant to section 22(a) of the *Act*.

[7] Since further mediation was not possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought the representations of the ministry and the affected party, initially.

[8] In its representations, the ministry indicated that it revised its access decision and that it was now prepared to disclose the report responsive to item 1 of the request to the appellant. However, as the affected party still opposes disclosure of the

² Section 23 reads:

An exemption from disclosure of a record under sections 13, 15, 15.1, 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.

information that the ministry originally redacted from the record, the issue of whether that information is subject to exemption under section 17(1) remains at issue.

[9] I then sought representations from the appellant and, in light of the ministry's change in position, sought further representations from the affected party. The parties' representations were shared between them in accordance with the IPC's *Practice Direction 7*.

[10] In this order, I find that section 17(1) has not been established. I uphold the ministry's decision to disclose this information to the appellant.

RECORD:

[11] At issue in the record, a 100 page report dated March 2022, is the redacted information on pages 19-20, 50-58 and 100. All these pages have been withheld in part, except for page 100 which has been withheld in full. The appellant has received the report, less the redacted information in these 12 pages.

[12] The redacted information relates to the expected rates of emissions for certain sources of emissions from the plant.

DISCUSSION:

[13] The sole issue to be decided is whether the mandatory exemption at section 17(1) for third party information applies to the information at issue in the record. For the reasons that follow I find that it does not apply.

[14] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,³ where specific harms can reasonably be expected to result from its disclosure.⁴

[15] The affected party relies on section 17(1)(a), which 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, if the disclosure 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.

³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[16] For section 17(1) to apply, the party arguing against disclosure 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;
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 of the section 17(1) test: type of information

The ministry's representations

[17] The ministry states that the information at issue is scientific or technical information as it consists of engineering information, namely production and emission rates. It states that the IPC has previously found that such information contained in an Emission Summary and Dispersion Modelling report is scientific or technical information.⁵

Representations of the affected party

[18] The affected party states that the information at issue is confidential information prepared by a professional in the field and pertains to the technical operation details of the plant. It states that the information at issue models the operation and capacity of the plant through the use of mathematical formulae. It submits that the redacted information is technical and scientific information within the meaning of section 17(1).

[19] The affected party also states that the redacted information is trade secrets, as it contains the details of process and production capacities at the plant and has economic value from not being known. It states that the specific details of the plant's operations are not known to its competitors and could allow them to derive proprietary information about the affected party and production numbers at the plant.

[20] The affected party refers to section 1.1 of the report, which provides that the information in the report could be used to derive proprietary information of the affected party as well as production numbers at the plant, therefore it is considered to be a trade secret by the affected party.

⁵ The ministry relies on Order PO-4000.

The appellant's representations

[21] The appellant agrees that the first branch of the test has been met as the report contains technical information because it involves information prepared by a professional in an environmental engineering field.

Findings re part 1

[22] The types of information referred to by the parties in their representations have been described as follows:

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as "scientific," it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.⁶

Technical information is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.⁷

Trade secret includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (a) is, or may be used in a trade or business;
- (b) is not generally known in that trade or business;
- (c) has economic value from not being generally known; and
- (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁸

[23] Based on my review of the record and the parties' representations, I find that the record, an emission summary and dispersion modelling report prepared by an engineer, contains scientific and technical information and that part 1 of the test under section 17(1) has been met.

[24] This information is scientific information as it relates to the observation and

⁶ Order PO-2010.

⁷ Order PO-2010.

⁸ Order PO-2010.

testing of emission rates. It is also technical information as it is information belonging to an organized field of knowledge, namely information prepared by an engineering professional in the field of applied sciences.

[25] On the other hand, I do not accept that the withheld information is a trade secret for the purposes of section 17(1). Section 1.1 of the report refers to the report containing trade secret information, as follows:

The information provided in this report could be used to derive proprietary information on [the affected party] as well as production numbers at the Facility. This information is thus considered to be a trade secret and of a proprietary nature by [the affected party] ...

[26] However, I find that I do not have sufficient information to determine that the information at issue in the report is trade secret information. The report is a requirement for an ECA application and was prepared by an engineer in the field. It contains emission summary and dispersion modelling information supplied to the ministry for an ECA application. The affected party has not addressed how this type of information, which is related to the emissions from a proposed asphalt plant, is not generally known in its business.

[27] As well, other than submitting that the actual emission result numbers set out in the report are not known, the affected party has not addressed how the type of information at issue is trade secret information by being the subject of efforts to maintain its secrecy.

[28] Therefore, as part 1 of the test under section 17(1) has been met, as the withheld information is technical and scientific information, I will move on to consider part 2.

Part 2: supplied in confidence

Supplied

[29] The requirement that the information has been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁹

[30] 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.¹⁰

[31] The parties agree and I find that the report was supplied to the ministry by the

⁹ Order MO-1706.

¹⁰ Orders PO-2020 and PO-2043.

affected party. However, I do not find that the withheld information was supplied in confidence to the ministry.

