



Information and Privacy
Commissioner/Ontario

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

ORDER P-841

Appeal P-9400449

Ministry of Natural Resources



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Natural Resources (the Ministry) received a request from the appellant for access to all information and activities pertaining to the lost circulation zone on Chatham Well #32 in Woodhouse Township. The appellant alleges that the water on her farm has been contaminated as a result of the drilling of a well by an engineering firm (Firm A). Apparently, the appellant has filed a civil suit against Firm A for damages as a result of its actions while drilling the well. Firm A is a client of another company of environmental professionals (Firm B).

The Ministry provided some records to the appellant. It denied access to the following three documents on the basis of the third party information exemption (section 17 of the Act):

- Record 1: a letter dated March 22, 1990 from Firm A to the Ministry;
- Record 2: a letter dated March 23, 1990 from Firm B to the Ministry enclosing a memorandum to file; and
- Record 3: a letter dated May 27, 1992 from Firm B to the Ministry.

The appellant appealed the denial of access to these three records.

She subsequently asked the Ministry for all information related to the Ministry's activities in monitoring and regulating Chatham Well #32 from the time the drilling permit was issued until the date of the request. Specifically, she was interested in receiving copies of the log books or records of visits which would record the Ministry's monitoring of the well during this time period.

The Ministry provided the appellant with total access to all the responsive information it had, but indicated that inspection and monitoring records did not exist. This decision was appealed on the basis that further records should exist.

A Notice of Inquiry was sent to the Ministry, the appellant and Firms A and B. Representations were received from all parties.

Because the subject matter of both appeals is similar, they were dealt with as one file. Accordingly, this order will dispose of the issues raised by the appeal of both decisions of the Ministry, i.e. denial of access and the reasonableness of the search.

DISCUSSION:

THIRD PARTY INFORMATION

In its representations, the Ministry indicates that it is relying on the submissions of the engineering firms with respect to the application of section 17(1) of the Act to the three letters.

Thus, in this case, for the records to qualify for exemption under section 17(1)(a), (b) or (c) the engineering firms 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.

Failure to satisfy any part of the test will render the claim for exemption invalid.

Part One of the Test

I have reviewed the three letters and am satisfied that they contain scientific and/or technical information related to the drilling of the well, water sampling and ground water quality interference. Accordingly, part one of the test has been met.

Part Two of the Test

To satisfy part two of the test, the engineering firms must show that the information was supplied to the Ministry, and that it was supplied in confidence, either implicitly or explicitly.

Both firms submit that the information was supplied to the Ministry implicitly in confidence.

Records 2 and 3 are confirmations of telephone conversations between the authors of the letters and a representative of the Ministry. All of the technical and scientific information contained in these records was provided **by the Ministry employee** to the representative of Firm B, who then confirmed the substance of the conversation in this correspondence. The information was not supplied **to the Ministry by Firm B**. Therefore, part two of the section 17(1) test has not been met with respect to these documents and I will not consider them further.

I am satisfied that the information contained in Record 1 was supplied to the Ministry. I am also satisfied that the individual who provided this information had a reasonable expectation that, in the words of Firm A, "information supplied in the letters would be strictly for the Ministry staff and their records". Thus, both elements of part two of the test have been satisfied with respect to Record 1.

Part Three of the Test

I will now consider the application of part three of the test (the "harms" element) to Record 1. Firm B claims that sections 17(1)(a), (b) and (c) are relevant considerations. However, it merely states, with respect to section 17(1)(c), that if the records are disclosed and weaken the case of Firm A in the civil action, then Firm A could suffer undue loss, which in turn could possibly adversely affect the business relationship between the two firms.

Firm A maintains that disclosure of the records could result in the harms described in sections 17(1)(b) and (c).

In order to meet the requirements of section 17(1)(b) of the Act, the firm must demonstrate, through the provision of detailed and convincing evidence, that:

1. the disclosure of the information in the records could reasonably be expected to result in similar information no longer being supplied to the institution; and
2. it is in the public interest that similar information continue to be supplied to the institution in this fashion.

Firm A indicates that the records were unsolicited correspondence to the Ministry. It argues that the information contained in the records goes well beyond what is required by the Ministry in the forms which must be completed and filed with the government with respect to the work undertaken by the firm. These forms, prescribed under the Petroleum Resources Act, and in particular, Form 107, the "Drilling and Completion Record" have been disclosed to the appellant. The firm suggests that if the records at issue are disclosed, such companies would be less willing to provide information to the Ministry in the future. The Ministry would have less information on which to base its decisions, decisions which have an effect on the public interest.

