



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

ORDER P-1354

Appeal P_9600399

Ministry of the Environment and Energy



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NATURE OF THE APPEAL:

The Ministry of the Environment and Energy (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a specified property in the City of Scarborough. The requester is the purchaser of a home being built on land formerly used for industrial purposes. She is seeking any information held by the Ministry which refers to the contamination of the land or the ground water beneath it. The Ministry located a number of responsive records and, with two exceptions, granted access in full to the requester.

With respect to the two remaining documents, the Ministry determined that the interests of a third party (the Corporation) could be affected by their disclosure. Accordingly, pursuant to section 28 of the Act, the Ministry sought the Corporation's views regarding the disclosure of the records to the requester. The Corporation objected to the disclosure of the records. The Ministry then decided to disclose them to the requester. The Corporation, now the appellant, appealed that decision on the basis that the records are exempt, pursuant to the mandatory exemption contained in section 17(1)(b) of the Act.

A Notice of Inquiry was provided to the appellant, the Ministry and the original requester. Representations were received from the Ministry only. The appellant indicated that he wished to rely on the submissions which were made to the Ministry in response to the section 28 notice and in his letter of appeal.

The records in dispute consist of an environmental report dated February 13, 1991 and a draft project status report dated April 11, 1994.

DISCUSSION:

THIRD PARTY INFORMATION

Section 17(1)(b) states:

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,

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;

In this case, because the Ministry is prepared to disclose the reports and the appellant objects, it is the appellant who must provide sufficient evidence that all the requirements of the exemption have been met. The appellant must provide sufficient evidence to establish that the reports

contain the requisite type of information, were supplied to the Ministry in confidence and that the harm in section 17(1)(b) could reasonably be expected to occur upon disclosure of the records.

Type of Information

Both the Ministry and the appellant submit that the records contain scientific and technical information. Based on the submissions of the Ministry and the appellant, as well as my review of the records, I find that they contain scientific and/or technical information and thus meet the first 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 appellant agree that the records were provided to the Ministry by the appellant, or the consultants engaged by the appellant, and I have no difficulty in so finding. The appellant submits that the 1991 report was marked "Privileged and Confidential - for the Purposes of Legal Advice" by the consulting firm who prepared it and that it was voluntarily provided by the appellant directly to the Ministry "in confidence", in order to obtain the Ministry's advice and assistance. The Ministry concurs that the 1991 report was submitted to it with an explicit expectation of confidentiality. I have reviewed this document and the submissions of the parties and agree that the second part of the section 17(1)(b) test has been met with respect to the 1991 report.

The 1994 report was sent by facsimile to the Ministry by the consultants retained by the appellant, at the request of the appellant. The cover page which accompanied the report was marked "privileged and confidential". The appellant and the Ministry submit that this indicates that this record was provided to the Ministry with an explicit expectation of confidentiality. I agree, and find that part two of the section 17(1)(b) test has been satisfied with respect to this document as well.

Harm

In order to meet the requirements of section 17(1)(b) of the Act, the appellant 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 Ministry; and
2. it is in the public interest that similar information continue to be supplied to the Ministry in this fashion.

[Orders P-604 and P-1235]

The appellant submits that landowners are not compelled to produce to the Ministry studies respecting environmental issues which they commission at their own expense. They continue to do so, however, in order to assist the Ministry in its enforcement and regulatory obligations. The appellant argues that the “cooperation shown by the parties in its confidential dealings with the Ministry should not in any way be eroded by any disclosure to the public”. In addition, the appellant suggests that it is:

in the public interest that parties be free to voluntarily supply information to the Ministry in confidence in order to obtain the Ministry’s cooperation in the assessment and implementation of any actions which may be volunteered, recommended or required.

Finally, the appellant submits that disclosure of these records will impede the Ministry’s ability to carry out its mandate should parties refuse to cooperate in the supply of information.

The Ministry states that while it prefers to receive reports such as the one at issue voluntarily, 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 appellant’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 records. 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 the disclosure of the reports could not reasonably be expected to result in the appellant, and other property owners, no longer providing information to the Ministry.

Further, even if the appellant and other property owners no longer provided 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 through the issuance of an order under section 18 of the EPA. Therefore, I find that section 17(1)(b) does not apply to exempt these documents from disclosure.

To summarize, as the appellant has not established that the harm outlined in section 17(1)(b) could reasonably be expected to occur should the records be disclosed, I find that the third requirement for the application of the section 17(1) exemption has not been met. Accordingly, the records are not exempt under section 17(1).

ORDER:

1. I uphold the decision of the Ministry to disclose the records.
2. I order the Ministry to disclose the records to the requester by sending her a copy by **March 30, 1997** but not before **April 4, 1997**.

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 records which are disclosed to the requester pursuant to Provision 2.

Original signed by: _____

Donald Hale
Inquiry Officer

_____ February 28, 1997