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

ORDER PO-1688

Appeal PA-980244-1

Ministry of the Environment

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BACKGROUND:

Environmental Bill of Rights, 1993 (EBR)

In order to fully appreciate the issues in this appeal, it is important to understand the overall purpose of the EBR and the operation of some of its provisions.

The EBR was enacted for the following reasons, as described in its preamble:

> The people of Ontario recognize the inherent value of the natural environment.
>
> The people of Ontario have a right to a healthful environment.
>
> The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.
>
> While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

Sections 2(1) and (2) state the purposes of the EBR:

> (1) The purposes of this Act are:
>
> (a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;
>
> (b) to provide sustainability of the environment by the means provided in this Act;
>
> (c) to protect the right to a healthful environment by the means provided in this Act.
>
> (2) The purposes set out in subsection (1) include the following:
>
> 1. The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.
>
> 2. The protection and conservation of biological, ecological and genetic diversity.
>
> 3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.

4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.

5. The identification, protection and conservation of ecologically sensitive areas or processes.

Section 2(3) describes in general terms how the EBR fulfills these purposes:

(3) In order to fulfil the purposes set out in subsections (1) and (2), this Act provides,

(a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;

(b) increased accountability of the Government of Ontario for its environmental decision-making;

(c) increased access to the courts by residents of Ontario for the protection of the environment; and

(d) enhanced protection for employees who take action in respect of environmental harm.

Public consultation process under the EBR

The EBR contains a number of provisions designed to provide the means by which, pursuant to section 2(3)(a), Ontario residents may participate in the making of environmentally significant decisions by the Government of Ontario. Part II of the EBR establishes an electronic database known as the Environmental Registry (the Registry). Any member of the public may access information in the Registry via the Internet. Under section 22 prescribed ministries (including the Ministry of the Environment) must include in the Registry information about proposals for environmentally significant instruments. Instruments are defined in the EBR as documents of legal effect issued under an Act including permits, licences, approvals, authorizations, directions or orders. An example of an instrument is a certificate of approval issued by the Ministry of the Environment under section 9 of the Environmental Protection Act (EPA). Section 27 of the EBR states what information about a proposal for an instrument must be placed in the Registry, which includes:

- a brief description of the proposal;
- how members of the public may participate in decision-making on the proposal;
- how members of the public may review written information about the proposal;
- an address to which written questions or comments may be sent; and

- any other information the minister giving the notice considers appropriate.

The EBR does not state precisely what information about a proposal, beyond the above, must be made available to the public. By stating that the public may review "written information about the proposal" (s. 27(2)3) and that the minister giving the notice may place on the Registry "any other information that the minister . . . considers appropriate" (s. 27(2)6), the EBR gives the minister a discretionary power to disclose information to the public at large, or to any individual member of the public, to facilitate the public's participation in the decision making process.

A minimum of 30 days notice must be given prior to the ministry deciding whether or not to implement the proposal (section 22).

A ministry which gives notice of a proposal under section 22 must take every reasonable step to ensure that all comments relevant to the proposal that are received as part of the consultation process are considered when the ministry makes decisions about the proposal (section 35(1)). As soon as reasonably possible after a decision is made whether or not to implement a proposal for an instrument, the ministry must give notice to the public of the decision through the Registry (sections 36(2), (3)).

Rights of appeal under the EBR

The legislation under which the ministry decides to grant or not to grant an instrument may provide the instrument applicant with a right of appeal from that decision to an appellate body. In that event, the EBR also provides any person with an interest in the decision a right to seek leave to appeal the decision to the same appellate body (sections 38, 39). For example, an instrument holder denied a certificate of approval under section 9 of the EPA could bring an appeal before the Environmental Appeal Board (the Board). Consequently, if the applicant had instead been granted the certificate of approval, an interested third party seeking to reverse the decision to grant the certificate would be able to file a leave to appeal application with the Board.

The application for leave to appeal must be made within 15 days after the ministry gives notice of the decision under section 36 (section 40).

