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

ORDER P-1050

Appeal P-9500377

Ministry of Transportation

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Transportation (the Ministry) received a request for access to copies of all correspondence and product or testing information related to highway testing blocks which was sent to the Ministry by two named companies, Company A and Company B. The documents relate to an application for Ministry approval of offset blocks (the product) on provincial guardrail systems.

Pursuant to section 28 of the Act, the Ministry notified Company A of the request. (Company A purchased the assets and technology of Company B in April, 1992.) Company A objected to the disclosure of any information with the exception of its general sales literature, which it does not consider to be confidential. The Ministry then issued a decision in which it granted partial access to the requested documentation and denied access to eight records on the basis of the third party information exemption (section 17(1) of the Act).

The requester appealed the denial of access.

During mediation of the appeal, the appellant limited the scope of his request to the documents numbered as 7-10 by the Ministry. These records may be described as follows:

7: Letter and attachment from Company A to the Ministry dated February 3, 1993 (5 pages)
8: Letter and attachment from Company A to the Ministry dated December 10, 1992 (5 pages)
9: Specifications (2 pages)
10: Letter from the United States Department of Transportation, Federal Highway Administration to Company A, dated September 1, 1992 (2 pages)

The appellant also maintained that there was a public interest in the disclosure of the records, thus raising the application of section 23 of the Act.

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

PRELIMINARY ISSUE

In his submissions, the appellant poses four questions related to the Canadian government's awareness of certain information about Company A's product. These questions, or "issues", as they are referred to by the appellant, were raised for the first time in his submissions. They do not appear to be requests under the Act and, as noted, refer to the knowledge of the **Canadian**, as opposed to the Ontario government.

Should the appellant wish to pursue these matters, he should submit a request to the appropriate federal government institution under the federal Access to Information Act. This office has no jurisdiction to deal with such questions.

THIRD PARTY INFORMATION

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

The Ministry submits that the records contain scientific and technical information about Company A's product. Company A supports this characterization of the information, as well as claiming that some of the information consists of trade secrets and commercial information. However, apart from stating this conclusion, Company A provides no evidence in support of this contention.

In Order P-454, former Assistant Commissioner Irwin Glasberg undertook an extensive analysis of the term "scientific" as it appears in section 17(1) of the Act. Based on the definitions of the terms "scientific" and "science" as found in the Concise Oxford Dictionary (8th ed.), he concluded that:

> Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the Act.

Again, based on the definition of "technical" in the Concise Oxford Dictionary (8th ed.), he found that:

> 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)(a) of the Act.

The records at issue in this appeal describe the composition and material sources of Company A's product, as well as the results of various tests and analyses of the product and product specifications. Some of these materials test a specific hypothesis, set out conclusions based on observations, or present findings according to a specific methodology. In addition, some of the information contained in the records describes the construction of materials made from the product and how it should be used.

Applying the definitions set out above to the information contained in the records, I find that they contain scientific and/or technical information. Thus part one of the section 17(1) test has been satisfied.

Part Two

In order to satisfy part two of the test, the Ministry and/or Company A must show that the information was supplied to the Ministry, either implicitly or explicitly in confidence.

It is clear from a review of the records that they all consist of correspondence sent to the Ministry from Company A which was supplying the Ministry with information about its product.

There is nothing on the face of the documents to indicate that they were provided to the Ministry explicitly in confidence. However, Company A submits that they were supplied to the Ministry in confidence and the Ministry states that:

> ... [it] respects [Company A's] claim for confidence as it may have been implied in the course of our dealings with them.

In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the application of the second part of section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act, whose wording is similar to that found in section 17(1) of the Act:

> In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

I adopt these comments for the purposes of this appeal.

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case including whether the

information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

Although there is nothing on the face of the records, I am prepared to accept Company A's claim that the information contained in the records was communicated to the Ministry on the basis that it was confidential and that it was intended to be kept confidential. Based on the materials provided by Company A, I find that this information was treated in a manner indicating a concern for its disclosure and was prepared for a purpose which would not entail disclosure.

Certain of the information has previously been disclosed to the appellant in response to various freedom of information requests he has filed in the United States. The appellant has provided these documents to this office as part of his submissions. However, there is no evidence before me as to whether Company A is aware of this prior disclosure, or that, in fact, it was even aware of the appellant's freedom of information requests. In these circumstances, I am not prepared to dismiss Company A's confidentiality claims. (I will, however, consider this matter further in my discussion of part three of the test below.)

Based on all the circumstances of this case, and considering the nature of the information, I find that Company A held a reasonable expectation, on an objective basis, that the materials it submitted to the Ministry would be kept confidential. Accordingly, I find that part two of the section 17(1) test has been met.

Part Three

Company A and the appellant are currently involved in an intellectual property dispute in the United States involving recycling technology related to, among other matters, Company A's product. In its submissions, Company A states that it is aware of the identity of the appellant. Thus, Company A asserts that disclosure of the records would prejudice its position in the marketplace and be detrimental to its interests in the litigation between it and the appellant. These submissions raise the application of sections 17(1)(a) and (c) of the Act.

As I have previously indicated, the appellant states that much of the information contained in the records has previously been disclosed to him in response to previous freedom of information requests he has submitted to various federal agencies and state Departments of Transportation in the United States.

Having reviewed the materials submitted to this office by the appellant, and compared them to the records at issue, I note that Record 10 and the second page of Record 9 are identical to some of the appellant's exhibits. In particular, an identical copy of Record 10 was received by the appellant from the states of Connecticut, Florida, Nebraska, New Hampshire, Rhode Island and Virginia in response to his freedom of information requests. Page 2 of Record 9 was received in response to requests to the states of Florida and Connecticut.

In my view, there can be no reasonable expectation of the harms described in sections 17(1)(a) and (c) of the Act arising from disclosure of Record 10 and page 2 of Record 9 where this information has already been disclosed and where it is available to the public. Thus, these records fail to meet the third part of the section 17(1) test and do not qualify for exemption. They should be disclosed to the appellant.

As far as the balance of the records are concerned, I accept the submissions of Company A that their disclosure could reasonably be expected to prejudice significantly its competitive position, or result in undue loss, the harms described in sections 17(1)(a) and (c) of the Act. Thus part three of the section 17(1) test has been met and the exemption applies.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the Act states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

My discussion of this section will be limited to those records which I have found to be exempt under section 17(1), namely Records 7, 8 and page 1 of Record 9.

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

The appellant's submissions on the application of section 23 are directed to the form and contents of Record 10, which I have already ordered be disclosed. He has not articulated any public interest arguments to support the disclosure of Records 7, 8 and page 1 of Record 9.

Having reviewed these documents, and considered the circumstances of this appeal, I conclude that the appellant's interest in disclosure of these documents is a private, as opposed to a public, one. Thus section 23 does not apply.

ORDER:

1. I uphold the decision of the Ministry to deny access to Records 7, 8 and page 1 of Record 9.

2. I order the Ministry to disclose page 2 of Record 9 and Record 10 to the appellant within thirty-five (35) days of the date of this order but 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 records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: November 15, 1995
Anita Fineberg
Inquiry Officer