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

ORDER P-1170

Appeal P-9500554

Ministry of Municipal Affairs and Housing

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BACKGROUND:

The Building Materials Evaluation Commission (the BMEC) is a body established under the Building Code Act. It is a scheduled agency under the Freedom of Information and Privacy Act (the Act), and the Minister of Housing is the designated "head" for the purposes of the Act. The BMEC is comprised of individuals appointed by the Lieutenant Governor in Council, and is charged with responsibility for:

- conducting research into the examination of innovative materials, techniques and building designs;
- reviewing applications for the use of innovative materials, systems and building designs, and authorizing this use, subject to any conditions deemed appropriate; and
- making recommendations respecting changes to the Building Code.

Once authorized by the BMEC, the use of any material, system or building design is deemed by statute not to contravene the Building Code.

It is important to note that the BMEC is separate and distinct from the Building Code Commission (the BCC), which is an administrative tribunal established under the Building Code Act to deal with disputes arising in the context of construction. The BCC is bound by the provisions of the Statutory Powers Procedure Act. Hearings are generally open to the public, and disputes are resolved under what could be categorized as an adversarial process.

A company (the applicant) made application to the BMEC for approval of a particular innovative material. This application included various supporting documents to assist the BMEC in evaluating the product. Following its review, the BMEC authorized use of this material, and issued an Authorization Report on August 24, 1995.

NATURE OF THE APPEAL:

The Ministry of Municipal Affairs and Housing (the Ministry) received a request under the Act, for access to a copy of the submissions made by the applicant to the BMEC. The Ministry responded on behalf of the BMEC, denying access to all responsive records on the basis of the mandatory exemption provided by section 17(1) of the Act (third party information).

The requester (now the appellant) appealed the Ministry's decision.

A description of the records is included in an appendix to this order.

During mediation, the appellant removed Record 15, the applicant's client list, from the scope of his request.

Further mediation was not successful, and a Notice of Inquiry was sent to the appellant, the Ministry and the applicant. A Supplementary Notice of Inquiry was also sent to the parties, seeking representations on the possible application of section 23 of the Act, the so-called "public

interest override". Representations in response to the two notices were received from all three parties.

During the course of the inquiry, the Ministry, with the consent of the applicant, issued a revised decision letter, disclosing Records 1, 2, 3, 4 and 5 in their entirety, and six pages of Record 6. The Ministry and the applicant also agreed to disclose pages 1-2 of Records 12 and 13.

In its representations, the Ministry for the first time raised section 22(a) of the Act as a new ground for denying access to Record 8, which the Ministry claimed was soon to be published.

After reviewing the Ministry's representations, it became clear that two other organizations might be affected by the release of Record 8 (the standards body), and/or Records 12 and 13 (the research organization), and a second Supplementary Notice of Inquiry was sent to them. Representations we received from both organizations.

Record 16 contains the electronic version of certain information contained in other records, and the appellant agreed to remove this record from the scope of his request.

Because he is already in possession of the first three pages of Records 12 and 13, the appellant also agreed to remove these pages from the scope of the request, and it is not necessary for me to address them further in this order.

Therefore, the records which remain at issue in this appeal are Records 7, 8, 9, 10, 11, 14, pages 4-6 of Records 12 and 13, and the remaining 17 pages of Record 6.

PRELIMINARY ISSUE:

As mentioned previously, for the first time in its representations the Ministry raised the possible application of section 22(a) to Record 8. The Ministry claimed that this record, which was in draft form at the time the applicant submitted its documentation to the BMEC, was about to be published in final form by the standards body, and made available to the public for a prescribed fee.

The appellant confirmed that he is seeking access to the draft version of this record, not the final published version. Consequently, I find that section 22(a) is not applicable in the circumstances of this appeal, regardless of whether I would have been prepared to consider this exemption when raised for the first time long after the deadline imposed for raising new discretionary exemptions in the Confirmation of Appeal letter.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the Ministry and/or any of the parties resisting disclosure 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 Ministry 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.

Part One

In their representations, the Ministry and the applicant submit that the information contained in the records is technical. Having reviewed the records, I agree, and I find that the first part of the exemption test has been satisfied.

Part Two

In order to satisfy part two of the test, the Ministry and/or the parties resisting disclosure must show that the information contained in the records was supplied to the Ministry, either implicitly or explicitly in confidence.

There would appear to be no dispute that the records were provided by the applicant to the BMEC as part of the application process, and I find that all records were supplied for the purpose of section 17(1).

