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

ORDER P-1235

Appeal P-9600063

Ministry of Environment and Energy

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NATURE OF THE APPEAL:

The Ministry of Environment and Energy (the Ministry) received a request for access to an engineering report prepared to document the environmental cleanup of contaminated soil at a former service station (the Report). The requester represents a firm of consulting engineers who have been retained by a potential purchaser of the property. The request was submitted under the Freedom of Information and Protection of Privacy Act (the Act).

Pursuant to section 28 of the Act, the Ministry notified a company which had commissioned the Report which is the subject of the request (the Corporation). Counsel to the Corporation objected to the disclosure of the report on the basis that it was subject to the exemption in section 17(1) of the Act (third party information).

The Ministry then issued a decision in which it decided to disclose the Report to the requester. The Corporation appealed this decision.

This office sent a Notice of Inquiry to the Ministry, the original requester and the Corporation. Representations were received from the Ministry and counsel to the Corporation.

As the representations received from the Corporation raised some issues which required further clarification, a Supplementary Notice of Inquiry was sent to the three original parties. In addition, the owner of the property was notified and provided with all the materials previously distributed to the original requester, the Ministry and the Corporation. Supplementary representations were received from all four parties. The representations submitted by the owner were provided by counsel.

The sole issue in this appeal is whether the report is subject to the mandatory exemption in section 17(1) of the Act.

Prior to discussing the application of this exemption, I feel some background information would be useful. This information is contained in the submissions of the parties to the appeal.

BACKGROUND:

In addition to other businesses, the Corporation leases land and provides products for the operation of gas stations. In 1992, the Corporation leased certain land from the property owner for the operation of one such station, with a sublease and supply agreement back to the owner. The requester states that, at that time, he carried out an assessment of the subsurface contamination at this site and determined that contamination was present. The Corporation was then the requester's client.

On May 31, 1995, the Corporation terminated its lease, discontinued the use of the land as a gas station and returned it to the owner. The Corporation indicates that there are contractual obligations under the lease and sublease and supply agreements which continue to exist between the Corporation and the owner.

The Corporation owned the underground storage tanks at the former gas station site. Therefore, it acknowledges that under the Environmental Protection Act (the EPA), it had the statutory

obligation to remediate any contamination at the time at which it removed the storage tanks. Consequently, upon termination of the lease, the Corporation engaged the services of another firm of consulting engineers who prepared the Report at issue in this appeal. The Report is dated July, 1995.

At this time, the owner wishes to sell his property. However, he advises that he and prospective purchasers have had difficulty obtaining a ruling from the Ministry regarding the cleanliness of his property. He suggests that one of the difficulties relates to the fact that he has also been unable to obtain a copy of the Report from the Ministry as the Corporation maintains that it is confidential.

The requester states that he has prepared his own assessment of the property on behalf of his present client, the potential purchaser. He states that this assessment suggests that contamination from the site has migrated to adjacent properties. The requester notes that he has advised his client of these potential liabilities.

DISCUSSION:

THIRD PARTY INFORMATION

Section 17(1) of the Act states, in part:

> 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;

In this case, because the Ministry is prepared to disclose the Report and the Corporation objects, it is the Corporation which must provide sufficient evidence that all the requirements of the exemption have been met. The Corporation must provide sufficient evidence to establish that the Report contains the requisite type of information, was supplied to the Ministry in confidence and that one of the harms in sections 17(1)(a), (b) or (c) could reasonably be expected to occur upon disclosure of the record.

Type of Information

Both the Ministry and the Corporation submit that the Report contains scientific and technical information. The Report was prepared by a consulting firm with expertise in the field of environmental testing, analysis and remediation. The firm monitored the removal of petroleum storage and distribution facilities and petroleum-hydrocarbon impacted soil. The Report describes the tests conducted in order to ascertain the condition of the soil and water at the site. The results of the tests are analysed and conclusions reached.

Based on the submissions of the Ministry and the Corporation and my review of the Report, I find that it contains scientific and/or technical information and thus meets one of the requirements for exemption under this section.

Supplied in Confidence

To meet this aspect of the section 17(1) exemption, it must be demonstrated that the information in question was supplied to the Ministry, and that it was supplied in confidence, either explicitly or implicitly.

