



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

# ORDER P-1306

Appeal P\_9600266

Ministry of Environment and Energy



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## **NATURE OF THE APPEAL:**

The Ministry of Environment and Energy (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for information relating to an Environmental Technologies Program grant awarded to a named company (the company).

The Ministry identified 74 records as being responsive to the request and determined that the interests of the company would be affected by disclosure of some of the information. The Ministry notified the company pursuant to section 28 of the Act, and requested representations with respect to release of the records. The company objected to the disclosure of any information.

Subsequently, the Ministry issued its decision letter and denied access in part to the records based on the exemption in section 17(1) of the Act. The Ministry also claimed section 22(a) of the Act to withhold patent information contained in Record 32.

The company filed a third party appeal, objecting to the partial disclosure, and Appeal Number P-9600178 was opened. Following settlement of that appeal, the requester (now the appellant) filed an appeal of the decision of the Ministry to grant only partial access, and Appeal Number P\_9600266 was opened. It is this appeal which is at issue in this inquiry.

During mediation, the appellant indicated that he is only seeking access to the information withheld from Records 1, 9, 14, 16, 21, 29, 32 and 70. The appellant also took the position that further records responsive to his request should exist.

Also during mediation, the Ministry withdrew its reliance on section 22(a) of the Act to withhold the patent information contained in Record 32. The Ministry confirmed that it is still relying on section 17(1) to withhold this information.

This office provided a Notice of Inquiry to the appellant, the Ministry and the company. Representations were received from all three parties. In its representations, the Ministry indicates that it withdraws its reliance on section 17(1) with respect to a number of portions of the records at issue. However, since the company continues to object to their disclosure, they remain at issue.

## **RECORDS:**

There are eight records at issue in this appeal. Record numbers are those assigned by the Ministry in its index. Records 1, 16 and 21 are project summaries. Record 9 is a briefing note. Record 14 is a transmittal sheet from the Environmental Technologies Program Unit. Record 29 is entitled "Projected Disbursement of Government Funding". Record 32 is correspondence from the company to the Ministry with an attachment. Record 70 is an internal Ministry memorandum. Of these, only Record 70, as well as the attachment to Record 32, were entirely withheld from disclosure. All other records were only partially withheld.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the parties resisting disclosure, in this case the Ministry and/or the company, 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 section 17(1) will occur.

### **Type of Information**

The Ministry and the company submit that the records contain commercial and financial information and that some of the records also contain information of a technical or scientific nature. In reviewing the records, I am satisfied that they all contain one or more of the types of information referred to by the Ministry and the appellant, and the first part of the test has been met.

### **Supplied in Confidence**

The second part of the test has two elements. First, the information must have been supplied to the Ministry, and second, the information must have been supplied in confidence.

Record 32 is a letter from the company to the Ministry. Records 1, 9, 14, 16, 21, 29 and 70 are Ministry generated documents. Many orders issued by the Commissioner's office have held that information contained in a record would reveal information "supplied" by a third party, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P\_218, P\_219, P-228, P\_451, P-472 and P\_581).

I am satisfied that Record 32 was supplied by the company to the Ministry and that the information which has been withheld from the remaining records would reveal information which was supplied to the Ministry by the company.

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 17(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.

In its representation, the Ministry states that its practice is to keep all applications and subsequent documentation confidential and that this practice is communicated to and is understood by companies or individuals submitting such information. The company asserts that all of the information supplied to the Ministry in respect of its application was supplied on a clear understanding that it was to be treated confidentially. In the circumstances of this appeal, I find that the company had a reasonable expectation of confidentiality at the time the information was supplied, and the second part of the test has therefore been met.

### **Harms**

In its representations, the Ministry indicates that it withdraws its objection to the release of the following portions of the records:

- all of the information in Record 1 except for item 2 under the heading “ETAC Recommendation”;
- the information withheld under the third bullet point under the heading “Background”;
- all of the information in Record 14 except for the company names identified in the record;
- all of the information on pages 1 and 4 of Record 21 and the dollar amount under the heading “Amount Requested” on page 2 of Record 21.

With respect to the remaining information, the Ministry states that it has no specific knowledge of any harm that would ensue from disclosure of the records.

