



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

ORDER 65

Appeal 880151

Ministry of the Environment



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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal to the Commissioner any decision of a head under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. On April 8, 1988, the requester, who is a solicitor, made a request in her own capacity and on behalf of the union local she represented, to the Ministry of the Environment (hereinafter referred to as the "institution"), for access to:

...any records in the custody of the Ministry pertaining to P.C.B. levels at 121 Industry Street, Toronto, Ontario, premises owned by NEI Canada Limited, c.o.b. as Ferranti Packard.

Without limiting the generality of the above request, we specifically seek access to any certificates, approvals or orders made or given by the Ministry in connection with the levels of P.C.B.'s and the handling of items containing them at the above location. Additionally, we specifically seek access to a report prepared for Ferranti Packard in or about April, 1987 by Clayton Environmental Consultants.

2. By letter dated April 18, 1988, the institution notified Ferranti_Packard Transformers Ltd. (hereinafter referred to as "Ferranti_Packard") of the request for the Clayton Environmental Consultants report and asked for their comments.

3. By letter dated May 9, 1988, Ferranti_Packard's solicitor provided reasons to the institution, as to why the report should not be disclosed, pursuant to section 17 of the Act.
4. By letter dated May 11, 1988, the requester was notified, by the institution, that:

...there are no certificates, approvals or orders made or given by the Ministry in connection with the levels of PCBs and the handling of items containing them at the above_noted location. There is a designated area of this site which is a PCB waste storage site under Regulation 11/82 of the Environmental Protection Act.

Further to your request for access to a Report prepared by Clayton Environmental Consultants, I hereby give notice that access to the Report is refused under the provisions of Section 17 of the Act.

5. On May 31, 1988, the requester wrote to me appealing the institution's decision not to release the Clayton Environmental Consultants report.
6. The record initially at issue in the appeal, a report prepared by Clayton Environmental Consultants Ltd. and dated June 12, 1987, was obtained and reviewed by myself and by members of my staff.
7. By letters dated August 22, 1988, I sent notice to the appellant, the institution and the affected third party that I was conducting an inquiry into this matter. Enclosed with these letters was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. This report outlines the facts of the appeal and

sets out questions which appear to the Appeals Officer or any of the parties, to be relevant to that appeal. The

Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report. It also advises that if a relevant new issue is raised during the inquiry each party will be advised and given the opportunity to make further submissions.

8. By letters dated September 13, 1988, the parties were invited to provide written representations to me and they in fact did so; the appellant on October 3, 1988, the institution on September 30, 1988 and the affected third party on September 21, 1988.

9. The letter sent by the institution to the affected third party, on April 18, 1988, in compliance with subsection 28(1)(a) of the Act, was reviewed by my staff during the course of the investigation of this appeal. This letter alerted my staff to discussions and further correspondence that took place between the above_noted parties, regarding the decommissioning ("decommissioning" is a process whereby an industrial site is taken out of operation) of the Ferranti_Packard plant at 121 Industry Street.

As a result, my staff queried the institution about whether there existed additional records that would have responded to the appellant's general request for "...any records ... pertaining to PCB levels at 121 Industry Street".

10. By letter dated October 20, 1988, the institution replied that the "...discussion/correspondence reference in the

Ministry's letter of April 18, 1988, dealt specifically with the decommissioning of the site and was not deemed applicable to the specifics of the request...".

11. My staff then requested production of all records relating to 121 Industry Street pursuant to subsection 52(4) of the Act.
12. The institution forwarded to my office copies of files that covered 1986 to 1988, inclusive, and also indicated that a file record showed documents in storage for the years 1984, 1983, 1973 and 1972. Further follow_up resulted in files being located for the years 1972 and 1981 only.
13. On December 6, 1988, I wrote to the institution asking them to:
 - 1) clarify whether all records for 121 Industry Street had been reviewed on receipt of the appellant's request,
 - 2) make a decision relating to disclosure of these records if they, in fact, had not been reviewed, and;
 - 3) advise the appellant of this decision.

The institution advised me on December 8, 1988, that only the records for the years 1986 to 1988, inclusive, had been reviewed prior to their decision of May 11, 1988. They further stated that:

PCB level data for 121 Industry Street is tabulated in the Clayton Report. There is no similar data in any of the other files on record. There would be no problem in opening the remainder of the files on 121 Industry Street to [the appellant] for her examination, with the exception of the report under appeal.

By letter dated December 8, 1988, the appellant was advised of the institution's decision to open all their files for examination, except for the Clayton Environmental Consultants report under appeal.