Both the Ministry and the Corporation submit that the Report was provided to the Ministry by the Corporation explicitly in confidence. I am satisfied that the Report was supplied to the Ministry.

With respect to whether the report was supplied in confidence, I note that, other than the title page, every page is marked "CONFIDENTIAL, trade secret and sensitive commercial information not to be disclosed to third parties without the prior written permission of [the Corporation]". The Ministry and the Corporation both submit that the Report was supplied to the Ministry explicitly in confidence, and, based on the markings referred to above, I accept these representations. Accordingly, I find that the requirement of section 17(1) that the information must have been supplied in confidence, either explicitly or implicitly, has been satisfied.

Harms

The Corporation submits that it need only demonstrate that the harms described in **one** of sections 17(1)(a), (b) or (c) could reasonably be expected to result from disclosure of the Report in order for the exemption to apply. I agree that these sections are to be read disjunctively. I will address the Corporation's arguments on the application of each of these sections. As the Corporation's submissions on the application of sections 17(1)(a) and (c) are closely interrelated, I will consider them together.

The Ministry states that it has no specific evidence of the impact of disclosing the Report. However, it has provided some useful information to which I will refer in the discussion which follows under section 17(1)(b).

Sections 17(1)(a) and 17(1)(c)

Section 17(1)(a) requires the Corporation to demonstrate that disclosure of the Report could reasonably be expected to prejudice significantly its competitive position or interfere

significantly with the contractual or other negotiations of a person, group of persons or organization. The Corporation must demonstrate that 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 in order to satisfy its section 17(1)(c) claim.

I accept the submissions of the Corporation that the application of section 17(1)(a) is not restricted to negotiations between the party requesting the information and the party seeking to prevent the information from being disclosed. I also agree with the Corporation that it is not required by this section that there be a contractual relationship between the party seeking disclosure and the one opposing disclosure.

The Corporation has essentially described three different scenarios in which, in its view, the harms outlined in these sections could reasonably be expected to occur. I will refer to them under the following headings:

(i) The Provisions of the Contract
(ii) The Costs of the Report
(iii) Potential Liability

(i) The Provisions of the Contract

The Corporation submits that the disclosure of the Report will interfere with both its contractual relations with the owner of the site as well as with its contractual rights or other negotiations at other properties. The Corporation claims that if the Report is released to a prospective purchaser, the purchaser will give it to the owner. Because the Corporation had a contractual relationship with the owner of the property which did not require the Corporation to provide a copy of the Report to the owner, the Corporation submits that disclosure at this time would significantly interfere with its contractual relations with the property owner.

Given the relationship between the requester and the prospective purchaser, and the submissions of the owner, I accept the submissions of the Corporation that there is a reasonable possibility that the owner could obtain a copy of the Report should I order it disclosed. In this regard, I also note that disclosure under the Act is disclosure "to the world" (Order M-96).

The Corporation also submits that, based on its experience, should the Report be disclosed, its network of dealers will become aware that such reports are available from the Ministry. The other dealers would then be able to obtain copies of reports related to their property although they are not required to be given them by the Corporation under their contracts.

In the Supplementary Notice of Inquiry, I requested that the parties, and in particular the Corporation and the owner, provide me with those portions of the agreement between them which relate to the provision of the Report by the Corporation to the owner. The Corporation responded by indicating that the agreements are silent on the specific issue of the provision of environmental information by it to the owner. The Corporation does indicate that the agreements are "fairly specific" in dealing with liability for environmental contamination on the property which it maintains is clearly assigned to the owner of the property. In this regard, the

Corporation has referred to specific sections of the lease and of the sublease and supply agreements. I will address the liability issue in more detail in my discussion of section 17(1)(c). In summary, the Corporation submits that the agreements it has with property owners do not oblige it to provide environmental information to such parties. Thus, should information such as that contained in the Report be disclosed under the Act, such disclosure could reasonably be expected to interfere with the contractual relations of the Corporation and the owners. In addition, the Corporation notes that negotiations with such parties could reasonably be expected to be interfered with on the basis that the owners could have negotiated for the provision of such reports had they so chosen.