NATURE OF THE APPEAL:

Application for certificate of approval under the EPA

The Ministry of the Environment (the Ministry) received an application for a certificate of approval under section 9 of the EPA to discharge air emissions into the natural environment at a specified location. More specifically, the applicant sought an amendment to an existing certificate of approval, to take into account certain changes in circumstances. In accordance with the EBR, the Ministry posted information about the proposal for an instrument on the Registry. The Registry posting contained a brief description of the nature

of the proposal, indicated that the Ministry may have "copies of this proposal for viewing" and stated that comments must be received within 30 days of the posting.

An individual who lives immediately adjacent to the plant for which the applicant sought the certificate of approval then contacted the Ministry in accordance with the Registry notice to obtain a copy of the application for the purpose of exercising his right to comment under the EBR. The Ministry advised the individual that he would be required to submit a request under the Freedom of Information and Protection of Privacy Act (the Act) for that document.

The individual (now the requester) then made a request under the Act for a copy of the application and "supporting material." The individual stated that he would be providing a copy to his "consulting engineer for comments as to the safety of the proposal with respect to" him and his family, as well as with respect to "adverse impacts from same." The individual further stated:

> I would note particularly that I will require all emissions data and modelling projections supporting the application, as well as data and statistics as to the proposed location of the equipment. I will also require details of all proposed abatement equipment and any other mitigation measures intended to prevent impact on the surrounding environment, and in particular [on me and my family].

The requester also asked the Ministry not to make a decision on the application pending the outcome of the process under the Act. It is my understanding that the Ministry has accepted this request.

The Ministry located 13 records responsive to the request and made a preliminary decision to grant full access to 12 records, and partial access to the remaining record, citing section 17 (third party commercial information) of the Act as its authority to refuse to disclose the remaining record in part. The Ministry also advised the requester that it had a duty to notify the applicant (the affected person) under section 28 and to provide it with an opportunity to make representations to the Ministry as to why the records should not be disclosed.

Later, under sections 28(1) and (2) of the Act, the Ministry notified the affected person of the request and sought representations as to whether or not the records should be disclosed. In its representations to the Ministry, the affected person objected in particular to the disclosure of one of the records to which the Ministry had decided to grant full access, an 11-page compilation of technical data prepared by an engineering consultant firm (the record at issue). After receiving representations from the affected person, the Ministry advised the affected person that it was maintaining its preliminary decision to disclose in full the record at issue.

Subsequently, the affected person wrote to the Ministry taking issue with the Ministry's decision. In this letter, the affected person stated that it understands who had made the request, and that this person had commenced litigation against it. The affected person also stated that the request was "improper" and "should be requested through the litigation process, and a Judge or Master should rule on its relevancy."

The affected person further stated that "[i]t is improper for the Plaintiff to request documents from a third party prior to requesting the documentation directly from the Defendant [affected person]." The affected person stated, in the alternative, that the record "should not be released pursuant to the Act."

The affected person, now the appellant, later appealed to this office the Ministry's decision to grant access to the record at issue. In its letter of appeal, the affected person took the position that disclosure of the record would "adversely affect" its business, and that "[c]ompetitors could use this information to [its] disadvantage . . ." Although the affected person did not state so explicitly, its letter of appeal suggested the application of section 17(1)(a) of the Act.

The Ministry subsequently disclosed the requested records to the appellant in accordance with its initial decision, with the exception of the record at issue.

A Notice of Inquiry outlining the issues in the appeal was sent to the appellant, the requester and the Ministry. Subsequently, this office was contacted by the office of the Environmental Commissioner of Ontario (ECO), which indicated that the appeal had come to its attention and that it may have information bearing on the issues in the appeal. The ECO is an officer of the Legislative Assembly, whose functions include reviewing the implementation of the EBR and compliance in ministries with the requirements of the EBR. In light of the ECO's role and expertise, I decided to send a copy of the Notice of Inquiry to the ECO and invite it to make representations on this matter. I received representations from all notified parties. The representations of the ECO are restricted to general submissions on the role and functions of the EBR and its relation to issues under the Act. The ECO's representations do not address the merits of the specific appeal.