14. Having had the opportunity to review the records which the institution was now willing to release to the appellant for viewing, my staff was of the opinion that some of these records may have been relevant to the original request, and may contain third party information of a scientific or technical nature thereby obligating the institution to notify the third parties, pursuant to section 28 of the Act before disclosing the records.

Of particular concern was a Clayton Environmental Consultants report dated May 4, 1987, that was a preliminary report to the report at issue in this appeal. Part of the May 4th report was identical to the report at issue, which had been exempted by the institution.

My staff notified the institution by letter dated December 23, 1988 that they had concerns that the rights of a third party under the Act might be jeopardized by the release of some of the records without notice to the third party and urged the institution to consider whether it had an obligation under section 28 to issue third party notice in respect of some records now being released to the appellant.

15. By letter dated January 10, 1989, the institution responded to my staff advising that they had:

...reviewed all of the records in the possession of the Ministry on the site in question and have determined that the only records that will continue to remain exempt are those specifically relating to the report under appeal.

This would include: the Clayton Environmental Consultants report dated June 12, 1987; the initial draft or preliminary Clayton report dated May 4, 1987; and two letters from Clayton to the third

party, both dated July 29, 1987. Both of these letters are an extension of the June 12 report and contain data generated by that report.

Otherwise, there are no records in the files that should not be opened to review by the requestor, nor do we consider that Section 28 of the Act should be invoked to issue third party notice in respect to the balance of the records not under appeal.

16. My staff asked the institution's Freedom of Information and Privacy Co_ordinator whether the appellant had been made aware of the contents of the above_noted letter as it set out a decision to refuse access to certain documents.

My staff was advised that the appellant had been notified verbally. The co_ordinator was advised that the Act demands a decision be conveyed in writing to the requester.

The institution then notified the appellant of its decision, by letter, dated January 11, 1989.

17. By letter dated January 13, 1989, the appellant advised my office that arrangements had been made with the institution to view those additional records which it had decided to disclose, on January 17, 1989.

18. By letter dated March 10, 1989, the institution was invited to provide further submissions on the question of why all records concerning 121 Industry Street, in the institution's custody, had not been reviewed on receipt of the access request and why 11 specific records (referred to in the attached appendix) subsequently discovered were not deemed relevant to the request when the original decision of the institution, on May 11, 1988, was made.

19. By letter dated March 10, 1989, I advised the third party, Ferranti_Packard, that three additional records had been discovered, disclosure of which might affect the interests of the company. I invited Ferranti_Packard to provide submissions to me on the disclosure of these records.

20. By letter dated March 10, 1989, the appellant was invited to provide further submissions on the relevance of the additional records to her original request.

21. I received additional submissions from Ferranti_Packard on March 22, 1989, the institution on March 23, 1989 and the appellant on March 29, 1989.

22. In their submissions to me, both the institution and the affected third party agreed that the original record in issue (i.e. the June 12, 1987 Clayton Environmental Consultants report) is "in the custody of or under the control of the institution" as required by subsection 10(1) of the Act. As this issue is no longer in question, it is not dealt with in the body of this order.

The issues that remain to be decided in this appeal are as follows:

- A. Whether the records in issue are subject to mandatory exemption from release pursuant to section 17 of the Act.
- B. If issue B is answered in the affirmative, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the exemption pursuant to section 23 of the Act.
- C. Whether subsection 11(1) of the Act is applicable in this matter.
- D. Whether the severability requirements of subsection 10(2) apply to the record in question.

The purposes of the Freedom of Information and Protection of Privacy Act, 1987 are set out in section 1 as follows:

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of government information should be reviewed independently of government; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions of the Act lies upon the head. In the case of third parties seeking to

rely on an exemption from disclosure (i.e. Ferranti_Packard in this case), and stated at page 4 in my Order 3 (Appeal Number 880031) dated June 21, 1988, they bear the onus of proving that an exemption relied upon applies to the records in issue.

Before addressing the issues raised by this appeal, I would like to comment on the manner in which the request and the ensuing appeal was dealt with by the institution. In particular, I am concerned with the way in which the request was responded to by the institution. The particular circumstances which have caused my concern are outlined in the introductory portion of this Order.

The appellant made a request that, in my opinion, was very clear and specific. She wanted:

- a) any records in the custody of the Ministry pertaining to PCB levels at 121 Industry Street, Toronto, Ontario;
- b) access to any certificates, approvals or orders made or given by the Ministry in connection with the levels of PCBs and the handling of items containing them at the above location; and
- c) access to a report prepared for Ferranti_Packard in or about April 1987 by Clayton Environmental Consultants.

