



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

ORDER P-1347

Appeal P_9600355

Ministry of Citizenship, Culture and Recreation



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant is an archaeological researcher who is writing a book on Indian sites in certain regions of the province. He submitted a request to the Ministry of Citizenship, Culture and Recreation (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to the reports prepared by two named consultants. The reports dealt with matters the appellant is investigating for his book.

Pursuant to section 28 of the Act, the Ministry notified the consultants of the request. One consultant consented to the release of her report and this document was disclosed to the appellant. The other consultant declined to consent to the disclosure of his reports, claiming that they were exempt from disclosure under section 17(1) of the Act (third party information).

The Ministry then issued a decision to the appellant denying access to the reports on this basis.

The appellant filed an appeal of this decision. The Ministry issued a supplementary decision in which it claimed that the reports were also exempt from disclosure on the basis of sections 14(1)(l) (facilitate the commission of an unlawful act) and 18(1)(a)(valuable government information) of the Act.

A Notice of Inquiry was sent to the Ministry, the appellant and the consultant. Representations were received from all three parties. In his representations, the appellant clarifies that he is not seeking information on the site locations. He thus indicates that he does not require any information on the lot and concession of these sites or any maps which identify the sites. However, he continues to seek access to those portions of the reports, including maps, which show the details of the site excavations.

The records at issue are:

- (1) Report on Stage II on an Archaeological Resource Assessment of the Proposed [named company] NPS 48 Hamilton to Milton Loop Hamilton Take-Off to Milton Tie-In, dated January 1992 and the related appendices.
- (2) Report on the 1992 Stage III Archaeological Investigations of the Proposed [named company] NPS 48 Hamilton to Milton Loop Hamilton Take-Off to Milton Tie-In, dated January 1993 and the related appendices.

These reports document an archaeological assessment of a proposed natural gas pipeline which is the subject of a contract between the consultant and the named company. In this order, I will refer to the named company as the "principal" and the records at issue as the "Reports".

DISCUSSION:

THIRD PARTY INFORMATION

Sections 17(1)(a), (b) and (c) of the Act state as follows:

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.

Type of Information

The Ministry submits that the records reveal scientific information concerning the archaeological assessments of the sites along the proposed gas pipeline routes. It is the position of the Ministry that "archaeology is recognized as an organized field of knowledge with natural, physical and social science components". The reports and appendices set out the rationale, methods and results of the archaeological fieldwork. The fieldwork was conducted by the consultants who are the holders of an archaeological consulting licence.

The Ministry states that the information may also be characterized as "technical", as the assessments "contain a significant amount of applied scientific components". Finally, the Ministry notes that the records reveal the commercial information of the consultant's client.

In Order P-454, former Assistant Commissioner Irwin Glasberg set out a definition of both "scientific" and "technical" information. He commented that "scientific" information is information belonging to an organized field of knowledge in either natural, biological or social sciences or mathematics. It must relate to the observation and testing of certain hypotheses or conclusions and be undertaken by an expert in the field.

"Technical" information is information belonging to an organized field of knowledge which would fall under the general category of applied science or mechanical arts, such as architecture, engineering or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process or thing.

I agree with these definitions and will apply them to the information in this appeal. Based on my review of the Reports and the submissions of the Ministry, I find that the Reports contain scientific and technical information, thus meeting 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.

The Ministry states that the records were supplied by the consultant pursuant to its reporting obligations under section 65 of the Ontario Heritage Act (the OHA). This requires archaeological licensees, such as the consultant, to furnish the Ministry with a report of their field work containing the details of the work done, details of the artifacts, a description of the site, stratigraphic information and the location of the site. These reports are known as Assessment and Mitigation Reports. On this basis, I am satisfied that the information was supplied to the Ministry by the consultant.

I must next determine if the Reports were supplied "in confidence".

The appellant reiterates that the Reports are required by law under the OHA and that they contain valuable information which can be used to learn about our heritage. Information does not automatically lose its confidential character simply because it is provided to an institution pursuant to a mandatory reporting requirement (Order P-345).

The appellant continues:

... the only information which now exists is in the reports on file at the Ministry and the field notes and artifacts in [the consultant's] possession. The purpose of archaeological assessments and mitigation is to save artifacts and data from destruction and to make this information available to scholars such as myself.

Both the Ministry and the consultant maintain that the Reports were supplied in confidence.

