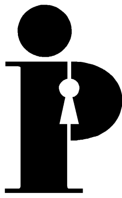

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1599

Appeal P_9800061

Ministry of Citizenship, Culture and Recreation

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NATURE OF THE APPEAL:

The appellant is a non-profit environmental coalition. It 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 a report titled "Archaeological/Heritage Recommendations Concerning a Winter Timber Access Road Upgrading and Possible Crossing of an Heritage Trail Area of Concern, Block #34-West Side of Net Lake and Snare Creek, Temagami Management Unit" (Record 1) and any other related information or documents.

Following consultations between the Ministry and the appellant, the appellant narrowed the latter part of the request to a second report titled "Cultural Heritage Assessments for Timber Management Planning Undertaken by the Teme-Augama Anishnabai 1991" (Record 2).

Before responding to the appellant, the Ministry notified five individuals whose interests might be affected by disclosure of these records (the affected parties), pursuant to section 28 of the Act One affected party did not object to disclosure of Record 2, and the other affected parties objected to disclosure of the records they were involved in producing.

The Ministry then issued a decision to the appellant denying access to the records on the basis of the following exemptions contained in the Act:

- law enforcement - section 14(1)
- third party information - section 17(1)
- economic and other interests - section 18(1)
- invasion of privacy - section 21

The appellant appealed this decision, and claimed that there was a public interest in disclosure of the records, thereby raising the possible application of section 23 of the Act.

A Notice of Inquiry was sent to the Ministry, the appellant and the five affected parties. Representations were received from the Ministry and two affected parties, but not from the appellant.

Both records were prepared by consultants on behalf of organizations with an interest in potential timber development. The Ontario Heritage Act (the OHA) requires cultural heritage planning and fieldwork assessments as part of all timber management operations of this nature.

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;

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected parties resisting disclosure 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 subsection 17(1) will occur.

[Order 36]

Part One

Type of Information

The Ministry and one affected party both submit that the information contained in the records is scientific and technical.

The Ministry points out that archaeology is recognized as an organized field of knowledge with natural, physical and social science components. It states that the information contained in the records stems from two archaeological assessments in the Temagami area, and that each report sets out the details of the rationale, methods and results of the archaeological fieldwork. The fieldwork was conducted under the auspices of an archaeological licence by experts and their staff.

One affected party submits that the purpose of preparing Record 1 "was to inventory and assess cultural heritage sites and features and it reveals scientific information concerning the archeological assessment of the sites along proposed timber access road upgrading and possible crossing of an Heritage Trail Area of Concern." This affected party also makes reference to

Order P-1347 in which it was held that information contained in a similar archeological assessment report of native site locations qualified as scientific and technical information.

Having reviewed the records and the representations of the Ministry and the affected party, I find that they meet the definition of both scientific and technical information established by former Assistant Commissioner Irwin Glasberg in Order P-454. The records contain "information belonging to an organized field of knowledge in either natural, biological or social sciences or mathematics" and "relate to the observation and testing of certain hypotheses or conclusions undertaken by an expert in the field" (scientific information). Both records also contain information "belonging to an organized field of knowledge which would fall under the general category of applied science or mechanical arts" (technical information).

Therefore, I find that the first part of the test has been established.

Part Two

In order to satisfy part two of the test, the parties resisting disclosure must show that the information was **supplied** to the Ministry, either implicitly or explicitly **in confidence**.

Supplied

The Ministry states that the records were supplied by third parties pursuant to reporting obligations under section 65(1) of the Ontario Heritage Act. This section requires every licensee to furnish a report to the Ministry containing full details of the work done, including details of all artifacts, a description of the site, stratigraphic information and the exact location of the site. These reports are known as Assessment and Mitigation Reports.

In Order P-1347, former Adjudicator Anita Fineberg held that these same types of reports were supplied to the Ministry. I concur with this finding.

In Confidence

The Ministry explains that prior to 1996, its practice was to make reports such as Records 1 and 2 available, for viewing purposes only, to a restricted group of persons, such as licenced archaeologists, researchers undertaking legitimate archaeological research, provincial ministries or agencies or municipalities. However, copies were not provided without the written permission of the authors. The Ministry reviewed this practice in June 1996, and determined that viewing would no longer be permitted in the absence of consent by the authors, and a formal request under the Act would be required before authority was given to view or receive copies of these types of records.