I later sent a Supplementary Notice of Inquiry to the parties seeking further representations on the section 17(1) exemption, and seeking representations for the first time on section 23, the so-called "public interest override". In response, I received representations from the requester and the ECO only.

THE RECORD:

The record at issue is an 11-page document entitled "Appendix F: Results of Air Dispersion Modelling" and indicates that it is part of the supporting documentation for an application to the Ministry from the appellant for an amendment to a "Certificate of Approval (Air) Product Drying and Bagging". The record is a compilation of technical data prepared by an engineering consultant firm (the consultant) retained by the appellant to assist in the application process. The record contains "statistical modelling utilizing the Ministry of Environment assumptions as to particulate impingement."

DISCUSSION:

THE ACT AND THE CIVIL LITIGATION PROCESS

In the appellant's letter to the Ministry, it takes the position that it is improper, in circumstances where the requester has commenced litigation against it, for the requester to utilize the access to information process under the Act as opposed to the discovery process under the Rules of Civil Procedure. The appellant does not reiterate this position in its representations to this office. Nevertheless, I will assume that the appellant maintains these views.

The relationship between the access provisions contained in the Act and the civil litigation process is addressed in section 64(1) of the Act. This provision states that:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

The application of section 64(1) was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:

> ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists, and, in my view, subsection 14(1)(f) or section 64 cannot be interpreted so as to exempt records of this type without offending the purposes and principles of the Act.
>
> I am supported in my view by the decision in the case of Playboy Enterprises Inc. v. Department of Justice [677 F.2d 931(1982)], heard in the United States Court of Appeals, District of Columbia Circuit. In that case, which was decided under the U.S. freedom of information legislation, the government put forward the argument that, because its claim of privilege with respect to a certain record had been sustained in discovery proceedings in other cases, those determinations should be given "controlling weight" in the decision as to whether the record should be released under the U.S. freedom of information legislation. The court answered by stating that "... the issues in discovery proceedings and the issues in the context of a freedom of information action are quite different. That for one reason or another, a document may be exempt from discovery does not mean that it will be exempt from a demand under the Freedom of Information Act."

These comments were subsequently relied upon by [then] Assistant Commissioner Irwin Glasberg in Order P-609.

In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between

the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:

> The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the Municipal Freedom of Information and Protection of Privacy Act legislation, nor ban the publication of the contents of police files required to be produced under that Act. My order was directed toward the preservation of the integrity of the discovery process by prohibiting publication of information obtained by one party from the other under the compulsions of that discovery process, including publication by third parties of such information. In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.
>
> Although that seems to me to be the effect of the order as it presently reads, it is desirable to clarify by adding at the end of the sentence: "this order does not restrict the jurisdiction of the Information and Privacy Commissioner/Ontario under the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 to direct the production of documents or information even though such documents or information may have been the subject of discovery in this action."

I adopt the principles enunciated by Assistant Commissioner Glasberg and the Ontario Court (General Division) cited above. Based on these principles, I conclude that there is no reason in the circumstances why the request under the Act should be deemed "improper", nor why this appeal should not proceed.

THIRD PARTY INFORMATION

Introduction

Section 17(1) of the Act reads, in part:

> 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;

In order for a record to qualify for exemption under sections 17(1)(a), (b) or (c) of the Act, each part of the following three-part test must be satisfied:

> 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, P-373].

To discharge the burden of proof under part three of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Orders 36, P-373].

This three-part test and the statement of what is required to discharge the burden of proof under part three of the test have been approved by the Court of Appeal for Ontario. That court recently overturned a decision of the Divisional Court 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.)].

Part One: Type of Information

The appellant submits that the information in the record qualifies as a "trade secret", "scientific information" and "technical information". With respect to "technical information", the appellant states:

> Technical information is information belonging to an organized field of knowledge such as applied sciences or mechanical arts. Examples include engineering. The Appellant submits that the information supplied is clearly technical information as it pertains to the field of engineering. It clearly describes the construction, operation and maintenance of the Appellant's equipment.