Report 1 states "Not to be Cited without the Written Permission of the Author". Report 2 states "Not to be Cited Without the Written Permission of [the consultant]". Both reports are stamped as having been received by the Ministry on May 19, 1994.

At that time, the Ministry had a practice in place whereby it would make such reports available, for viewing purposes only, to a restricted group of persons, such as licenced archaeologists, researchers undertaking legitimate archaeological research (such as academics), provincial ministries or agencies or municipalities. However, the Ministry did not release copies to, or allow copies to be made by third parties requesting the data unless the written permission of the author was first obtained.

In 1996 the Ministry decided to review its practice of allowing archaeologists and researchers to view the reports without obtaining prior permission of the authors. During this review period, the Ministry has advised anyone wishing to view Assessment and Mitigation reports to make a request under the Act. The appellant's request was made during this review period.

In my opinion, it is clear that when the Reports were supplied to the Ministry, copies would not be provided to the appellant unless the consent of the consultant had been obtained. The notations on the Reports previously referred to confirm that this was the consultant's

understanding of the process. In fact, the appellant notes that, prior to making his request under the Act, he wrote to the consultant requesting access to the Reports. The consultant did not respond.

Based on the information provided by the Ministry and the consultant, I am satisfied that the consultant held a reasonable expectation of confidentiality when he supplied the Reports to the Ministry. This satisfies the second requirement for exemption under section 17(1) of the Act.

Harms

In addition to requiring the Reports for his book research, the appellant indicates that he is planning future research in the area, including excavations at one of the sites detailed in the Reports and possibly at the other site as well. The information contained in the Reports is also necessary for him to plan this future research.

In his submissions, the consultant acknowledges that he is aware of the appellant's identity as the appellant contacted the consultant's principal. Based on the appellant's stated use of the information contained in the reports, the consultant argues that disclosure of the information could reasonably be expected to prejudice his competitive position or interfere significantly with his contractual negotiations with his principal. These are the anticipated harms set out in section 17(1)(a) of the Act.

The consultant explains that his company has competed with the appellant in the past for archaeological consulting contracts. He notes that his principal will require additional work on the two sites prior to the completion of the pipeline work. In his opinion, should the appellant obtain the two Reports, he will attempt to compete with him for future contracts.

In addition, the consultant submits that he hopes to publish the results of his discoveries once the excavations and analyses of the sites are completed. Given the appellant's stated intention to publish a book, the consultant is concerned that disclosure of the Reports could assist the appellant in publishing first and thus interfere with his competitive position on this basis as well.

Based on his submissions, I find that the consultant has established that disclosure of the Reports could reasonably be expected to result in the harms set out in section 17(1)(a) of the Act.

Both the Ministry and the consultant maintain that section 17(1)(b) is also a relevant consideration in this case. That is, they state that disclosure of the Reports 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".

As noted previously, the Reports were provided to the Ministry pursuant to section 65 of the OHA. As a minimum, 14 points of information must be included in each report under Regulation 881 of the OHA. However, as the Ministry has often found that such information is inadequate, it has developed a set of advisory guidelines which require additional information. The quality of a report which meets this standard is much higher than that required by the statute and regulation. The Reports at issue meet the guidelines standard.

Both the Ministry and the consultant submit that if an archaeologist feared that his report would be disclosed, it could reasonably be expected that he would provide a much less detailed report. The Ministry states that the information contained in the Assessment and Mitigation Reports contributes enormously to the wealth of knowledge concerning the heritage of Ontario. Thus it is in the public interest that the Ministry continue to receive as much detailed information as possible on these sites.

I agree that information of this nature will be more likely to be provided to the Ministry when professionals, such as the consultant have the confidence to know that materials will not be subject to disclosure outside the Ministry. I also agree that there is a public interest in ensuring that information related to these activities continue to be supplied to the Ministry. Thus, I find that the harms described in section 17(1)(b) could reasonably be expected to occur if the Reports are disclosed.

In summary, I find that, in the circumstances of this case, the Reports are exempt under section 17(1) of the Act. Therefore, I need not consider the application of the other exemptions claimed by the Ministry.

I would like to note that the consultant has acknowledged that the information contained in the Reports will not remain confidential forever. He states that when his principal applies to the Ontario Energy Board for leave to construct a pipeline, the information on the discoveries, including the Reports, will be released as part of the public record. However, until that time, he maintains, and I accept, that the Reports are subject to the exemption in section 17(1) of the Act.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Anita Fineberg
Inquiry Officer

February 18, 1997