When Record 1 was supplied to the Ministry in December 1997, it was accompanied by a covering document which stated that the record was submitted in confidence and should not be disclosed pursuant to a request under the Act.

The Ministry submits that the reports were provided with a reasonably-held expectation of confidentiality. The Ministry also states that it has treated the records consistently in a manner that indicates a concern for their protection from disclosure.

The affected parties submit that the records were supplied to the Ministry on the understanding that they would be treated as confidential, and that this was communicated to the Ministry.

In my view, when Record 1 was supplied to the Ministry, there was clear understanding that its content would not be disclosed to others in the absence of consent. Although Record 2, which was prepared in December 1992, does not contain the same explicit reference to confidentiality, I am satisfied that it was provided to the Ministry with a similar expectation of implicit confidentiality. It is also relevant to note that previous orders of this office have held that information does not automatically lose its confidential character simply because it is provided to an institution pursuant to a mandatory reporting requirement (Orders P-345 and P-359).

I am satisfied that the affected parties who prepared and/or submitted Records 1 and 2 had a reasonably-held expectation of confidentiality at the time they were supplied to the Ministry.

Therefore, part two of the test has been satisfied.

Part Three

Harms

The Ministry and the affected parties submit that section 17(1)(b) applies. They state that disclosure of the records could reasonably be expected to result in similar information no longer being supplied to the Ministry, and that it is in the public interest that similar information continue to be supplied.

The parties explain that the records were provided to the Ministry pursuant to section 65 of the OHA. A minium of 14 points of information must be included in each report, as outlined in Regulation 881 of the OHA. However, the Ministry's practice is to ask for information that goes beyond the statutory requirements, and has produced a set of guidelines which require this additional information. In the Ministry's view, the quality of reports which conform to these guidelines is much higher than that required by the statute and regulation. The parties submit that if Records 1 and 2 are disclosed, future reports will only contain the minimum amount of information necessary to satisfy the provisions of the OHA.

The Ministry adds that the additional information contained in the Assessment and Mitigation Reports contributes enormously to the wealth of knowledge concerning the heritage of Ontario and is a resource of intrinsic value to all Ontarians. The Ministry submits that it is in the public interest for it to continue to receive as much detailed information as possible in these reports.

I accept that information of this nature will be more likely to be provided to the Ministry when professionals, such as the affected parties, are confident 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 continues to be supplied to the Ministry. Accordingly, and

based on the representations provided by the Ministry and the affected parties, I find that the harm described in section 17(1)(b) could reasonably be expected to occur if the records are disclosed, and the third requirement for the test has been established.

All three requirements for exemption under section 17(1)(b) have been established, and I find that Records 1 and 2 qualify for exemption under that section of the Act.

Because of this finding, it is not necessary for me to consider the sections 14(1)(l), 18(1)(a) and 21 exemption claims.

COMPELLING PUBLIC INTEREST

The appellant's letter of appeal contains the following statement:

> I believe it is in the public interest that these documents be released, and would like to pursue an appeal of the initial decision. In particular, timely access to [Record 1] is imperative, as this area is currently allocated for logging and this information pertains to this decision directly.

On the basis of this statement, section 23 of the Act, the public interest override, was added to the Notice of Inquiry.

As previously indicated, the appellant did not make representations in response to the Notice.

The Act is silent as to who bears the burden of proof in respect of section 23. However, a number of previous orders have stated, and I agree, that:

> ... it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant (see for example Orders P-241, P-710 and P-1216.

I have reviewed Records 1 and 2 and, in the absence of evidence or representations from the appellant, I am not convinced that disclosure of the information contained in them is necessary in order to advance the public interest. I am not satisfied that there is a compelling public interest in disclosure of this information, nor that disclosure of the records would clearly outweigh the purpose of the mandatory section 17(1) exemption claim, as required by section 23.

Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

I uphold the decision of the Ministry.

Original signed by: July 21, 1998
Tom Mitchinson
Assistant Commissioner