The requester submits that the information does not qualify as "commercial information", "financial information" or a "trade secret". However, with respect to "technical information", the requester submits:

> The type of information appears (since we don't have it), from its title, "Appendix F, Results of Air Dispersion Modelling", to be technical information, as defined in Order P-454. We would expect it to consist of statements as to the emissions expected from the stack and predictions of the results of those emissions in terms of air quality at various locations in the vicinity of the plant, compared to the Ministry of the Environment's and/or other standards as to same. The actual model used, the assumptions made and the basis for same, as well as the conclusions calculated are among the issues about which our client wants independent advice.

The Ministry submits that the record contains "scientific" and "technical" information and that the record meets the first part of the three-part test for exemption under section 17(1). The Ministry states:

> 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 environmental impact of industrial processes. A number of tests are required to ascertain the amount of pollution that is generated by the equipment that the third party proposed to install.

Previous orders of this office have defined "technical information" in section 17(1) as follows:

> . . . The Concise Oxford Dictionary (8th ed.) defines "technical", in part, as follows:
>
> > of or involving or concerned with the mechanical arts and applied sciences.
>
> 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 (see, for example, Order P-454).

Both the Ministry and the appellant argue that the record qualifies as "technical information". In addition, the requester appears to concede that the record so qualifies, although the requester indicated that this submission was being made without the advantage of viewing the record. Having considered the representations of the parties, and having reviewed the record, I am satisfied that it is "technical information" for the purposes of section 17(1). Therefore, part one of the three-part test has been met.

Part Two: Supplied in Confidence

Supplied

The appellant submits:

> . . . the Record has been supplied to the Ministry. The Record is the verbatim compilation of information supplied by [the consultant] to the Appellant and in turn supplied by the Appellant to the Ministry.

The Ministry also submits that the record was supplied to the Ministry.

The appellant makes no specific submissions on the "supplied" issue.

The record was attached as an appendix to the appellant's application to the Ministry for an approval under section 9 of the EPA. In my view, it is clear that the record was "supplied" to the Ministry within the meaning of that word in section 17(1) of the Act.

In Confidence

In addition to the "supplied" requirement, part two of the test for exemption under section 17(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 to demonstrate simply that the 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 (Order M-169).

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).

The appellant submits:

> . . . the information which it has supplied was supplied with a reasonable expectation of confidentiality on the part of the Appellant at the time that the information was supplied. Order P-561 sets out the parameters for determining whether there is a reasonable expectation of confidentiality. In the situation of the Appellant the following facts must be considered . . .

The appellant further submits, in response to each of the four points from Order P-561:

(1) The information was communicated to the Minister on a basis that it was confidential and that it was to be kept confidential. Page four of the application clearly indicates this.

(2) The information is treated consistently in a manner that indicates concern for its protection from disclosure. The full particulars of the Record are known only to [two named officers of the appellant]. The information is kept by each of these persons under lock and key. Access to the premises is limited in that all visitors must sign in and no one is allowed access to the information contained in the

> Record without the specific authority of [named officer of the appellant]. Any outside person or organization having access to the information must execute a confidentiality agreement.
>
> (3) The information is not disclosed or available from sources to which the public has access.
>
> (4) The Record was prepared for a purpose which does not entail disclosure.

The appellant also states:

> The Appellant relies on page four of the Application as documentation which provides an explicit expectation of confidentiality by the Appellant.
>
> With respect to an implicit expectation of confidentiality, the Appellant . . . expected that all the information contained in the Record would be kept confidential. It expected that it would be held confidential permanently. The information is consistently treated as confidential by the Appellant . . .

The requester submits:

> The whole point of the EBR with respect to instrument applications is to provide public notice and an opportunity for public input with respect to applications that are classified for posting on the Registry. It is in the nature of environmental permit applications that the consequences of the activity may have implications for other persons. Emissions cross property boundaries and [I am] the closest receptor, immediately adjacent to the plant building. The building abuts [my] back yard. The posting says that "all comments & submissions received will become part of the public record" (page 2). In [my] submission, there is no reasonable expectation of confidentiality with respect to the subject application, or if there is a reasonable expectation of confidentiality in any aspect, it is not with respect to the air emissions information which is the very subject of the permit and of the public posting and input processes.