The institution's response advised the appellant that:

...there are no certificates, approvals or orders made or given by the Ministry in connection with the levels of P.C.Bs. and the handling of items containing them at the above noted location. ...Further to your request for access to a report prepared by Clayton Environment Consultants, I hereby give notice that access to the report is refused under the provisions of section 17 of the Act.

A requester may have no knowledge of what records exist in response to his/her request. A requester trusts that a full and complete answer to his or her request will be received from the institution. Unless a requester has personal knowledge of a record that would respond to a request, or suspects that full disclosure was not provided, the requester will probably be satisfied with the response received from an institution and the matter might never proceed to me for review.

The narrowing of a general request by an institution, without advising the requester of the specific areas of search undertaken, certainly concerns me and I trust that my direction on this point, as set out in my Order 33 (Appeal Number 880053) dated December 28, 1988, has been implemented by all institutions covered under the Act:

When an institution chooses to narrow its area of search based on its interpretation of a request, without seeking clarification from a requester, it should inform the requester of the specific areas of search undertaken. Telling the requester what areas were searched in such circumstances will avoid giving a false impression that the records of the entire institution were searched when this was not the case.

Informing the requester as to the area of search would enable the requester to provide any further information in his or her knowledge that might give rise to a wider area of search.

In this appeal, it is my view that the institution unilaterally narrowed the request they received in an unfortunate manner. The institution's explanation that the records prior to 1986 dealt with the decommissioning of the site and were therefore not deemed relevant to the request is difficult to understand. If a site containing PCBs is involved in decommissioning, it stands to reason that the files recording these events would

contain information on the PCB levels at the site prior, and during the course of, the decommissioning. If the institution knew these files contained information on the decommissioning of the site, they should have requested these files from storage and searched them for records in response to the request. I cannot accept the reasoning offered by the institution.

I have now viewed and am deeming relevant to the first part of the request items 1 through 7 and 9 in the attached appendix which were viewed by the appellant on January 17, 1989. Items 8, 10 and 11 in the appendix are also deemed relevant to the request and are dealt with in Issue A.

I intend to meet with the Senior Officials of the institution to confirm that appropriate procedures are in place to ensure that requesters receive a complete response to their requests.

ISSUE A: Whether the records in issue are subject to mandatory exemption from release pursuant to section 17 of the Act.

The records that are in issue in this appeal are:

1. A Clayton Environmental Consultants report dated May 4, 1987,
2. A Clayton Environmental Consultants report dated June 12, 1987,
3. A letter dated July 29, 1987 from Clayton Environmental Consultants enclosing test results, and
4. A second letter dated July 29, 1987 from Clayton Environmental Consultants enclosing test results.

As I have noted above, the burden of proving that these records fall within the subsection 17(1) exemption lies with the parties resisting disclosure, i.e. the institution and Ferranti_Packard.

Subsection 17(1) of the Act reads as follows:

17.__(1) 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; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order to fall within the section 17 exemption, the records in issue must each meet the following three_part test established in my Order 3 supra:

1. the record must contain 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 types of injury specified in (a), (b), or (c) of subsection 17(1) will occur.

All three parts of this test must be satisfied in order for the section 17 exemption to apply.

The two Clayton Environmental Consultants reports at issue in this appeal were commissioned and paid for by NEI Canada

Limited, carrying on business as Ferranti_Packard. They are waste management programs and are comprised of:

- a) a background section describing the consultations between the parties,
- b) the objectives and scope of the study,
- c) the methodology used to collect samples and the locations where the samples were collected,
- d) a description of the analysis performed on the samples,
- e) the results of the study both in narrative and table forms, and
- f) the recommendations.

One of the July 29, 1987 letters contained an analysis of samples collected from the boiler room and outlined recommendations to the company. The second July 29, 1987 letter contained an analysis of soil sampling and outlined remedial actions for the company.

In their submissions to me, NEI Canada Limited (hereinafter referred to as NEI), argued that the records contain scientific, technical and commercial information:

...The report contains information of a technical subject, PCBs at the Ferranti_Packard site. It is prepared by technical and scientific experts and sets out the results of scientific and other tests, presents a technical analysis of the test results and includes the recommendations and advice of technical and scientific experts regarding a program for removal.

The institution did not provide any submissions on this point.

I am satisfied that each of the records contain information of a scientific and/or technical nature having regard to the ordinary

meaning given those words. No evidence was presented from NEI to support their argument that the records contain commercial information and I find, in any event, that they do not.

