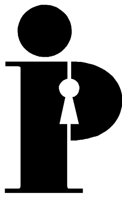

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-609

Appeal P-9300319

Ministry of Environment and Energy

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ORDER

The Ministry of Environment and Energy (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to the contamination of soil in the vicinity of a named property. The Ministry identified one record which was responsive to the request. This document consists of an 11 page Agreement, dated June 22, 1990, entered into between the Ministry and the owner of the property (the company) respecting the clean up of soil in the area.

The Ministry determined that the release of this Agreement might affect the interests of the company and, pursuant to section 28(1) of the Act, notified this party that an access request had been received. The company was invited to make representations on whether the document in question should be released. The Ministry then considered the submissions made and decided to release the Agreement. The company appealed the Ministry's decision.

This issue could not be successfully mediated and notice that an inquiry was being conducted to review the decision was sent to the Ministry, the company (now the third party appellant) and the original requester. Representations were received from the Ministry and the company only.

In its representations, the appellant also submitted that the Agreement ought not to be disclosed pursuant to the discretionary exemption contained in section 14(1)(f) of the Act.

The first issue which I must determine is whether the mandatory exemption provided by sections 17(1)(a), (b) and (c) of the Act applies to the Agreement in question. These provisions 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;
>
> (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 section 17(1), the party resisting disclosure of the record (in this case the company) 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 sections 17(1) (a), (b) or (c) will occur.

[Order 36]

I will first consider part 2 of the test. To satisfy this component of the test, the company must establish that the information contained in the Agreement was **supplied** to the Ministry and secondly that such information was supplied **in confidence** either implicitly or explicitly.

In its representations, the Ministry takes the position that the Agreement was not supplied to the Ministry by the appellant but was rather the product of discussions between representatives of the Ministry and legal counsel for the company.

The company approaches this issue in a different fashion:

> ... [T]he term "supplied" should be construed to include any information supplied by [the company] and modified through discussion and consensus of the parties. The information in the Agreement is one and the same as that supplied by [the company].

A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the affected person. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been "supplied" for the purposes of section 17(1) of the Act (Orders 36, 87, 203, P-219, P-228, P_251, P-263 and P-581).

Finally, other orders issued by the Commissioner's office have held that information contained in a record would reveal information "supplied" by a third party, 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 institution (Orders P-218, P-219, P-228, P_451 and P-472).

Based on the representations provided to me and the circumstances of this case, I find that the terms and conditions contained in the Agreement were negotiated between the Ministry and the company. Accordingly, I am satisfied that the reasoning applied in the line of orders referred to previously applies to this record. I find, therefore, that the information contained in the Agreement was not "supplied" to the Ministry for the purposes of section 17(1) of the Act.

I have also considered whether the disclosure of the record would permit the drawing of accurate inferences about the information that the company actually supplied to the Ministry. From my examination of the Agreement, I cannot conclude that any such inferences could reasonably be drawn.

For these reasons, I find that the second part of the test for the application of section 17(1) of the Act has not been met.

As stated previously, the failure to satisfy any component of the three-part test means that the section 17(1) exemption will not apply. In deference to the representations made by the company, however, I will also consider whether the information contained in the Agreement was supplied in confidence and whether the release of the Agreement would result in any of the harms outlined in this section.

The company asserts that the information contained in the Agreement was also supplied to the Ministry **in confidence**. The Ministry, for its part, submits that the question of whether the contents of the Agreement are, in fact, confidential is governed by paragraphs 13 and 14 of the document.

Paragraph 13 of the Agreement specifies that the approval of the Lieutenant Governor in Council is required before the Agreement will take effect. Paragraph 14 then provides that neither party is permitted to disclose the terms of the Agreement before the requisite approval under paragraph 13 is obtained. The Ministry has provided the Commissioner's office with documentary evidence which indicates that the Lieutenant Governor's approval was obtained on June 21, 1990.

In my view, while there was an expectation that the terms of the Agreement would be kept confidential at the time that the document was drafted, that expectation was time limited and, by virtue of paragraphs 13 and 14 of the document, no longer existed once the approval of the Lieutenant Governor had been obtained. On this basis, I do not accept that the Agreement retained its confidential aspect once the document was formally executed.

I will now consider whether the company has met the third part of the section 17(1) test.

