



Information and Privacy
Commissioner/Ontario

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

ORDER P-974

Appeal P-9500180

Ministry of Environment and Energy



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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 Environment and Energy (the Ministry) received a request for information regarding a property that may have experienced soil and groundwater contamination. The requester owns land adjacent to the property, and wishes to know whether its land has been affected by any contamination.

The Ministry identified the records responsive to the request and granted access in part to the requester. The Ministry determined that the interests of the owner of the possibly contaminated property (the owner) might be affected by the disclosure of the one remaining record. The Ministry notified the owner pursuant to section 28 of the Act, and requested representations on the application of section 17 of the Act (third party information) with respect to the release of this record.

The owner objected to disclosure of the record. The Ministry decided to release the record to the requester. Counsel for the owner, hereafter referred to as the appellant, appealed this decision.

A Notice of Inquiry was provided to the Ministry, the appellant and the requester. Representations were received from all parties.

The record at issue in this appeal consists of a 36 page "Groundwater Assessment" report completed by a consulting firm, dated November 11, 1994 (the report). The report outlines a workplan to investigate various issues regarding contamination of the property.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the Ministry and/or the affected party 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.

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In this case, because the Ministry does not support the application of section 17(1), it is the appellant who

must satisfy all three parts of the test.

Part One

The report contains information which is the result of a technical study by staff of a firm of consulting engineers with expertise in the field of environmental testing and analysis. Both the appellant and the Ministry submit that, as such, the record contains scientific and technical information. I have reviewed the record at issue and I agree with this view. Accordingly, part one of the test has been satisfied.

Part Two

In order to satisfy part two of the test, the appellant must show that the information was supplied to the Ministry and that it was supplied in confidence, either implicitly or explicitly. Both the Ministry and the appellant submit that the report was supplied to the Ministry explicitly in confidence, as the covering letter submitted with the report indicated that it was being provided on a confidential basis. I have reviewed the record and the covering letter, and find that the appellant had a reasonable and objective basis to conclude that the report would be kept confidential. Therefore, I find that part two of the test has been satisfied.

Part Three

The Ministry submits that release of the record would not cause any of the harms specified under sections 17(1)(a), (b) or (c). Although the appellant does not make specific reference to these sections of the Act, his submissions appear to relate to the harms described in each of the sections.

17(1)(a)

This section of the Act provides that third party information supplied in confidence to an institution must not be disclosed if to do so could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

The appellant submits that disclosure of the report may reasonably result in significant interference with its negotiations with a potential purchaser of the property. The appellant indicates that the potential purchaser is cooperating in the investigation and remediation of the property. The appellant states that the potential purchaser may expect the requester to disclose the report to other adjacent property owners, resulting in premature and unfounded allegations concerning the appellant's property. As a result of such allegations, the potential purchaser may be expected to cease negotiations for the appellant's property.

Although the appellant has expressed concerns that release of the record will interfere with its current negotiations with a potential purchaser, it has also advised that it has provided a copy of the report to the potential purchaser. Since the purchaser already has a copy of the report it is difficult to see how its release could harm the current negotiations.

As far as any future negotiations with other purchasers are concerned, the appellant has not provided any information to indicate why the report would not be disclosed to these entities as well.

Moreover, the appellant has not provided any evidence in support of its statement that "... [the potential purchaser] may reasonably expect that [the requester] will disclose the Report to other property owners...".

Nor has it indicated the basis on which it claims that the potential purchaser may object to other adjacent property owners having knowledge of the report. Thus, the appellant has not established that disclosure of the report could reasonably be expected to interfere with its contractual negotiations.

17(1)(b)

If disclosure of the report could reasonably be expected to result in similar information no longer being supplied to the Ministry when it is in the public interest that similar information continue to be so supplied, then the "harms" set out in section 17(1)(b) of the Act have been established.

The appellant advises that disclosure of the report to the requester will directly result in similar information no longer being supplied by the appellant or its consultants to the Ministry, and will discourage others from doing so. The appellant states that it is clearly in the public interest that persons having contaminated land co-operate with, and voluntarily disclose their knowledge to the Ministry. The appellant states that if the report is disclosed, it will not provide the Ministry with the results of the investigations outlined in the document which were intended to be supplied to the Ministry in the future. The appellant submits that even though the Environmental Protection Act (E.P.A.) requires that notice be given to the Ministry by persons who discharge a contaminant into the natural environment that causes or is likely to cause an adverse effect, people who fear public disclosure of such an incident will tend to interpret the phrase "adverse effect" very narrowly to justify non-notification.

While the appellant has advised that it will no longer supply similar information in the future to the Ministry, it does acknowledge that the E.P.A. requires it to provide such information. The Ministry states that, while it prefers to work co-operatively with property owners, it can issue an order to produce a report outlining both the extent of such contamination and remedial proposals.

It has been held in previous orders that section 17(1)(b) of the Act is not intended to protect information that is provided to an institution pursuant to a statutory obligation to do so (Order P-323). Thus, while I agree with the appellant that it is in the public interest that information such as that contained in the record continue to be supplied to the Ministry, I find that section 17(1)(b) has no application in the circumstances of this appeal.

17(1)(c)

The harms described in section 17(1)(c) of the Act are established if disclosure of the report could reasonably be expected to result in undue loss or gain to any person, group, committee, or financial institution or agency.

The appellant maintains that, since the report suggests that the property is environmentally contaminated, "...

the requester can be expected to interpret the Report in such a way that they launch an investigation or action against [the appellant]." Thus, the appellant asserts that it could suffer undue loss as a result of disclosure of the record.

The requester states that it learned of the contamination through a real estate agent. The Ministry confirmed this information in a letter to the requester dated December 24, 1994. Thus, while the information contained in the report might be helpful to the requester, it would not in itself be necessary for the requester to launch its own investigation or consider any legal action. Moreover, the appellant has not explained the connection between the information contained in the report and the form of any "investigation" or "legal action" which it believes the requester might undertake. Accordingly, I find that section 17(1)(c) of the Act does not apply.

Thus, as the appellant has not established that the harms outlined in sections 17(1)(a), (b) or (c) of the Act could reasonably be expected to occur should the report be disclosed, I find that the third part of the section 17(1) test has not been met. Therefore, the report should be released to the requester.

ORDER:

1. I uphold the decision of the Ministry.
2. I order the Ministry to disclose the record to the requester within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the requester pursuant to Provision 2.

Original signed by: _____

Anita Fineberg
Inquiry Officer

_____ August 10, 1995