In order to satisfy the second part of the test, the records must have been supplied by NEI to the institution, in confidence, implicitly or explicitly. The institution stated that the records were supplied to them in confidence but provided no evidence to support this proposition. They advised that reports such as the Clayton Environmental Consultants report have not been made available to the public in the past.

NEI argued that the report was commissioned for the company's own use and that it was not publicly available and has not been disclosed to anyone other than the government or its own staff. They further argued that they have treated the report as confidential and would not have voluntarily supplied it to the institution if they suspected it would be publicly disclosed. NEI stated that their expectation of confidentiality was based, in part, on the Ministry's history of treating such documents as confidential.

The appellant argued that the records may have been provided by NEI to the institution pursuant to a regulatory obligation under the Environmental Protection Act and as such no implicit claim of confidentiality can be sustained.

NEI acknowledged that the records were provided voluntarily to the institution in response to an informal request from the institution. They also acknowledge the fact that the institution has the power to order such information to be provided to them.

Correspondence and notations of telephone conversations on the institution's files for 121 Industry Street, make it clear that the records in issue in this appeal were provided in an atmosphere of cooperation between NEI and the institution. The institution made it clear what it required and NEI complied with it's requests.

I therefore do not agree with NEI's assertion that the records were commissioned only for the company's use. Certain testing was specifically recommended by the institution and it is clear from the files that NEI was complying with these recommendations. It is fairly obvious that certain testing would not have been carried out except at the request of the institution.

Notations on the institution's files raise questions about NEI's assertion that they have treated the records confidentially and have not disclosed them to anyone other than the government or within their own company. These notations indicate that the site at 121 Industry Street was sold to a development company and the deal was to close on August 1, 1987. Ferranti_Packard was to lease a 100 sq. ft. area on the site to accommodate PCB waste. The purchaser, through its solicitor, corresponded with the institution. It is apparent from this correspondence that the purchaser received copies of the Clayton Environmental Consultants report.

I have no knowledge of the purchaser's use of these records or with whom these records were shared.

Further, NEI did not expressly claim confidentiality when it provided the records to the institution and there is nothing to

indicate that confidentiality was ever promised to them by the institution.

I am therefore not satisfied that the onus of proving that the records were supplied to the institution in confidence, either implicitly or explicitly, has been met by either NEI or the institution.

Since the second part of the three part test has not been met and, as a result, the section 17 exemption cannot apply it is not necessary for me to comment on the third part of the test.

As I have found that the burden of proof has not been met with respect to Issue A, it is not necessary for me to deal with Issues B, C or D. I would, however, like to make one comment to the institution with respect to Issue C.

In the Appeals Officer's Report, the institution was asked to respond to the applicability of subsection 11(1) of the Act. In response, the institution stated that the affected third party would address this issue in their response. Subsection 11(1) of the Act provides as follows:

11.__(1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

The duties and responsibilities set out in section 11 of the Act belong to the head alone. This is a mandatory provision requiring the head to disclose records in certain circumstances. Making submissions on the applicability of this section of the Act is, therefore, not something that can be delegated to a third party to speak to. It was inappropriate for the

institution to pass its obligation to speak to this issue onto the third party in this matter.

In summary, I order the head to release all the records in issue in this appeal, in full, to the appellant. I also order that the institution not release these records until 30 days following the date of the issuance of this Order. This time delay is necessary in order to give the third party sufficient opportunity to apply for judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on the institution within this 30_day period, I order that the records be released within 35 days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ June 27, 1989
Date

A P P E N D I X

1. Observation report, dated August 26, 1981.
2. PCB inventory, dated October 11, 1982.
3. PCB inventory, dated November 18, 1982.
4. Letter from Ferranti-Packard Transformers Ltd. to the Ministry, dated June 14 1984.
5. PCB inventory, dated November 29, 1985.
6. PCB test results on tank located on property, dated June 1, 1979.
7. Letter from the Senior Environmental Officer to Minden, Gross, Grafstein and Greenstein, dated May 21, 1987, setting out information on pockets of soil contamination.
8. Clayton Environmental Consultants report dated May 4, 1987.
9. Record of telephone conversation dated May 20, 1987 wherein discussion was had with Mr. Cassar of Ferranti-Packard about PCB contamination.
10. Letter from Clayton Environmental Consultants to Mr. Cassar dated July 29, 1987 enclosing test results.
11. Second letter from Clayton Environmental Consultants to Mr. Cassar dated July 29, 1987 enclosing test results.