In confidence

[32] The party arguing against disclosure must show that the party supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.¹¹

[33] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.¹²

The ministry's representations and the affected party's response

[34] Both the ministry and the affected party rely on section 1.1 of the report in support of their submissions that the record was supplied in confidence. This section of the report reads:

The information provided in this report could be used to derive proprietary information on [the affected party] as well as production numbers at the Facility. This information is thus considered to be a trade secret and of a proprietary nature by [the affected party]. It is therefore requested that it be held in confidence and not released to anyone outside of the review procedure without prior consent of [the affected party]. This request relies on Section 17 of the Ontario *Freedom of Information and Protection of Individual Privacy Act*.

[35] The ministry quotes this provision and then concludes that the responsive records meet part 2 of the three-part test, without any further submissions on part 2.

[36] However, later in its representations, at paragraph 29 (under part 3 of the test),

¹¹ Order PO-2020.

¹² Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

the ministry states:

Furthermore, similar information has been posted to the affected party's website [name] in the report titled "Air Quality Impact Assessment – Revision 1", prepared by [the engineer who prepared the record at issue] for [the affected party] related to the same proposed asphalt plant (at [address]). Information from pages 19, 20, 51, 56, 57, and 58 of the records at issue can be found on pages 14 and 15, of the September 21, 2021 report. As well, information similar to that found on page 100 of the records at issue can be found on pages 62 and 63 of this publicly available report.

[37] I sent a copy of the ministry's representations to the affected party and asked it to provide reply representations to the ministry's representations, as follows:

... In responding to the ministry's representations, please respond in particular to the representations of the ministry on the public availability of the information at issue in this appeal in the September 2021 Air Quality Assessment report referred to at paragraph 29 of the ministry's representations.

Please address the applicability of parts 2 and 3 of the section 17(1) test to the information at issue in this appeal, given the public availability of the information in the September 2021 report, which the ministry submits is similar to that at issue in this appeal. From my review of the publicly available report, it appears to me that the publicly available report contains certain of the same numbers as those at issue in this appeal ...

[38] In response, the affected party did not address part 2 of the test under section 17(1), other than agreeing with the ministry that part 2 of the test has been met. It also acknowledged the public availability of the September 2021 report.

[39] Instead of addressing the information in the publicly available report and part 2 of the test, the affected party made submissions on only part 3 of the harms test, namely, that its competitors would gain an advantage by having their costs reduced by disclosure of the information at issue, without specifically addressing how this could be accomplished by reference to the specific emission related information at issue in the record.

Affected party's representations and the appellant's response

[40] In its initial representations, the affected party submits that section 1.1 of the report explicitly provides for confidentiality and restricts circulation of the report without its consent.

[41] The affected party states that the redacted information was prepared to support

its ECA application, not for a purpose that would ordinarily entail disclosure and was not otherwise disclosed or available from sources to which the public has access. It states that the report was consistently treated as confidential by both the affected party and the ministry.

[42] The appellant states that the affected party has not demonstrated that it was reasonable to expect the report to be kept confidential, as it chose to apply for an ECA and must demonstrate compliance with provincial air pollution standards with an Emission Summary and Dispersion Modelling Report. It states that this type of approval is subject to the *Environmental Bill of Rights, 1993* (the *EBR*)¹³ including mandatory posting of the application on the Environmental Registry, mandatory opportunity for the public to comment, and leave to appeal provisions.

[43] In reply to the appellant, the affected party states that the IPC has consistently found that air dispersion modelling data supplied to the ministry carries a reasonable expectation of confidentiality, based on the ministry's practice of providing third parties with the opportunity to make submissions in the event of a request for information under the *Act*.¹⁴

[44] The affected party submits that the environmental legislation and regulations raised by the appellant have no bearing on this appeal, as the ECA application and leave to appeal processes are entirely separate proceedings, subject to their own requirements for documentary disclosure, representations, and the potential for appeal.

Findings on In Confidence

[45] The record at issue is a March 2022 Emission Summary and Dispersion Modelling Report prepared by the engineer for the affected party to support the affected party's application to the ministry for an ECA to operate the plant. The report includes information about the expected air and noise emissions at the proposed hot mix asphalt plant.

[46] The report provides that it satisfies the requirements of section 26 of Ontario Regulation 419/05.¹⁵ This section details the contents of this report. Section 22 of this regulation provides that:

A person who applies for an environmental compliance approval or amendment to an environmental compliance approval in respect of a facility that discharges or will discharge a contaminant into the air shall prepare a report in accordance with section 26 and submit it to the Director as part of the application.

¹³ *Environmental Bill of Rights, 1993*, SO 1993, c 28.

¹⁴ The affected party relies on Orders PO-1688 and PO-4000.

¹⁵ O. Reg. 419/05: AIR POLLUTION - LOCAL AIR QUALITY under *Environmental Protection Act*, R.S.O. 1990, c. E.19.

