



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

# **ORDER P-479**

## **Appeal P-9200651**

### **Ministry of Environment and Energy**



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## ORDER

On May 10, 1993, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and to make orders under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

The Ministry of the Environment (now the Ministry of Environment and Energy) (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for information relating to Ministry approvals obtained by a third party developer for the construction of a sedimentation pond. The Ministry identified a number of records responsive to the request and notified the third party pursuant to section 28(1) of the Act. The third party objected to the release of any of the records. The Ministry, after considering the objections of the third party, granted partial access to the requester. Access was denied to some of the records pursuant to sections 17(1)(a) and (c) of the Act. The third party appealed the Ministry's decision.

During mediation, the Ministry reconsidered its decision and agreed to release all of the responsive records to the requester. The requester then indicated he was no longer interested in receiving access to some of the records.

The records remaining at issue in this appeal are described in Appendix A to this order.

Further mediation was not possible and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry and the requester. Written representations were received from all parties.

The sole issue in this appeal is whether the mandatory exemptions provided by sections 17(1)(a) and (c) of the Act apply to the records at issue. These sections read 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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Pursuant to section 53 of the Act, the burden of proof that a record falls within a specified exemption lies upon the head. However, if, as in this case, a third party appeals the head's decision to release a record, the burden of proving that the record should be withheld from disclosure falls on the third party.

For a record to qualify for exemption under section 17(1)(a) or (c), the third party 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 record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

### **Part One**

In order to meet part 1 of the test, the appellant must establish that disclosure of the records would reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

The appellant submits:

... the information is of a technical nature. The information was submitted by our engineering consultant.

The Ministry makes the following representations with respect to part 1 of the section 17(1) test:

... the Ministry is of the opinion that **the application and engineering reports** are technical information which outlines the design and construction of the storm and sanitary sewer systems [emphasis added].

In Order P-454, Assistant Commissioner Glasberg defined "technical information" as follows:

In my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, 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. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1) of the Act.

Having reviewed the records, I find that all of the records with the exception of Records 1, 17, and 18, contain "technical" information. Accordingly, Records 2-16 satisfy the first part of the section 17 test.

Record 1 is a cover letter from the consulting engineers to the Ministry setting out the enclosures submitted in support of the development application. The enclosures do not form part of the record at issue. Records 17 and 18 are internal Ministry memoranda which describe the requester's complaints about the appellant's sewer project and the Ministry's response. In my view, none of these three records contain "technical" information or any of the other types of information set out in section 17. As they do not satisfy the first part of the test, they do not qualify for exemption under section 17 (1) of the Act.

The Ministry has not cited any other exemptions to deny access to Records 1, 17 and 18. Therefore, they should be disclosed to the requester.

## **Part Two**

The second part of the test has two elements. First, the information must be **supplied** to the Ministry and secondly, it must be supplied **in confidence**, either implicitly or explicitly. In addition, the information contained in the record would "reveal" information "supplied" by the appellant within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-218, P-219, P-228 and P-241).

In their representations, none of the parties directly address the issue of whether the information was supplied to the Ministry.

I have reviewed all the records at issue. I am satisfied that they were either supplied to the Ministry or that disclosure of the information contained in them would reveal information originally supplied to the Ministry.

The next matter to be determined is whether this information was supplied to the Ministry in confidence, either implicitly or explicitly.

The appellant submits:

... the information submitted to the Ministry of Environment was submitted in confidence.

However, in its representations, the appellant goes on to state that:

This development has been scrutinized by the Public and Government agencies through the planning process. There have been numerous Public Meetings and Open Houses before any construction took place.

The Ministry's representations on this issue state:

The Certificates of Approval issued by the Ministry is [sic] considered a public record.

The information was supplied to the Ministry, implicitly in confidence. When a proponent submits an application, our staff have traditionally kept the information confidential.

The requester commented on confidentiality as follows:

On 25 June 1992 at a meeting with M.O.E., Daimler, the Village of Wellington; County Planner; D. Barker - Engineers; ourselves and other interested parties, the M.O.E. file was open for inspection and the information in the file to that date was openly discussed.

The applications to the M.O.E. are of public record in the Village of Wellington and have been open to public viewing, including myself.

All data and information was not held to be confidential until such time as we entered into litigation with the village in order to enforce bylaw compliance by Daimler.

I accept the Ministry's position that the Certificates of Approval and their Amendments are public records. The Ministry has indicated that the Environmental Protection Act is the enabling legislation. These records, identified as Record 7, pages 2 and 3 of Record 9, Records 11 and 13 do not meet the confidentiality requirement of the test and should be disclosed.

I am prepared to accept that the remaining records at issue were supplied to the Ministry implicitly in confidence. The question raised in the requester's representations is whether the

subsequent public disclosure of the information, with the appellant's apparent knowledge and consent, was a waiver of that confidentiality.

In my view, whether this information was subsequently made public goes to the issue of whether disclosure of the records could reasonably be expected to result in the harms contemplated by sections 17(1)(a) and (c) of the Act.

### **Part Three**

In this case, to satisfy part 3 of the test the appellant 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 harms described in sections 17(1)(a) or (c) would occur if the information was disclosed (Order 36).

The appellant, in its representations, states:

... if the information is released, we feel there could be some undue gain by [the requester]. We feel the subject development has been scrutinized and reviewed by several government agencies, and no further review is required.

Apart from this assertion, the appellant has not provided any evidence that disclosure of the records could reasonably be expected to result in the harms described in sections 17(1)(a) and/or (c) of the Act.

Moreover, the appellant itself has indicated that its development project was subject to public scrutiny. The requester has indicated that the sewer works aspect of the project and "the M.O.E. file" up to June 25, 1992 in particular, was previously disclosed to himself and others.

Therefore, based on the facts and circumstances described by the appellant, I am not satisfied that disclosure of the records could reasonably be expected to result in any of the situations outlined in either section 17(1)(a) or (c) of the Act.

### **ORDER:**

I uphold the Ministry's decision to disclose the records described in Appendix A, and order the Ministry to release this information to the original requester within 35 days of the date of this Order and not earlier than the thirtieth day following the date of this Order.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ June 21, 1993

## APPENDIX A

1. Letter dated September 19, 1991 from consulting engineers to the Ministry.
2. Fax dated September 25, 1991 from the Ministry office in Kingston to the Ministry office in Toronto.
3. Application for Sewage Works Approval dated July 31, 1991 (5 pages).
4. Consulting engineers' Sanitary Sewer Design Sheets (5 pages).
5. Consulting engineers' drawing.
6. Consulting engineers' drawing.
7. Certificate of Approval dated January 15, 1992 for Municipal Sewage.
8. Letter dated June 4, 1992 from consulting engineers to the Ministry (11 pages including attachments).
9. Letter dated June 5, 1992 from consulting engineers to the Ministry (5 pages including attachments).
10. Letter dated July 9, 1992 from consulting engineers to another engineering firm with a copy to the Ministry (2 pages).
11. Notice of Amendment of Certificate of Approval dated August 4, 1992 for Municipal Sewage.
12. Letter dated August 7, 1992 from consulting engineers to the Ministry.
13. Amended Certificate of Approval dated August 19, 1992.
14. Letter dated May 26, 1992 from consulting engineers to the Ministry.
15. Survey shots of sediment control pond (attachment to #14).
16. Functional engineering report dated December 2, 1987 (attachment to #14).
17. Internal Ministry memorandum dated May 28, 1992.
18. Internal Ministry memorandum dated June 2, 1992.