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

ORDER P-435

Appeal P-9200588

Ministry of Northern Development and Mines

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ORDER

BACKGROUND:

The Ministry of Northern Development and Mines (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to certain funding proposals (the proposals) submitted to the Ministry under the Mine Technology Research Subprogram of the Northern Ontario Development Agreement (NODA), together with the Ministry's evaluations of the proposals.

NODA is a joint undertaking of the Government of Canada and the Government of Ontario, whose purpose is to encourage economic development and diversification in Northern Ontario by the development and implementation of strategies for sustainable development in tourism, forestry and minerals. A Joint Federal/Provincial Management Committee administers the programs operated under NODA. The Mining and Minerals Technology Program Technical Sub-Committee is responsible for administration of the funding program.

The requester specifically sought access to the following proposals and corresponding evaluations: 05, 06, 14, 16, 18, 21, 22, 25, 27, 33, 34, 36, 37, 41, 43, 44, 45, 46, 52, 53, 54, 55, 57, 58, and an unnumbered proposal submitted for the creation of the Canadian Abandoned Mine Agency. All proposals relate to mining and minerals technology. The Ministry provided access to records relating to proposal 22, which involved the requester, and denied access to all other responsive records, pursuant to sections 15(a) and 17(1) of the Act. The requester appealed the Ministry's decision.

Mediation was not successful, and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the appellant, the Ministry and the 14 companies and/or individuals who submitted the particular proposals identified by the appellant (the affected persons). Written representations were received from the Ministry and the appellant. Two affected persons involved with projects 06, 18, 27 and 37 agreed to the release of their proposals and evaluations, and a third affected person objected to the release of the proposal and evaluation relating to his project. None of the other affected persons responded to the Notice of Inquiry.

In Order P-388, I considered the application of sections 15(a) and 17(1) to the records at issue in Appeal #P-920588, including what was referred to as the unnumbered proposal and corresponding evaluation, and ordered the Ministry to disclose all records to the appellant. I subsequently learned that, due to an oversight by this office, representations had not been solicited from the originator of the unnumbered proposal (the final affected person) before Order P-388 was issued. I was asked by the final affected person to re-open Order P-388 and to provide it with an opportunity to make representations in respect to the disclosure of the unnumbered proposal and corresponding evaluation.

This request by the final affected person raised the question of my authority to re-open and reconsider a part of Order P-388. Accordingly, I solicited representations from the appellant, the Ministry and the final affected person with respect to my jurisdiction to reconsider Order P-388 in these circumstances.

At the same time, for the purposes of expediency, I invited the final affected person to also make representations on the substantive issues raised in the appeal. In the interim, I instructed the Ministry that Order P-388 was stayed.

Coincidental with the release of this order, I have instructed the Ministry to comply with the provisions of Order P-388 with respect to all records at issue in Appeal #P-920588, except the unnumbered proposal and corresponding evaluation (the record). In this order I will be considering the application of various exemptions claimed by the Ministry and the final affected person with respect to this remaining record.

For the purposes of this order, I am assuming that where a person who is directly affected by the appeal has not been provided with an opportunity to make representations concerning disclosure of the record, I have the legal authority to re-open the Order and reconsider the application of the exemptions claimed by the Ministry to that record, namely sections 15(a) and 17(1) of the Act.

PRELIMINARY ISSUE

In its original decision letter, the Ministry claimed sections 15(a) and 17(1) of the Act as the basis for exempting the various records at issue in Appeal #P-920588, including the record which is the subject of this order. The Ministry did not claim section 15(b) of the Act with respect to this record. In its representations, the final affected person raises section 15(b) of the Act, and submits that this section is applicable to the record.

In Order P-257 I addressed the situation where an affected person attempts to raise the application of a discretionary exemption which was not claimed by the institution. At page 5 of that order I stated:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released. If, during the course of an appeal, a head indicated a change in position in favour of release of information not covered by sections 17(1) or 21(1), again, this would almost always be an acceptable course of action, consistent with the purposes of the Act. In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited

> context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it."

In my view, this appeal does not raise the type of situations described in Order P-257, and, because the Ministry has not claimed section 15(b) of the Act as a basis for exempting the record at issue in this appeal, I find that this section is not applicable.

ISSUES:

The issues arising in this appeal are:

A. Whether the discretionary exemption provided by section 15(a) of the Act applies to the record.

B. Whether the mandatory exemption provided by section 17(1) of the Act applies to the record.

SUBMISSIONS\CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 15(a) of the Act applies to the record.

Section 15(a) of the Act states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

In order to qualify for exemption under section 15(a) the record must meet the following test:

1. The Ministry must demonstrate that disclosure of the record could give rise to an expectation of prejudice to the conduct of intergovernmental relations; **and**

2. The relations which it is claimed would be prejudiced must be intergovernmental, that is relations between the Ministry and another government or its agencies; **and**

3. The expectation that prejudice could arise as a result of disclosure must be reasonable.

[Order 210]

The Ministry submits that prejudice would result from the release of the information contained in the record. The Ministry's representations, referring to advice received from the Federal

Government's co-chairperson of the Mining and Minerals Technology Program Technical Sub-Committee, state that:

> release of the information in the records would likely alienate the mining industry in general and discourage its participation in the Northern Ontario Development Agreement, and accordingly the records should not be disclosed. It was felt by [Ministry officials] that due to the very dominant role the federal government plays in this program, if we did not respect their wishes federal-provincial relationships in this area would be seriously prejudiced.