In its representations, the company indicates that it is involved in litigation with the original requester, but that it has not yet been served with a statement of claim. The company then argues that the disclosure of the Agreement, which it views as being subject to privilege, could reasonably be expected to interfere with the rights and privileges of the company in the litigation

pursuant to section 17(1)(a) of the Act. The position of the company is more particularly stated as follows:

> The Agreement was made with a view to the settlement of issues between [the company] and the Crown. It is submitted that the Agreement is absolutely privileged in litigation between [the parties] ... It is submitted that the settlement privilege that protects the Agreement also applies as well to the content of the Agreement. If parties to settlement negotiations believed that their statements might be used by a third party in subsequent proceedings, they might be less frank in those discussions.

The company also contends that, should the Agreement be released, the original requester would obtain an undue gain under section 17(1)(c) of the Act in that this party would likely not have received access to this same document under the civil litigation process. Conversely, the company would suffer an undue loss.

The relationship between the access provisions contained in the Act and the civil litigation process is addressed in section 64(1) of the Act. This provision states that:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

The application of section 64(1) was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:

> ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the Freedom of Information and Protection of Privacy Act, 1987 is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists, and, in my view, subsection 14(1)(f) or section 64 cannot be interpreted so as to exempt records of this type without offending the purposes and principles of the Act.
>
> I am supported in my view by the decision in the case of Playboy Enterprises Inc. v. Department of Justice [677 F.2d 931(1982)], heard in the United States Court of Appeals, District of Columbia Circuit. In that case, which was decided under the U.S. freedom of information legislation, the government put forward the argument that, because its claim of privilege with respect to a certain record had been sustained in discovery proceedings in other cases, those determinations should be given "controlling weight" in the decision as to whether the record should be released under the U.S. freedom of information legislation. The court answered by stating that "... the issues in discovery proceedings and the issues in

> the context of a freedom of information action are quite different. That for one reason or another, a document may be exempt from discovery does not mean that it will be exempt from a demand under the Freedom of Information Act."

I adopt this approach for the purposes of this appeal.

To put the matter somewhat differently, the Act contains an exhaustive list of the exemptions which are available to an institution should it wish to deny access to a particular record. There does not exist a discrete settlement privilege under the Act, and litigation privilege is only available pursuant to the discretionary exemption contained in section 19 of the Act. This latter exemption was not raised in the context of this appeal.

For the reasons stated, I am unable to accept the company's position that the privileged status of the Agreement in another context is sufficient to trigger the application of either section 17(1)(a) or (c) of the Act. Since the company has not provided any other evidence to indicate that the harms contemplated under these sections will likely come to pass, I find that the third part of the section 17(1) test has not been satisfied.

To summarize, the company's submission that section 17(1)(a) or (c) apply to the Agreement fails on three separate grounds. These are that (1) the information contained in the Agreement was not supplied to the Ministry, (2) the information was not supplied to the Ministry in confidence and (3) the harms referred to in sections 17(1)(a) and (c) have not been established.

In its representations, the company also asserts that the Agreement should be withheld from disclosure pursuant to the discretionary exemption contained in section 14(1)(f) of the Act. This provision permits an institution to refuse to disclose a record where the disclosure could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication. It should be noted that the Ministry did not originally claim this exemption and decided, instead, to release the Agreement in its entirety.

In Order P-257, former Assistant Commissioner Tom Mitchinson considered the issue of whether or not a party other than an institution can rely on a discretionary exemption when an institution has not done so. At pages 5 and 6 of that order, he addressed this matter as follows:

> 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 ... 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. ... 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.

Following a review of the facts of this case, and the submissions made by the company, I find that this appeal does not represent one of those "rare occasions" when an discretionary exemption, not raised by an institution, should be considered. Even if I reached a different conclusion, however, the representations provided by the company, which are very general in nature, are insufficient to establish that the release of the Agreement would deprive the company of a fair trial.

For the reasons specified, I uphold the Ministry's decision.

ORDER:

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

2. The Ministry has indicated that the original requester still owes the Ministry $ 297.05 for the processing of this request. The Ministry need not release the Agreement until the outstanding fees are remitted.

3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the record disclosed to the requester pursuant to Provision 1, **only** upon request.

Original signed by: January 12, 1994
Irwin Glasberg
Assistant Commissioner