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

ORDER PO-1666

Appeals PA-980243-1, PA-980246-1, PA-980247-1
and PA-980248-1

Ministry of the Environment

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NATURE OF THE APPEAL:

The requester made a request to the Ministry of the Environment (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to all correspondence, site evaluation reports, orders and Certificates of Approval for water, waste water and sewage at 261 named sites. The Ministry treated each site as a separate request and opened corresponding files.

The Ministry located responsive records and notified a named engineering and contracting company (the Company) to determine its views regarding the disclosure of records pertaining to it which were contained in four of the request files. The Company objected to the disclosure of the records pertaining to it in each of the four files.

After considering the Company's views regarding disclosure, the Ministry issued a decision to the requester in which it granted full access to the requested records. The Company appealed the Ministry's decision in each of the four files. This office opened four appeal files to correspond to the Ministry's files. As the parties are the same and the records are similar, the four appeal files will be dealt with together.

I sent a Notice of Inquiry to the Ministry, the requester and the Company. Representations were received from the Ministry and the Company. The requester wrote to this office to advise that she is no longer appealing the decision regarding Appeal Number PA-980248-1 as she already has a copy of this record. The decision and record relating to Appeal Number PA-980248-1are, therefore, no longer at issue. The requester also indicates that she will not be providing representations with respect to the remaining appeals. The Company states in its representations that it is only concerned about disclosure of the site evaluation reports. It indicates that it does not take issue with the disclosure of the covering letters attached to the site evaluation reports. Therefore, the covering letters which are attached to each of the documents referred to below are not at issue and should be disclosed to the requester.

RECORDS:

The records at issue consist of the following:

Appeal PA-980243-1: a document titled "Bioremediation - Six Month Progress Report", for the period ending June 16, 1997 regarding [a specified address], Niagara Falls.

Appeal PA-980246-1: a document titled "Bioremediation - Six Month Progress Report", for the period ending September 18, 1996 regarding [a specified address], Orillia.

Appeal PA-980247-1: a document titled "Bioremediation - Six Month Progress Report", for the period ending September 18, 1995 regarding [a specified address], Sudbury.

DISCUSSION:

THIRD PARTY INFORMATION

As I indicated above, the Ministry has decided to disclose the records at issue to the requester. For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the party resisting disclosure, in this case, 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 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.

[Orders 36 and P-373]

The Court of Appeal for Ontario recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)].

The Company relies on all three subsections of section 17(1).

BACKGROUND:

The Ministry provides some background information which outlines the context in which the records were created and provided to it. In this regard, the Ministry indicates that a named Oil company notified the Ministry that there had been contamination on several of its sites and that it had retained the Company to clean up these sites. The Ministry indicates further that the Company submitted to the Ministry its Certificate of Approval to clean up the sites in accordance with the Environmental Protection Act (the EPA), and that the Company provided the Ministry with the records at issue as part of this ongoing cleanup process.

Part One

The Company refers to the definition of scientific and technical information as established in Order P-454. In this order, former Assistant Commissioner Irwin Glasberg examined these two types of information and found:

> In my view, scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the Act.
> ...
>
> In my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act.

I adopt these definitions as established by the former Assistant Commissioner.

The Company submits that the records contain scientific information as they relate to the field of environmental science which involves the testing of soils to determine the absence of pollutants. It also argues that the records contain technical information as they relate to environmental engineering, which is a field of applied science.

The Ministry does not dispute that the records contain scientific and technical information.

Although I accept that the methods employed by the Company are the result of scientific development, testing and analysis, I find that the information in the records at issue does not relate to the observation and testing of specific hypothesis or conclusions. Rather, the records contain information regarding the application of the methods which have been developed by the Company. Therefore, I find that they do not contain scientific information within the meaning of the above definition. That being said, however, I am satisfied that they contain technical information as this information relates to the field of environmental engineering and was prepared by a professional in the field and describes the operation of a process and equipment.

The Company also argues that the records contain trade secrets as defined by this office in Order M-29. In that order, former Commissioner Tom Wright defined "trade secrets" as:

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

I adopt this definition of "trade secret" for the purposes of this appeal.