As far as the confidentiality aspect of part two is concerned, the Ministry submits that there has been a long-standing expectation on the part of applicants to the BMEC that documentation submitted in support of an application will be treated confidentiality. The Ministry points to a minute passed by the BMEC on July 27, 1995 which formally reaffirmed its policy that members treat applications and supporting materials as confidential. According to this minute, confidentiality does not apply to documents released through BMEC disclosure policies, matters of administration, matters that are in the public domain, and disclosure made under the Act. The Ministry also draws the distinction between the manner in which records are treated under the BMEC application process and the public hearings process followed by the Building Code Commission.

The applicant submits that the materials provided in support of its application were supplied to BMEC explicitly in confidence, and the Ministry states that this explicit expectation of confidentiality was communicated to the BMEC Secretary at the time the application was filed.

The appellant disputes that any information was supplied in confidence, and states: "Building code issues as addressed by BMEC are of technical nature as relates to the Building Code. Typically these issues are invited for public comment prior to inclusion in the Building Code."

Having reviewed the representations, I find that there is an implicit expectation of confidentiality associated with the application process before the BMEC. Once authorization has been issued,

certain information is published and made publicly available; the records already disclosed to the appellant by the Ministry fit into this category. However, the information released at the time of authorization does not include the technical, product-specific test results and other details provided in support of the application, and this is the type of information which is contained in the records which remain at issue in this appeal. In the circumstances of this appeal, I find that these non-disclosed records were supplied either explicitly or implicitly in confidence, and the second part of the section 17(1) exemption test has been established.

Part Three

I will now consider whether disclosure of the technical information contained in the records could reasonably be expected to:

- prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the applicant or any other organization (section 17(1)(a));

- result in similar information no longer being supplied to the Ministry where it is in the public interest that similar information continue to be so supplied (section 17(1)(b)); or

- result in undue loss or gain to any person, group, committee or financial institution or agency (section 17(1)(c)).

The applicant submits that disclosure of the records to the appellant, and therefore to others including competitors, would significantly prejudice its competitive position and result in undue loss to the applicant and undue gain to others who could benefit from the information contained in the records. The applicant points out that the records include test results and conclusions relating directly to the analysis and assessment of its unique product.

The Ministry supports this position, and submits that disclosure of the records would allow competitors of the applicant to have access to otherwise confidential and proprietary technical data about the product, which was developed at significant cost by the applicant. In the Ministry's view, competitors could use this information to enhance or design competing products, thus by-passing considerable expenses or research and design.

As far as section 17(1)(b) is concerned, the Ministry submits that if this type of proprietary technical information is made publicly available under the Act, companies may no longer be prepared to participate in the BMEC authorization process. The Ministry feels it is in the public interest to facilitate the use of innovative materials, systems, and building designs through authorizations made by the BMEC.

The appellant submits that disclosure would not result in harm to the applicant because the product authorization has already by issued by the BMEC. Because the approval document is in the public domain, the appellant feels that release of documents submitted to persuade the BMEC to approve the product would not result in the type of harms envisioned by sections 17(1)(a), (b) or (c).

I will first outline my findings with respect to all of the records with the exception of Records 8, 12 and 13, which may have unique considerations regarding the interests of the standards body or the research corporation.

Records 7, 9, 10, 11, 14 and the remaining pages of Record 6

Having reviewed Records 7, 9, 10, 11, 14 and the remaining pages of Record 6, together with the relevant representations, I find that the Ministry and the applicant have provided sufficient evidence to establish that disclosure could reasonably be expected to significantly prejudice the competitive position and result in undue loss to the applicant. The records which are made available to the public through the BMEC authorization process do not include the level of technical detail present in the materials submitted in support of the application. In my view, the test results, technical drawings, and product evaluations included in these records relate to a unique product developed by the company, and should not be disclosed.

Records 12 and 13

Records 12 and 13 are similar documents, both of which were prepared by the research organization for the applicant. They both consist of a two-page covering report and four pages of test results involving the applicant's product. As noted earlier, the Ministry and the applicant have consented to the disclosure of the first two pages of each record, and the appellant has removed the first three pages of each record because he already has copies in his possession. Therefore, I only need to discuss the possible application of part three of the section 17(1) test to the final three pages of each of these two records.

For the same reasons outlined under my discussion of Record 7, etc., above, I find that disclosure of the final three pages of Records 12 and 13 could reasonably be expected to significantly prejudice the competitive position and result in undue loss to the applicant. Because of this finding, these three pages of each record qualify for exemption under sections 17(1)(a) and (c) of the Act, and it is not necessary for me to determine whether the requirements of part three of the section 17(1) test have been established by the research organization.