[47] The entire report has been disclosed to the appellant, other than certain emission rate related information set out in 12 pages of this 100 page report. Not all rate related information in the report has been withheld. The affected party has not addressed the actual rates that it wants withheld, other than generally describing this information as it being related to processing capacity at the plant. Nor has it clearly differentiated to me why certain rates from the report have been disclosed, while other rates are the subject of this appeal.

[48] The affected party relies on Orders PO-1688 and PO-4000, where similar information as that at issue in this appeal was found to meet part 2 of the test. However, in both these orders there was no evidence that the information at issue was publicly available. Also, in Order PO-4000, the information at issue was subject to confidentiality and non-disclosure agreements between the ministry and the third parties, which is not the case here.

[49] I have compared the report that is before me and the publicly available report. As noted in the chart below, which lists the titles of the two reports, both documents were prepared by the same engineer and both concern emissions from the affected party's proposed asphalt plant. The publicly available report is dated six months before the record in this appeal.

Publicly available report	Report at issue
REPORT Air Quality Impact Assessment – Revision 1	REPORT Emission Summary and Dispersion Modelling Report
[Affected party] Proposed Asphalt Plant, [name of town]	[Name of town] Hot Mix Asphalt Plant Version 1.0
Submitted to: [Named] Environmental and Land Project Manager [and the affected party]	Submitted to: The affected party
Submitted by: The engineer	Submitted by: The engineer
September 2021	March 2022

[50] As indicated, in its representations, the affected party did not address the individual emission rates at issue in the report. The affected party also did not specifically address or dispute my statement in my letter to it that:

From my review of the publicly available report, it appears to me that the publicly available report contains certain of the same numbers as those at issue in this appeal.

[51] As indicated, from my review of both reports, it appears to me that almost all the information at issue from pages 19, 20, 51, 56, 57, and 58 of the record can be found on pages 14 and 15 of the September 21, 2021 publicly available report.

[52] Page 100 of the record contains a 23 line chart of emission data. It appears to me that virtually all information contained in this chart can be found on pages 62 and 63 of the publicly available report.

[53] Besides information from pages 19, 20, 51, 56, 57, 58, and 100 being at issue, information has been redacted from pages 50, 54, and 55 of the record. From my review, the redacted information appears to me to be the same, or very similar to, the information contained in pages 14 to 15 of the publicly available report.

[54] Based on my review of the information at issue in the report before me and the publicly available report, it appears to me that almost all of the information in the report is replicated in the publicly available report.

[55] As I have found that almost all the information at issue in the record appears to me to be the same as that available in a publicly available report that predates the record, I cannot find that the information at issue in the record was:

- treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.

[56] Based on my review of the affected party's representations and the information in the publicly available report, I find that the affected party has not shown that there is an objective basis for me to find that it had a reasonable expectation that the information at issue was to be treated confidentially at the time it supplied this information to the ministry.

[57] Therefore, part 2 of the test under section 17(1) has not been met. I find that the information at issue in the record was not supplied to the ministry with a reasonable expectation of confidentiality.

[58] In making this finding that part 2 of the test has not been met, I have considered the ministry's and the affected party's reliance on section 1.1 of the record (quoted above) that identifies the information at issue as trade secret information that

should not be released to anyone outside of the review procedure without the prior consent of the affected party.

[59] Although by section 52(13) of the *Act* a third party may be entitled to an opportunity to provide representations in an inquiry under the *Act*, as was the case here, this does not mean that a third party must consent to disclosure before its third party information can be ordered disclosed by the IPC.

[60] Specifically, in addition to not finding that the information at issue is trade secret information as set out in section 1.1 of the record, I find that this provision, that provides that the affected party should consent before release of the information, is not determinative of whether the information at issue was supplied in confidence. It is a well-established principle that one may not contract out of the provisions of the *Act*.¹⁶

[61] In conclusion, I have found that part 2 of the test under section 17(1) has not been met and the information at issue in the record is not exempt by reason of section 17(1). I will order it disclosed.

[62] Even though I have found that part 2 of the test has not been met, and all three parts of the test must be met for section 17(1) to apply, I also find that part 3 of the test does not apply.

[63] Specifically, even if I had found that part 2 of the test under section 17(1) had not been met, considering that the information in the report is substantially similar to that in the public document, and given that the affected party has not explained why the information in the report is any different, I would have found that the harms test in part 3 of the test under section 17(1) has not been met.

[64] As I have found that section 17(1) does not apply to the information at issue in the record, it is not necessary for me to determine whether there is a compelling public interest in disclosure of the information at issue by reason of section 23 that would override the application of the section 17(1) exemption, and I decline to do so.

ORDER:

1. I uphold the ministry's decision to disclose the information at issue in the record to the appellant.
2. I order the ministry to disclose the information at issue in the record to the appellant **by January 23, 2024, but not before January 18, 2024.**

Original signed by: _____
Diane Smith

December 12, 2023 _____

¹⁶ See for example Orders MO-3255, MO-3335, and PO-3508.

Adjudicator