Record 1 contains a very detailed description, provided by the company which undertook the drilling, of the events that occurred during the drilling and subsequent testing of Chatham Well #32. This information was not provided to the Ministry pursuant to any contractual, statutory or other legal obligation. In fact, the letter contains very specific information which did not need to be reported to the Ministry at all. Firm A did not have any financial interest in supplying this information to the Ministry.

The issues surrounding drilling for oil and gas and the effect on the surrounding environment are of concern to a great many individuals. The legislature has decided what information the government should have to track the activities of drilling companies and the environmental impact of such activities. This is the information provided to the appellant. The additional information contained in Record 1, voluntarily provided to the Ministry, would assist the Ministry in understanding the circumstances surrounding the drilling of Chatham Well #32 and provide it with more information to use in its attempt to understand how the water on the appellant's farm became contaminated. I agree that information of this nature will be more likely to be provided to the Ministry when professionals, such as Firm A, have the confidence to know that materials will not be subject to disclosure outside the Ministry.

I also agree that there is a public interest in ensuring that information related to these activities continue to be supplied to the Ministry. Accordingly, I find that the third part of the test has been met with respect to Record 1. As all three parts of the test have been satisfied, the exemption provided by section 17(1)(b) of the Act applies to this letter.

REASONABLENESS OF SEARCH

Where the requester provides sufficient details about the records which he is seeking and the Ministry indicates that such records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable effort to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

As I have previously indicated, the appellant maintains that records should exist which document the Ministry's monitoring and regulation of Chatham Well #32 from the date of the issuance of the drilling permit until the date of her request. In particular, she believes there should exist an inspector's log book of his activities involving this well.

During the course of the appeal, the appellant provided this office with a portion of the transcript of the trial proceedings involving charges under the Ontario Water Resources Act and the Environmental Protection Act brought by the Ministry of the Environment against Firm A. The appellant has highlighted certain portions of this transcript which, in her view, demonstrate the probable existence of notes made by an inspector from the Ministry. With the consent of the appellant, this transcript was forwarded to the Ministry to assist with its search for the responsive records.

The appellant also provided this office with a copy of a letter from the Ministry to her M.P.P.

I have carefully reviewed the transcript and the Ministry's letter. In my view, there is nothing in either of these documents which points to the **existence of any documentation** prepared by Ministry officials with respect to inspections of the drilling and/or other operations of Chatham Well #32.

As part of its representations, the Ministry has submitted an affidavit sworn by the Ministry's Freedom of Information and Privacy Co-ordinator (the Co-ordinator) in the district in which the well was located. This individual indicates that he searched three files:

1. a previous request made by the appellant under the Act for records similar to those which are currently at issue;
2. the Chatham Well #32 file held in the Ministry's office in London; and

3. the file that was compiled at the Simcoe Area Office of the Ministry.

No inspector's records or logs were located in any of these files.

The Co-ordinator then attempted to and did locate a former Ministry employee, namely the Petroleum Resources Inspector, who was responsible for monitoring the drilling and completion of Chatham Well#32.

A request for an affidavit was made. However, the Ministry was unable to secure this document as the former employee did not attend the arranged meeting. Nor did he respond to further Ministry attempts to procure the affidavit.

The Ministry has also advised this office that the Petroleum Resources Act does not impose an obligation on inspectors to complete log books. Both the statute and the accompanying regulations are silent on this issue. Moreover, there is no obligation on a driller to advise the Ministry of a lost circulation zone, nor is there an obligation on the Ministry to respond to such a situation.

Having carefully reviewed the representations of both parties, I am satisfied that the Ministry has taken all reasonable steps to locate any records, including inspector's log books or inspection reports, which document the Ministry's monitoring and regulation of Chatham Well #32.

ORDER:

1. I uphold the decision of the Ministry to deny access to Record 1.
2. I order the Ministry to disclose Records 2 and 3 to the appellant within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day after the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.
4. I uphold the decision of the Ministry with respect to the reasonableness of its search for responsive records.

Original signed by: _____

Anita Fineberg
Inquiry Officer

January 18, 1995