The Ministry submits that "it is the Ministry's practice to keep applications and all supporting documentation confidential as this type of record reveals information that is often considered as having scientific, technical, commercial or business value to the proponent." The Ministry states that the record was supplied "explicitly in confidence", based on the appellant's "indication in section 12 [of the application] that it should not be disclosed." In its supplementary representations, the Ministry states:

> . . . The [Ministry] had a general position that the application and supporting information would be kept confidential and that the information would only be released in response to a request pursuant to the provisions of the [Act] . . .

> When the [EBR] came into effect, the applications for Certificate of Approval were amended (1/95) to have the proponents indicate whether the information could be released (section 12 of the application). Requests for information by the public as a result of an application for Certificate of Approval being placed on the Environmental Registry, are guided by the company's indication of: Can Be Disclosed - Yes/No. All other requests are processed through the FOI stream to determine whether third parties are harmed by the release of information.

It is arguable that, on an objective basis, the appellant could not have had a reasonable expectation of confidentiality at the time it submitted the record to the Ministry. The appellant was advised by the Ministry, by way of the application form, that the information supplied in support of its application was subject to the Act and to the EBR. With respect to the Act, the appellant knew or ought to have known that if a request was made for the record, the Ministry would be required to disclose it unless one of the listed exemptions applied. The effect of notice of the EBR is that the appellant knew or ought to have known that the Ministry could disclose the record for the purpose of facilitating the public consultation process mandated by Part II of the EBR, pursuant to its discretionary power under section 27, notwithstanding any confidentiality concern.

Further, the Ministry's "Guide for Applying for Approval (Air)" dated November 1994 states (at p. 6):

> The release of information contained in information submitted in support of an application for approval is subject to the provisions of the [Act]. This Act defines what may and what may not be disclosed to the public and will be used to assess all requests for information contained in applications for approval. The applicant should therefore clearly identify all documents which are to be considered confidential and must provide detailed evidence in support of this claim. The evidence in support of this claim will be one of the factors the Ministry considers when making a decision regarding disclosure of the records . . . [emphasis added]

Thus, by way of the Guide, the Ministry notified the appellant that it "must" support any claims of confidentiality it might make for submitted documents at the time the application is made. Despite the Ministry's statement in the Guide that "detailed evidence in support of [any confidentiality] claim" was required, the appellant provided none at the time it submitted its proposal to the Ministry. The sole indication of a confidentiality concern was a "no" notation on the application form. The lack of any supporting evidence explaining to the Ministry the reasons why the information should be treated confidentially, as required by the Guide, weighs against the reasonableness of the appellant's confidentiality expectation.

On the other hand, I accept that the appellant has treated the record, within its own custody, consistently in a manner that indicates a concern for its protection from disclosure. In addition, I accept that the information in the record is not available from publicly accessible sources.

With respect to the Act and the EBR, clearly the appellant was notified that the record could possibly be disclosed pursuant to the disclosure mechanisms in these statutes. However, the Ministry has acknowledged that its practice is not to disclose a record pursuant to the EBR where an applicant requests that it be treated confidentially, and to guide those seeking the record to the Act (see my comments below on this practice). Therefore, it is reasonable for the appellant to have expected that the Ministry would not disclose the record under the EBR, based on the appellant's "no" notation in the application, and that any disclosure would take place only pursuant to the Act. With respect to the Act, in my view, all third party business entities submitting information to government know or ought to know that the Act could apply and that the government may be compelled to disclose that information in response to a request under the Act. Where there is substantial evidence of a reasonable expectation of confidentiality, as in this case, the mere possibility that the Act could compel disclosure, in the event that the test for exemption under section 17 is not met, is insufficient to neutralize that reasonable expectation. If the opposite were true, it is arguable that the section 17 exemption could never apply, since the onus under part two of the test for exemption could never be met. Clearly, the Legislature could not have intended this result.