I find that disclosure of the Report could not reasonably be expected to significantly interfere with the contractual relations between the Corporation and the owners on the basis of the Corporation's arguments on this point or interfere with negotiations of such contracts. In my view, merely because the agreements are silent on the issue of disclosure and disclosure might be afforded under the Act does not constitute a **significant** interference in such cases.

Frequently, as in the present case, there are pre-existing relationships between parties who are requesting information under the Act and those who are objecting to its disclosure. In my estimation, it is not sufficient for the party objecting to disclosure to maintain that because the requester had no legal entitlement to the information from the objector, that the exemption in section 17(1)(a) should apply to exempt such disclosure under the Act. Nor do I find that such disclosure could, on this basis, reasonably be expected to result in undue gain or loss so as to satisfy section 17(1)(c).

(ii) The Costs of the Report

The Corporation also objects to the fact that the requester could obtain a copy of the Report from the Ministry without paying any of the costs associated with its preparation. This is the second basis of the Corporation's submissions on the application of sections 17(1)(a) and (c).

The Corporation states that frequently owners of the property where the Corporation is removing its equipment request copies of the reports commissioned by the Corporation in order to sell or refinance their property. The Corporation states that the owners would save the costs of having such a report prepared at their own expense. This in turn would adversely impact on the Corporation's negotiating position as it generally tries to negotiate partial payment from the property owners for such reports. In this situation, the Corporation submits that it would incur undue loss while the owners or anyone else who obtains the reports at no cost would enjoy undue gains.

In the Supplementary Notice of Inquiry, the Corporation was requested to provide more detailed information on these assertions. The Corporation advises that when the Report was prepared, the owner of the property potentially might have purchased it. However, as some time has passed since the compilation of the information on which the Report is based, the Corporation states that now it would elect not to provide the Report to the owner. It would not do so as the Corporation has no information concerning the intervening use of the property and thus the current accuracy of the Report. In these circumstances, the owner of the property is not a potential purchaser of

this Report (as the Corporation will not sell it to him). The Corporation has not identified any other potential purchasers of this Report.

The Corporation notes that the cost of the Report on this site was $9,000 and that the average cost of similar types of reports ranges from $5,000 to $10,000. The Corporation states that in the past it has been able to negotiate 50% of the cost of such reports from purchasers. However, it also states that, prior to 1994, it did not release such reports to third parties except for regulators. It also indicates that it currently reserves the right not to release the reports. The Corporation does not compile records on how many reports it has sold, nor how much money it has negotiated for such reports over the past two years.

Based on the information provided by the Corporation, I cannot conclude that it has established a case under section 17(1)(a) or (c) related to the partial recovery of the costs associated with preparing the Report. With respect to the particular Report at issue in this case, the Corporation has not provided any information to indicate that there is a market for the document; a market which would be lost if it is disclosed under the Act.

As far as any other reports of this kind are concerned, the information submitted by the Corporation is insufficient to establish that disclosure of such reports **could reasonably be expected to result in such harms.** I have insufficient evidence before me on the specifics of the market and market value of such documents either since 1994 or in the future. Furthermore, given the amount of money at issue with respect to the costs of such reports, I am not convinced that, assuming the potential loss of a maximum of $5,000 per report, such amount could be said to be a **significant** interference for the purposes of section 17(1)(a) or an **undue** gain or loss for the purposes of section 17(1)(c), particularly in view of the fact that I have no information on the actual or potential sales volume.

In summary, I find that the Corporation has not provided sufficient evidence to establish that the disclosure of the **information** contained in the Report could reasonably be expected to result in the harms in section 17(1)(a) or (c) of the Act on the basis of the loss to the Corporation of the potential for recovering $4,500. Nor, on the basis of the evidence provided to me, do I find these arguments sustainable with respect to the disclosure of similar reports.

(iii) Potential Liability

The Corporation submits that it is not a party to the agreement between the prospective purchaser and the owner and that it does not want to be involved in that transaction in any way. It does not want to be in a position where the Report is used by the prospective purchaser to assist in its decision to purchase the property. In my view, this concern does not provide evidentiary support for the argument that disclosure of the Report could reasonably be expected to prejudice significantly the competitive position of the Corporation or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization under section 17(1)(a) of the Act. Nor does this assertion, in and of itself, support a section 17(1)(c) claim.

However, the Corporation has expanded on this argument in the context of section 17(1)(c).