The Company submits that it has developed a unique monitoring process to test soil samples for the removal of pollutants and that this process is not generally known in the environmental remediation industry. The Company asserts that it is the only company using this process which, it explains, is more cost effective than other more traditional methods of soil analysis. Therefore, the Company submits that this information has economic value to it. Finally, the Company indicates that it has made every reasonable effort to maintain the secrecy of this process. It indicates further that, in submitting the documents to the Ministry it attached a warning that they were submitted in confidence, that they contain a trade secret, and that they should not be released, as to do so could jeopardise its competitive position.

I accept that the Company has developed a unique monitoring process and its treatment of this process would lead me to conclude that information about the process would reveal a trade secret. However, although the records refer to the process which was developed by the Company they do not provide any detail as to how the process actually works. Rather, they identify the process and describe its application in

testing soil in accordance with a Certificate of Approval. I note, that the Certificate of Approval contains sufficient information to be able to identify the nature of the process. The Ministry indicates that Certificates of Approval are public records in accordance with section 19 of the EPA and are routinely disclosed.

The Ministry indicates further that its technical staff determined that the information which is contained in these records could easily be determined by simply going past the site every day to determine progress and activities.

Finally, in reviewing the records, I note that much of the information in the records pertains to the results of the testing, and that the actual soil testing was performed by an independent laboratory, and, therefore, does not actually refer to the process used by the Company.

Based on my review of the information in the records and the Ministry's representations on this issue, I find that I am not persuaded by the Company's arguments in this regard. Consequently, I find that the records do not contain trade secrets.

Part Two

In order to satisfy Part two of the test, the information must have been **supplied** to the Ministry **in confidence** either implicitly or explicitly. In Order M-169, Adjudicator Holly Big Canoe made the following comments with respect to the issue of confidentiality in section 10(1) of the municipal Act (which is the equivalent of section 17(1) of the 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.

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 agree with this approach.

The Company states that the records were supplied by it to the Ministry explicitly in confidence. In this regard, the Company refers to a document which was attached to each of the records at the time they were submitted to the Ministry. This document specifically notes that the Company's expectation of confidentiality is intended to apply to access requests made under the Act.

The Ministry agrees that the records were submitted to it explicitly in confidence.

I am satisfied that the Company submitted the documentation to the Ministry explicitly in confidence.

Part Three

In order to satisfy the third requirement of this exemption claim, the Company must present evidence which is detailed and convincing, and must describe a set of facts or circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17 would occur if the information was disclosed (Orders P-278 and P-249; (see also, Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) cited above).

The Company's position

Section 17(1)(a)

The Company submits that the records make reference to the process developed and used by it to test soil. The Company points out that this process is not followed in the industry. The Company acknowledges that the records do not set out the actual procedure to follow to duplicate the process, however, it argues that the mere disclosure of the reference to the process would prejudice its competitive position vis-a-vis others in the Bioremediation industry. In this regard, the Company submits that a competitor could easily derive the process used by it from a review of the information in the records or from the knowledge that the Company uses this particular method of soil testing.

Section 17(1)(b)

With respect to the harms under this section, the Company notes that, as a regulator in the environmental engineering industry, the Ministry has an interest in maintaining open and frank communications with those in the industry in order to keep the Ministry informed and to foster co-operation with those it oversees, thus ensuring effective regulation of the industry.

The Company indicates that the records were supplied to the Ministry pursuant to a condition in a Certificate of Approval. It argues that disclosure of this information would create a serious incentive to those in the industry to resist such conditions and to demand limitations on the scope of information required to be provided. More generally, the Company submits that disclosure of "confidential" information would lead those in the industry to be reticent about providing any information of this nature to the Ministry. The Company asserts that the Ministry has no statutory authority to compel production of this information and submits that, in the result, the Ministry would receive less information regarding those it regulates.

Section 17(1)(c)

The Company states that the process referred to in the records was developed by it at significant cost and risk. The Company indicates that the development of this process has given it a significant competitive advantage over those who use the more costly and time-consuming traditional methods of soil testing. The Company submits that disclosure of the records would remove this competitive advantage as competitors will learn that effective soil testing is possible by using this process. The Company believes that competitors will be able to use the information in the records to move in this direction and attempt to duplicate the process.

The Ministry's position

The Ministry explains, in considerable detail, its reasons for believing that disclosure of the records would not result in any of the harms described in section 17.

In this regard, the Ministry indicates that the records contain information which is the result of a technical study by staff of the Company, which would have entailed conducting a number of tests to ascertain the amount of pollution on site. The reports set out the Company's proposal to the Oil company for the clean-up of the sites to Ministry standards.