In my view, the Ministry's representations, as well as the position taken by the Federal Government, focus on the possibility that release of the record would prejudice the relationship between the mining industry and both levels of government, not the relationship between the federal and provincial governments themselves. Accordingly, I find that the Ministry has failed to establish that an expectation of prejudice to the conduct of **intergovernmental** relations could reasonably be expected to result from disclosure of the record and, therefore, the record does not qualify for exemption under section 15(a) of the Act.

ISSUE B: Whether the mandatory exemption provided for by section 17(1) of the Act applies to the record.

Section 17(1) of the Act provides, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For a record to qualify for exemption under sections 17(1)(a), (b) and/or (c) the Ministry and/or the affected person resisting 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; **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 (a), (b) or (c) of section 17(1) will occur.

[Order 36]

I have examined the unnumbered proposal and, in my view, it contains scientific, technical and/or financial information, thereby satisfying the requirements for the first part of the section 17 test. As far as the corresponding evaluation is concerned, in my view, only the information relating to the nature of the proposal and/or the requested funding can properly be considered as scientific, technical and/or financial information; the remaining portion of the evaluation fails to satisfy the requirements of the first part of the test.

The Ministry takes the position that the information contained in the proposal and the evaluation was "supplied" by the final affected person. Although, I accept that the proposal was supplied to the Ministry, the information contained in the evaluation was created by Ministry staff, and was not "supplied" by the final affected person. It is possible for information which was not actually supplied to the Ministry to be "supplied" for the purposes of section 17(1) if its disclosure would permit the drawing of accurate inferences with respect to information which was actually supplied to the Ministry (Order 203). In my view, the only information contained in the evaluation which would permit the drawing of accurate inferences about information actually supplied to the Ministry is the same portion of the evaluation which I found to contain scientific, technical and/or financial information under my discussion of the first part of the test.

Therefore, I find that the unnumbered proposal and those parts of the evaluation which contains scientific, technical and/or financial information were "supplied" to the Ministry for the purpose of section 17(1) of the Act.

As to whether this record was supplied "in confidence", I find that the request for proposals issued jointly by the Ontario Mining Association, the Ontario Ministry of Northern Development and Mines, and the Federal Department of Energy, Mines & Resources, makes no explicit reference to confidentiality, nor was any evidence submitted during the course of this appeal which would indicate that the Ministry offered any explicit undertaking regarding confidentiality. As far as any implicit expectation of confidentiality is concerned, the Ministry states in its representations:

> The practice by both the federal and provincial officials was (and is) to treat proposals in confidence and not circulate them beyond the evaluation process. My understanding is that this practice was well known by the industry participants and accordingly gave rise to the expectation of confidentiality on their part.

After having been provided with an opportunity to make further representations with respect to the record at issue in this appeal, the Ministry submitted an affidavit from the Co-ordinator of the NODA program which indicates that he was aware that the final affected person expected the proposal to be treated confidentially.

In its representations, the final affected person states:

> ... the unnumbered proposal constitutes third party information within the meaning of section 17 of the Act that contains technical and financial information supplied in confidence implicitly or explicitly that 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.

The final affected person also submits an affidavit similar in nature to the one provided by the Ministry, which states that the final affected person communicated an expectation of confidentiality at the time the proposal was submitted.

Based on the evidence before me in this appeal, I feel that some doubt exists as to whether the portions of the record which I have found were "supplied" to the Ministry were supplied "in confidence". However, it is not necessary for me to make a finding on this part of the test, because the requirements of the third part of the section 17(1) exemption test have not been established.

To satisfy the third part of the test, the Ministry and/or the final affected person must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in sections 17(1)(a), (b) and/or (c) would occur if the information was disclosed. Generalized assertions of fact in support of what amounts, at most, to speculations of possible harm do not satisfy the requirements of the third part of the test (Orders 36, P-373, P-394 and P-400).

In its representations, the Ministry makes no reference to the third part of the test, and provides no evidence in support of the position that one of the enumerated harms would reasonably be expected to occur if the record is disclosed.

The final affected person's representations allude to the type of harm envisioned by section 17(1)(b), but include only the following statements in support of its position:

> It is in the public interest for both governments to share information and to avoid duplication of efforts. Without the assurance that expectations of confidentiality would be respected by the Government of Ontario, Canada would be reluctant to communicate proposed federal initiatives.

In my view, the evidence provided by the Ministry and the final affected person is insufficient to establish that disclosure of the information contained in the record at issue in this appeal could reasonably be expected to "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". Therefore, I find that the third part of the section 17(1) exemption test has not been established. Because all three parts of the test must be established in order for a record to qualify for exemption under section 17(1), I find that the record at issue in this appeal does not qualify for exemption and should be released to the appellant.

ORDER:

1. I order the Ministry to disclose the record to the appellant within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.

2. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the requester pursuant to provision 1, **only** upon request.

Original signed by: March 22, 1993
Tom Mitchinson
Assistant Commissioner