The harms described in this section 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 Corporation again refers to the contractual relationship it had with the owner of the site in support of its section 17(1)(c) claim. That is, pursuant to the contract between the owner and the Corporation, the owner was not entitled to receive a copy of the report at no cost. The Corporation suggests that the owner could have negotiated this term and that, because it did not, it will receive an undue gain if it can now obtain the report from the Ministry at no cost.

I have already dealt with this argument under section (ii) above.

The Corporation also indicates, as in its section 17(1)(a) submissions, that when its dealer network becomes aware that such reports may be obtained for free from the Ministry, "... This would constitute undue gain for them when they have other avenues to obtain this information".

As I stated in considering this submission in the context of section 17(1)(a), I have been provided with insufficient evidence as to the markets for these reports. Accordingly, I do not find that I have been provided with sufficient evidence to support a claim of undue gain to the dealers under section 17(1)(c).

Finally, the Corporation states that it prepared the Report to provide certain information to the Ministry and for its own internal business purposes. The Corporation submits that "... Use of the report by others exposes [the Corporation], and its consultant to liability to third parties. That is a significant loss to [the Corporation]." The Corporation states that it is aware of the identity of the requester and that "... the purchaser's consultant is requesting the report in order that it can rely on the report in making recommendations to the prospective purchaser ...".

The Corporation has elaborated on these submissions in its representations in response to the Supplementary Notice of Inquiry. It states that both the legislation and property conditions change from time to time. In addition, there are a number of limitations on the scope of the work given to consultants. The Corporation expresses its concern that if third parties rely on such reports to their detriment, it expects that it would be exposed to claims by those third parties. Regardless of the outcome of such claims, the Corporation does not want to expose itself to the legal costs of defending such claims.

The requester notes that he carried out an independent Phase II Environmental Site Assessment on the property for his client. This assessment found contamination exceeding the Ministry's cleanup Level II both within the property as well as at the property boundary adjacent to a highway. He notes that his client may be still interested in purchasing the site if the environmental liabilities can be clearly defined. He indicates that these liabilities depend greatly on the decisions and cleanup efforts carried out by the Corporation as detailed in the Report. He states that unless the Report becomes available for his client, it will not purchase the property and will, therefore, have:

> ... wasted in excess of $5,000 (including the cost of this current process) because a **perception that the site has been properly cleaned up was given by [the Corporation] and evidence to the contrary was found** [original emphasis].

The requester has not elaborated on this assertion. I have no information as to when this claim as to proper clean-up was allegedly made, to whom or the circumstances under which it was given.

The Corporation indicates that the agreements between property owners who act as agents for the Corporation and the Corporation clearly impose obligations on the property owners for the responsibility for the care and control of the gasoline. This is evidenced by certain provisions of the agreements provided to me by the Corporation and the owner. The Corporation notes as well, that under the terms of the Gasoline Handling Act (the GHA) operators of retail outlets have certain obligations to safeguard the environment. The Corporation asserts that the policy rationale behind this is clear. That is, those who have care and control of the gasoline should be directly responsible for ensuring that it does not leak from the underground storage tanks. In this case, the operator was the property owner.

The GHA also imposes obligations on owners of underground storage tanks to remediate any contamination at the time the underground tanks are decommissioned. In this case, as I have previously indicated, the Corporation owned the tanks on the owners property. Therefore, the Corporation, rather than the owner, engaged the services of the environmental consultant who prepared the Report. The Corporation submits that it carried out this statutory obligation despite the fact that the contractual arrangement is that the property owner is obliged to bear the cost of environmental contamination on the property. The Corporation thus submits that:

> ... To allow the owner of the site to obtain information on his site without payment, sends a clear message that it is not his responsibility or his cost to safeguard the environment. In our view, this is not a message which should be sent.

I do not accept this submission. If, as the Corporation suggests, the owner has certain responsibilities for safeguarding the environment, I do not believe that the receipt of information about its condition is connected to an abrogation of these responsibilities.

Records in the custody or under the control of government institutions are subject to disclosure under the Act. It would seem to me that frequently records which were originally prepared for one purpose are used for another, potentially very different purpose, if they are disclosed under the Act. In my view, a claim of undue loss or gain is not established merely because this subsequent use is not the same as, or perhaps is even potentially inconsistent with that originally intended. Furthermore, given that disclosure under the Act is "disclosure to the world", there is no control over, or restrictions placed on, the use of such information.