In this regard, the Ministry notes that the records outline the Company's authority under the EPA. As I noted above, the Ministry indicates that Certificates of Approval are public records in accordance with section 19 of the EPA and are routinely disclosed. The Ministry states further that, in accordance with section 168 of the EPA, it has always considered information about contaminants released to the environment as public information.

The Ministry indicates that sections 13 to 15 of the EPA require that no person shall contaminate the natural environment, but should such a situation arise, the person is to forthwith notify the Ministry. The Ministry acknowledges that such records are usually received voluntarily, however, section 18(6) of the EPA authorizes the Director to issue an order for the production of a report (such as the records at issue).

The Ministry indicates that the information in the records is very general in nature and does not provide the level of detail that would be included in an application for the initial Certificate of Approval. The Ministry

reiterates that its technical staff determined that the information which is contained in these records could easily be determined by simply going past the site every day to determine progress and activities.

The Ministry refers to a number of appeals it has had with this office in which similar records were at issue and indicates that, on at least two occasions, the Commissioner has ordered the disclosure of reports of site contamination (see Order P-1235). Further, the Ministry indicates that it releases records of this type as a result of approximately 4,000 access requests annually and indicates that it notified the Company in this case only because of the notation on the records that they were supplied in confidence.

The Ministry does not make specific submissions on the Company's expectation of harm under sections 17(1)(a) and (c), however, it offers a number of general comments.

The Ministry indicates that it has already processed over 300 requests from the requester for this type of report. The Ministry submits that it is quite possible that, because it was not marked "confidential", a similar report relating to another site has already been disclosed. The Ministry refers to prior dealings with this Company and notes that the Company does not always mark its reports as "confidential". The Ministry refers specifically to a report prepared by the Company for another Oil company regarding its site which was sent by the Oil company to the Ministry. The Ministry indicates that since this report was not marked "confidential", it was released to a requester pursuant to an access request.

I have confirmed with the requester the records which she already has and I find that her possession of them and the manner in which they were obtained confirms the Ministry's submissions in this regard.

The Ministry recognizes that such reports are expensive to produce, but takes the position that the reports belong to the Oil company rather than the Company, and any such cost could be easily borne by such a large corporation.

Finally, the Ministry submits that the public has a right to know the extent of contamination and whether the site has been cleaned up.

With respect to section 17(1)(b), the Ministry acknowledges that it would prefer to work co-operatively with the industry, however, it submits that the EPA provides the authority for it to obtain this type of record in any event.

I have considered the arguments raised by both the Ministry and the Company. I would like to point out that both parties have provided extensive and detailed submissions on this issue. Although the Company has strenuously objected to the disclosure of the records, I am not persuaded that the harms which it believes will come to pass should they be disclosed could reasonably be expected to occur. In particular, I am not convinced that the Company, or any other similar company in the industry would no longer supply this type of information to the Ministry. The EPA clearly requires specific types of information and establishes the legal authority to obtain it. Although, as the Ministry indicates, it would prefer to have this

information provided voluntarily, it indicates that it is prepared to compel its production under the authority of the EPA, if necessary. Consequently, I find that section 17(1)(b) does not apply.

With respect to the harms in sections 17(1)(a) and (c), I find that the information at issue is sufficiently general so as not to compromise the Company's interest in maintaining the unique aspects of its process. Further, I find that, as some of the information is already publicly available through the Certificates of Approval, the harms contemplated by the Company by disclosure of similar information in these records is not reasonable. Finally, as I noted above, much of the information in the records pertains to the results of the actual soil testing which was done by an independent laboratory. The Ministry indicates that this type of information is routinely disclosed to the public. Taking all of this into consideration, I find that the Company has not provided sufficient convincing evidence to establish that the harms in either section 17(1)(a) or (c) could reasonably be expected to occur should the information be disclosed. Therefore, I find that part three of the test has not been met, and the records should be disclosed to the requester.

ORDER:

1. I uphold the Ministry's decision to disclose the records to the requester.

2. I order the Ministry to provide the requester with copies of the records responsive to Appeals PA-980243-1, PA-980246-1 and PA-980247-1 by **May 18, 1999** but not before **May 12, 1999**.

3. In order to verify compliance with the terms 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: April 13, 1999
Laurel Cropley
Adjudicator