



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-1595

Appeals P-9800081 and P-9800126

Ministry of the Environment



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NATURE OF THE APPEALS:

This order addresses the issues arising from the third party appeals of two decisions made by the Ministry of the Environment (the Ministry) to disclose information relating to the appellant. The requests which led to these appeals were filed on separate dates by the same requester. Both requests, made pursuant to the Freedom of Information and Protection of Privacy Act (the Act), were for access to information pertaining to two different cemeteries located in Toronto. The two cemeteries are represented by the same consultant in these proceedings. The consultant filed appeals of the Ministry's decisions on behalf of the two cemeteries and I will refer to the cemeteries collectively as the appellant in this order. Two appeal numbers were assigned to the requests, however, because the parties are the same and the issues are similar, I will address both appeals in this order. I will describe the particulars of each request and decision below under the assigned appeal number.

Appeal P-9800081

The first request was for access to all documentation regarding a Certificate of Approval issued April 2, 1997 for a crematorium at a named Cemetery operated by the appellant.

The Ministry located records responsive to the request and determined that the interests of the named Cemetery would be affected by disclosure of the information. The Ministry notified the appellant and requested representations with respect to the release of the documentation relating to the crematorium.

The appellant objected to the release of the records to the requester based on section 17 of the Act. The Ministry then issued a decision granting the requester partial access to the records and denying access to the remainder of the records based on the exemptions in sections 17(1)(a) and 17(1)(c) of the Act. The appellant appealed the decision to grant access to any records. (The requester did not appeal the Ministry's decision to deny access to the remainder of the records.)

Appeal P-9800126

The second request was for access to the Certificate of Approval, any previous Certificates of Approval and any complaint records for crematoria at a number of named cemeteries including that operated by the appellant. The Ministry located records responsive to the request and again determined that the interests of the cemeteries would be affected by disclosure of the information. The Ministry notified the cemeteries, including the appellant, and requested representations with respect to the release of the documentation relating to their crematoria. (Although a number of cemeteries were included in the request, this appeal only deals with one of them).

The appellant also objected to the release of the records responsive to this request to the requester based on section 17 of the Act. The Ministry then advised the requester that no records were located at the Ministry's Spills Action Centre. It also granted partial access to records held by the Ministry's Toronto District Office and to the records held by the Approvals Branch. The Ministry denied access to information on the burner unit and "supporting information" for the cremator based on section 17(1) of the Act. In addition, access to information about complaints was denied under section 21(1) of the Act. The appellant appealed the decision to grant access to

any of the records located at the Approvals Branch. (The requester did not appeal the Ministry's decision to deny access to the remainder of the records, or the fact that no records existed at the Spills Action Centre.)

Results of Mediation

During mediation, the appellant consented to the release of Records 1, 3, 4, 5, and 10 in Appeal P-9800081 and Records 1, 7, 11, 12, and 13 in Appeal P-9800126 to the requester. The Ministry was advised of this and indicated it would be releasing these records to the requester. Accordingly, these records are no longer at issue in this appeal. However, it is not clear whether the Ministry has yet disclosed these records to the requester. Therefore, I will include an order provision requiring the Ministry to do so.

This office provided Notices of Inquiry for each appeal to the Ministry, the appellant and the requester. Representations were received from the appellant and the Ministry.

RECORDS:

The records at issue in Appeal P-9800081 consist of an application for approval (air), mass balance, heat balance and retention time calculations, a letter from an environmental consultant to the Ministry, typed and handwritten calculations and drawings of the consultant, a land survey and an engineering assessment.

The records at issue in Appeal P-9800126 consist of applications for approval (air), certificates of approval, a one-page document titled "Burners and Combustion Air", handwritten calculations of the consultant, a one-page document titled "Approvals Record for Emission Inventory Update" and an engineering assessment.

PRELIMINARY MATTER:

In its representations, the Ministry indicates that information in a portion of the record which had been withheld in Appeal P-9800126 was included in a record which is to be made available to the public. Accordingly, the Ministry advises that it has changed its decision with respect to this request and is prepared to provide the requester with full access to the records.

The appellant has indicated that it objects to the disclosure of any information pertaining to the two cemeteries. Therefore, the additional information which the Ministry is prepared to disclose is also at issue in this appeal.

DISCUSSION:

THIRD PARTY INFORMATION

As I indicated above, the Ministry has decided to release records pertaining to the appellant and the appellant objects. In third party appeals, section 53 of the Act has been interpreted by this office as placing the onus of proof of the elements of the section on the party resisting disclosure.

Therefore, for a record to qualify for exemption under section 17(1)(a), (b) or (c), the appellant 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 institution 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.