In my view, the Corporation's "potential liability" argument under section 17(1)(c) can succeed only if it can demonstrate that disclosure of the information in the Report could reasonably be expected to result in undue loss to the Corporation (and potentially undue gain to another party). The reasonable expectation of the undue loss in the form of "potential liability" must be incurred by the Corporation not as a result of any other information provided by the Corporation, nor any

other extraneous circumstances. It cannot be "liability at large"; it must be that arising from disclosure of the Report.

The only specific concerns the Corporation has identified which might lead to detrimental reliance on the part of third parties (and potential liability on its part) are those of legislative and property changes as well as limitations on the scope of the work given to the consultants. The Report clearly outlines the scope of the work undertaken by the consultants as well as their mandate. It is dated July, 1995; environmental legislation in effect at that time is a matter of public record. The Report outlines the condition of the property at that time.

I have referred to the Corporation's extensive submissions on its responsibilities and those of the owner/operator under the contract, the EPA and the GHA. In my view, based on this information, to some extent it is not clear who is responsible for what. The owner submits that it is the Corporation which "... is obliged by statute law and by contractual law to return the land to what it was before it was used as a gas station". Regardless of this uncertainty, the Corporation admits that as owners of the tanks it was responsible for their removal and the remediation of any contamination at that time. This is the information contained in the Report. Under the Act, it is the potential harms that could reasonably result from the disclosure of this information which is at issue before me.

Having considered all of the above, I find that the Corporation has provided me with insufficient evidence to find that disclosure of the Report could reasonably be expected to result in "potential liability" and therefore loss or gain to any person under section 17(1)(c) of the Act. Furthermore, given that the information was compiled as a result of its statutory obligation to remediate any contamination at the time of the tank removal, in the event that the Corporation was exposed to such a claim, I would not find that any loss or costs so incurred in these circumstances would be "undue", nor that any gain which inured to another party was "undue". Accordingly, I am not satisfied that 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" within the meaning of section 17(1)(c).

Section 17(1)(b)

In order to meet the requirements of section 17(1)(b) of the Act, the Corporation must demonstrate, 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.

[Order P-604]

The Corporation acknowledges that it has certain reporting obligations to the Ministry when former service station sites are being decommissioned, but notes that the obligations exist only under voluntary guidelines. The Corporation submits that it is in the public interest that as much

information as possible be disclosed to the Ministry in order to assure the Ministry, and consequently the public, that the site conditions have been appropriately dealt with. If the Report is disclosed, the Corporation submits that, in the future, it will only provide the Ministry with the minimum information required by law which would not be as extensive as that provided in this particular case.

The Ministry states that it prefers to receive reports such as the one at issue voluntarily. However, it states that pursuant to section 18 of the Environmental Protection Act (the EPA), the Director can issue an order to require production of "such a report" and that "... In such situations, the Ministry will order sufficient information to be able to undertake their mandate".

I accept the Corporation's submissions that it is in the public interest that as much relevant information as possible continue to be supplied to the Ministry in situations such as the one which resulted in the creation of the Report. However, given that the Ministry has the statutory authority to compel the Corporation to provide it with sufficient information to satisfy its obligations under the EPA, I am of the view that disclosure of the report could not reasonably be expected to result in the Corporation no longer providing information to the Ministry. Even if the Corporation were not to provide as much detailed information in the future, the Ministry will still be able to obtain production of the information necessary to satisfy the "public interest" element of this section. Therefore, I find that section 17(1)(b) does not apply.

To summarize, as the Corporation has not established that the harms outlined in any of sections 17(1)(a), (b) or (c) could reasonably be expected to occur should the Report be disclosed, I find that the third requirement for the application of the section 17(1) exemption has not been met. Accordingly, the Report is not exempt under section 17(1).

ORDER:

1. I uphold the decision of the Ministry to disclose the Report.

2. I order the Ministry to disclose the Report to the requester by sending him a copy by **August 27, 1996** but not before **August 22, 1996**.

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 Report which is disclosed to the requester pursuant to Provision 2.

Original signed by: July 23, 1996
Anita Fineberg
Inquiry Officer