The appellant has submitted detailed representations outlining his reasons for wanting access to the records. He details his own dealings with the Environmental Technologies Program and his views regarding his treatment by the Ministry in respect of these dealings and in general. It is very clear from his representations, that the appellant has a serious dispute with the Ministry. He concludes by saying that “as a taxpayer whose taxes contributed to the funding of this grant, as a business person whose product’s success has been compromised by the Ministry’s actions, it is fair and just to expect and receive full disclosure”.

The company has also provided extensive representations in support of its position that the harms in sections 17(1)(a), (b) and (c) will result from disclosure of the information.

With respect to section 17(1)(b), the company asserts that if the information is released it will no longer be able to supply information to any arm of the Government of Ontario.

In essence, the company’s representations regarding sections 17(1)(a) and (c) indicate that it is disturbed that, as a small, private commercial enterprise, it must respond to an access request,

and be required to provide information regarding a product which it has worked hard to develop. The company is particularly concerned about disclosure of any information that would identify the names of or any arrangements it has made with other parties in connection with the development of its product as these connections have taken time and considerable effort to establish. Moreover, the company argues that many agreements it has made with other parties contain two-way confidentiality clauses, and its relationship with these parties would be compromised by disclosure of information which would identify them.

The company refers to the information contained in specific records and simply states that this is "private commercial information", and release of this information will cause it "significant commercial harm". With respect to Record 32, the company indicates that in its view, this record refers to its relationship with its lawyers and contains a legal opinion and is thus protected by solicitor-client privilege. The company submits that disclosure of this record would cause it "serious commercial harm".

The company sums up its concerns regarding disclosure of the records as follows:

[N]ot only is each individual bit of information commercially damaging, but the collective value of a lot of little bits, combined with a reasonable amount of intelligence provides our competitor with a broader understanding of our costs, our partners, our technical know-how, our customers, etc.

In reviewing the information at issue, I find that the portions of the records identified above (for which the Ministry has withdrawn its objection) relate to Ministry commitments to the project or requirements which must be met in order for the project to receive Ministry support. I am not persuaded that disclosure of this information would result in any of the harms in the section. As the third part of the test has not been met for this information, it should be disclosed to the appellant.

However, after considering the representations of the parties, I find that disclosure of information which would identify any parties with which the company has commercial relations could reasonably be expected to interfere with the contractual relations of the company vis a vis these other parties. I also find that disclosure of the remaining information impacts directly on the development and commercialization of the company's product and that its disclosure could reasonably be expected to result in the harms in section 17(1)(a). Accordingly, I am satisfied that the third part of the test has been satisfied regarding this information and it is properly exempt under section 17(1).

## **REASONABLENESS OF SEARCH**

Where a requester provides sufficient details about the records which he is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further 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.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

During mediation, the appellant indicated to the Appeals Officer that he believed more records should exist. Specifically, he was of the opinion that the Ministry should have in its possession records relating to the issue of exclusivity of the product and the worldwide proprietary rights. He did not address this issue in his representations, however.

The Ministry indicates that the Manager of the Environmental Technology Development program at the Research and Technology Branch at the time the application was submitted is presently the Co-ordinator of the same program at the Industry Conservation Branch, which has taken over responsibility for the program (the Manager). The Manager was responsible for overseeing the program area's search for records responsive to the request. He indicated that a search was conducted on electronic and hardcopy files related to the project. He indicated further that the Liaison Officer for the project had forwarded all documents in his possession to the master project file at the Industry Conservation Branch, and that no other records are maintained. The Manager confirmed that the file which was forwarded to the Ministry's Freedom of Information and Privacy office contained all transactions recorded on the project from application to the present.

Having reviewed the representations provided to me, I am satisfied that the Ministry has made a reasonable effort to identify and locate records responsive to the request.

## **ORDER:**

1. I order the Ministry to disclose to the appellant the information described below, by sending him a copy of this information by **January 2, 1997**, but not earlier than **December 30, 1996**.
  - all of the information in Record 1 except for item 2 under the heading "ETAC Recommendation";
  - the information withheld under the third bullet point under the heading "Background";
  - all of the information in Record 14 except for the company names identified in the record;
  - all of the information on pages 1 and 4 of Record 21 and the dollar amount under the heading "Amount Requested" on page 2 of Record 21.
2. I uphold the Ministry's decision to withhold the remaining portions of the records at issue.

3. The Ministry's search for records responsive to the request was reasonable in the circumstances and this part of the appeal is dismissed.
4. 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 1.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ November 27, 1996