[Order 36]

All three parts of the test must be satisfied in order for the exemption to apply.

Type of Information

The Ministry indicates that the records contain information which is the result of a technical study by staff of a consulting firm who are experts in the field of the environmental impact of crematoriums. As such, the Ministry acknowledges, and I agree, that the records contain scientific and technical information. Therefore, the first part of the test has been met.

Supplied in confidence

In order for this part of the section 17(1) test to be met, the information must have been supplied to the Ministry in confidence, either implicitly or explicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

The Ministry indicates that in section 12 of the application for a Certificate of Approval, the proponent is informed that information contained in the application is subject to the Act and the Environment Bill of Rights, which is a mechanism for making certain types of information available to the public. The Ministry advises further that its guideline for completing the application states that all records submitted to the Ministry are subject to the provisions of the Act. The Ministry states that while it generally keeps applications and all supporting documentation confidential as this information often has scientific, technical, commercial or business value to the proponent, it takes the position that the records at issue do not contain this category of information. Despite this, however, the Ministry acknowledges that the appellant submitted its documentation to it explicitly in confidence.

The appellant points to the information noted on page 3 of the relevant application forms as evidence that the records were supplied explicitly in confidence.

I accept that the information contained in the records was either actually supplied to the Ministry by the appellant or that its disclosure would reveal information supplied by the appellant.

In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the issue of confidentiality in the equivalent of section 17(1) found in section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act:

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(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. [emphasis added]

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

I accept that the appellant had a reasonably held expectation that some of the records were being supplied by it in confidence. Therefore, the second part of the test has been met regarding these records. However, I am not persuaded that the appellant's expectations regarding the confidentiality of the following records was reasonable: Appeal P-9800081 - Records 7, 8, 9, 18, the second page of Record 19, and Records 20 and 21; Appeal P-9800126 - Records 4, 6, 8, 9, 10 and 14. My reasons are as follows.

The Ministry advises that the Environmental Protection Act (the EPA) requires that certain types of information be made available to the public.

In particular, section 19(1) of the EPA provides that Certificates of Approval are to be made available to any person making an inquiry (Records 6 and 8 in Appeal P-9800126). The Ministry indicates that Record 21 (Appeal P-9800081) and Records 9 and 10 (Appeal P-9800126) contain assessments and/or a summary of the process and impact on the environment

by the engineering staff at the Approvals Branch of the Ministry and that this information is similar to that included in the Certificate of Approval.

Further, the Ministry indicates that, based on section 168 of the EPA, information about contaminants released to the environment are considered public information. Records 7, 8, 9, 18, the second page of Record 19 and Record 20 (Appeal P-9800081) all contain information about the environmental impact of operating the crematoria units. Record 4 (Appeal P-9800126) is the "supporting information" submitted with the application for a certificate of approval and contains information about heat requirements and the environmental impact of operating the crematoria. Record 14 (Appeal P-9800126) contains two assessments conducted in 1984 by the Ministry's Toronto regional engineer which pertain to the environmental impact of operating the crematoria units.

In my view, the appellant is experienced in both industry and legislative requirements concerning the construction and operation of crematoria units and should be familiar with the above noted provisions of the EPA. In view of this, I find that it would not be reasonable for the appellant to expect that information contained in or of a similar nature to that contained in the Certificates of Approval or pertaining to the environmental impact of the operation of the crematoria, was supplied to the Ministry in confidence. This is the case whether the information was supplied directly by the appellant or whether the disclosure of Ministry calculations would reveal information supplied by it. Accordingly, I find that the appellant has not established the application of the second part of the test for these records. Therefore, they are not subject to the protection of section 17(1) and should be disclosed to the requester.

Harms

I found above that the protections of section 17(1) are not available to the following records: Appeal P-9800081 - Records 7, 8, 9, 18, the second page of Record 19, and Records 20 and 21; Appeal P-9800126 - Records 4, 6, 8, 9, 10 and 14. Therefore, the following discussion pertains only to the following records: Appeal P-9800081 - Records 2, 6 and the first page of Record 19; Appeal P-9800126 - Records 2, 3 and 5.

In its representations, the appellant submits that disclosure of the records would result in the harms described in paragraphs (a), (b) and (c) of section 17(1). In support of its position the appellant states that:

... production data, contaminant emission summary, heat and mass balance, unit design drawings, supporting information for estimate of contaminant emissions, dispersion calculations are based on detailed design of the crematoria which has been the product of constant research and development and design amendments as [Ministry] criteria changes.

The appellant suggests that the requester is a competitor and submits that disclosure of the records "clearly represent severe potential financial, commercial and competitive loss to the original designer ..." The appellant's representations do not expand on this assertion.