Record 8

As far as Record 8 is concerned, the standards body submits that it is a working technical document which was forwarded in confidence to a select group of experts as part of its product review process. Because Record 8 is not expressly identified as a draft edition, the standards body is concerned that it may be used in place of the final edition published in December 1995, leading to misinterpretation and confusion among regulatory authorities, the standards body's clients and other end users. [It should be noted that there is no reference to confidentiality on either the notice sent to the experts along with Record 8, or on the record itself]. The concerns raised by the standards body appear to relate indirectly to the harms outlined in sections 17(1)(a) and/or (c).

Although I can appreciate the concern expressed by the standards body, in my view, I have not been provided with sufficient evidence to establish any of the harms outlined in section 17(1)(a), (b) or (c) of the Act .

As stated in the published version of Record 8, the standards body is a not-for-profit organization which "maintains and operates laboratories, certification services, and a quality system registration programme for the examination, testing and classification of devices, constructions, materials and systems to determine their relation to life, fire and property hazards." In my view, the information contained in Record 8 relates to the applicant's product, not to the standards body. Given the fact that the final version of Record 8 has been published, I find that disclosure of the draft version could not reasonably be expected to result in any of the harms outlined in sections 17(1)(a), (b) or (c) with respect to either the applicant or the standards body, and this record does not qualify for exemption.

Although not directly relevant to my finding, it would seem to me that the concerns identified by the standards body regarding possible confusion over misuse of draft documents could be addressed by identifying these documents as "draft" until such time as they are finalized and published.

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 competing public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

There are two requirements contained in section 23 which must be satisfied in order to involve 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 submits that the harms identified in sections 17(1)(a), (b) and (c) could only occur if the applicant had obtained the approval of the BMEC through use of misrepresentations, inaccuracies, improper procedures or exclusion of relevant or important facts. If this were the case, then the appellant feels that section 23 should apply, because the public should have a right to be protected through the use of proper approvals, especially where fire safety is the issue.

The appellant also points out that similar information was released to him in response to a different request made under the Act, in the context of a public hearing before the Building Code Commission.

The Ministry submits that the public interest at issue in this appeal is the maintenance of public confidence in the safety of buildings in which the applicant's product is used, and that this interest is satisfied by the fact that:

- a qualified public authority (the BMEC) authorizes the use of the product;
- another qualified public authority (the local chief building official) reviews the use of the product in accordance with the BMEC

Authorization in particular construction projects; and

- the product will be tested against recognized standards by testing organizations, whose independence, integrity and technical competence are universally acknowledged.

The company submits that the release of the information contained in the records could only be of interest to a competitor, and that no public interest is present.

Based on the representations provided by the various parties, I find that the processes established under the Building Codes Act address, among other things, the public interest in maintaining building safety. A number of records submitted by the company as part of the BMEC approval process have been disclosed to the appellant as part of this public accountability process. The fact that the appellant utilized the Building Code Commission (which is a component of the Building Codes Act processes) in the past to ensure the proper use of building materials on a particular job site is, in my view, evidence which supports the adequacy of these processes in normal circumstances. In my view, I have not been provided with sufficient evidence to establish that the circumstances of this particular application give rise to a compelling public interest in disclosure of the remaining records which would clearly outweigh the mandatory section 17(1) exemption, whose purpose is to ensure that information supplied by third parties to the government under certain defined circumstances should remain confidential (Order P-561).

Therefore, I find that section 23 of the Act does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 7, 9, 10, 11, 14, pages 4-6 of Records 12 and 13, and the remaining 17 pages of Record 6.

2. I order the Ministry to disclose Record 8 to the appellant by **May 29, 1996**, but not earlier than **May 24, 1996**.

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 disclosed to the appellant pursuant to Provision 2.

Original signed by: April 24, 1996
Tom Mitchinson
Assistant Commissioner

APPENDIX

List of records identified by the Ministry as responsive to the request

1. June 6, 1995 letter from engineering consultant to the BMEC.
2. June 7, 1995 letter from engineering consultant to the BMEC.
3. May 5, 1995 letter from applicant to BMEC.
4. May 30, 1995 application from applicant to BMEC.
5. Undated two-page document describing subject matter of application.
6. Twenty-three hard copies of overhead projector slides prepared in support of application.
7. June 6, 1995 submission of engineering consultant in support of application.
8. Draft report of a standards body regarding the applicant's product.
9. May 31, 1995 report of a review body - test results of applicant's product.
10. Video taken during the review body's test.
11. Diagrams of details of joint design of applicant's product.
12. March 3, 1987 six-page evaluation report prepared for the applicant by the research corporation, including cover sheet, summary of test results, table of test results, detailed findings, and appendix.
13. March 3, 1987 six-page evaluation report, prepared for the applicant by the research corporation, including cover sheet, summary of test results, table of test results, detailed findings and appendix.
14. January 20, 1989 evaluation report prepared by a review body for the applicant.
15. Applicant's client list.
16. Disk containing information from certain records in electronic form.