The Ministry has made representations on each record. In order to fully canvass its reasons for disclosing the information in them, I will deal with each category of record separately.

P-9800081 - Record 2 and P-9800126 - Records 2 and 3

These records are applications for the Certificate of Approval.

The Ministry states that the only information in Record 2 of Appeal P-9800081 which is not "tombstone data" is the application fee. The Ministry indicates that this fee does not relate to the business operation or financial viability of the cemetery. The Ministry argues that the appellant's bald assertions that disclosure would result in the harms enumerated in section 17(1) are insufficient evidence of harm.

The Ministry advises that it originally withheld the name and model number of equipment used by the Crematorium in Record 2 of Appeal P-9800126, but felt that it was being overly cautious. The Ministry also indicates that this information is contained on the Certificate of Approval. The Ministry now believes that this information should be released. With respect to Records 2 and 3 of Appeal P-9800126, the Ministry indicates that, based on its engineering staff's knowledge of the industry, any technical or scientific information in the record is common to all or most cemeteries with crematoria. The Ministry surmises that its disclosure could not reasonably be expected to result in any of the harms in section 17(1).

P-9800126 - Record 5

This record summarizes the operation of the crematoria. The Ministry submits that it does not describe any information unique to particular crematorium operations. Moreover, the Ministry advises that according to its engineering staff, this information is commonly known and used in the industry.

P-9800081 - Record 6

This record contains basic information pertaining to the combustion of a cadaver. According to the Ministry's engineering staff's knowledge of the industry, this is commonly known and applied information.

P-9800081 - page one of Record 19

This record contains a hand-drawn process flow chart. Again the Ministry advises that this information is basic to all crematoria and therefore, there is nothing unique in the information which would result in any of the harms enumerated in section 17(1).

Findings

I have considered the representations of the parties. I agree with the Ministry that the appellant's bald assertions that disclosure would result in the harms enumerated in section 17(1) are insufficient evidence of harm. With respect to Record 2 (Appeal P-9800081), it is not evident, on its face, that disclosure of the information in this record could reasonably be expected to

result in any of the harms in section 17(1). Nor do the appellant's representations provide any assistance in understanding the nature of the harm claimed by it.

With respect to the remaining records, I accept the Ministry's submissions that the information in the records is common to all or most cemeteries with crematoria. In my view, the appellant has provided no evidence, other than a general statement, that the information in the records is unique to it and that disclosure could reasonably be expected to result in any one of the harms in section 17(1). The evidence provided by the Ministry is based on the extensive knowledge of its engineering staff regarding the construction and operation of crematoria in general. I accept the Ministry's position that, based on this knowledge, the disclosure of the information at issue could not reasonably be expected to result in either of the harms enumerated in sections 17(1)(a) or (c).

With respect to the harm envisioned by section 17(1)(b), that is, disclosure would 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, the appellant has not specifically addressed this part of the exemption. However, I note that the appellant appears to acknowledge that the Ministry establishes the criteria for the design and operation of crematoria units. Moreover, a Certificate of Approval is necessary in order to operate the crematoria and the information contained in the records would appear to be relevant to a determination by the Ministry that the design standards supplied by the appellant are in conformity with Ministry standards. Therefore, I am not convinced that the appellant is in a position to decline to provide the information contained in the records. Accordingly, I find that the harm in section 17(1)(b) could not reasonably be expected to occur from disclosure of Records 2, 6 and the first page of Record 19 in Appeal P-9800081, and Records 2, 3 and 5 in Appeal P-9800126.

Summary

I have found that part two of the section 17(1) test has not been met with respect to the following records: Appeal P-9800081 - Records 7, 8, 9, 18, the second page of Record 19, and Records 20 and 21; Appeal P-9800126 - Records 4, 6, 8, 9, 10 and 14. I have further found that part three of the test has not been satisfied with respect to the following records: Appeal P-9800081 - Records 2, 6 and the first page of Record 19; Appeal P-9800126 - Records 2, 3 and 5. All three parts of the test must be met in order for a record to qualify for exemption under section 17(1). Accordingly, I find that this section does not apply and the records should be disclosed to the requester.

ORDER:

1. I uphold the Ministry's decision.
2. I order the Ministry to disclose the records at issue in this appeal, and including Records 1, 3, 4, 5, and 10 in Appeal P-9800081 and Records 1, 7, 11, 12, and 13 in Appeal P-9800126, to the requester by providing her with a copy of them by **August 18, 1998** but not earlier than **August 13, 1998**.

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: _____

July 14, 1998

Laurel Cropley
Adjudicator