Finally, it is clear that the appellant did not provide the Ministry with any information in support of its confidentiality claim with respect to this record, despite being advised by the Ministry that it "must" do so. However, based on the Ministry's practice, the appellant could reasonably have expected that it would have an opportunity to make representations to the Ministry in the event of a request under the Act, pursuant to section 28. In fact, the appellant was given notice of this request, and did make submissions on the application of section 17 to the Ministry at that time.

To conclude, I find that in the circumstances, on an objective view, the appellant had a reasonable expectation of confidentiality with respect to the record at issue. I will now consider the application of part three of the three-part test for exemption under section 17(1) of the Act.

Part Three: Harms

To discharge the burden of proof under part three of the test, the appellant must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in this section would occur if the information was disclosed (Order P-373). The appellant was advised of this onus in the original Notice of Inquiry. The appellant was given a second opportunity to provide information that would meet this onus. In my Supplementary Notice of Inquiry, I asked the appellant to provide more detailed information in support of its assertion that disclosure of the record could reasonably be expected to prejudice significantly its competitive position. The appellant made no submissions in response to the Supplementary Notice of Inquiry.

In its submissions in response to the original Notice of Inquiry, the appellant stated:

> Disclosure of the information contained in the Record will permit any technically competent person or organization (and in particular the Appellant's competitors) to deduce production

> rates and production methods which constitute the Appellant's primary competitive advantage. Such information is clearly revealed in the figures and diagrams contained in the Record. It is a relatively simple matter to deduce the information based on the information supplied in the Record. As stated above, the Appellant's major competitive advantage is its ability to achieve advantageous production rates through the use of its production methods. Both are strictly held confidential secrets and both are relatively simple to deduce from the information contained in the Record. Therefore, the disclosure of same will lead to a severe competitive disadvantage visited upon the Appellant.
>
> . . . . .
>
> . . . The Appellant has spent many years and large sums of money in designing and constructing its plant to be efficient and cost effective. The Appellant submits that the release of the information contained in the Record will cause the Appellant to lose the benefit of that expenditure of time and money and the Appellant will lose its competitive edge.
>
> . . . The Appellant submits that it has supplied sufficient details so that the test outlined in [Order P-479] has been met. In particular, the Appellant refers to the flow diagrams and theoretical modelling as concrete detailed evidence, the disclosure of which would be prejudicial to the Appellant's competitive advantage.
>
> . . . . .
>
> . . . The Appellant submits that [Order P-1595] is distinguishable on its facts. The Record submitted by the Appellant contains information which is particular to its operation and is not generalized. The Record contains information which relates specifically to the setup and production of its facility. The information contained in the Record is not common to all or most whey production facilities. The flow charts and industrial diagrams are unique and particular to the Appellant. The Appellant has not made bald assertions that disclosure would result in the harms enumerated in section 17(1). The assertions made by the Appellant are supported by the information contained in the Record and present a clear danger to the Appellant that it will lose its competitive advantage with the disclosure of the material.

The appellant's submissions in effect argue that the harm outlined in section 17(1)(a), that is significant prejudice to its competitive position, could reasonably be expected to result from disclosure of the record. In particular, the appellant argues that production rates and methods can be deduced from "figures and diagrams" contained in the record. The appellant further indicates that competitive harm will result from disclosure of "flow diagrams", "flow charts" and "industrial diagrams" contained in the record.

These references to the contents of the record are erroneous, and appear to stem from the appellant's description of the record at the outset of its submissions as including "diagrams which delineate how the production facility is organized, flow charts showing production rates, and statistical modelling utilizing the [Ministry's] assumptions as to particulate impingement." In fact, the record does not contain any

organizational diagrams or production flow charts; rather, the record contains only the third category described by the appellant, "statistical" air dispersion modelling information.

In my view, the appellant has not discharged its burden of proof under section 17(1). While it seems reasonable to conclude that, in some cases, if production rates or methods are disclosed to an industry competitor, a business could suffer significant harm to its competitive position, the appellant has failed to bridge the evidentiary gap between disclosure of the record and revelation of production rates or methods. The appellant's submissions on the harm issue are generalized to the three categories of information it described, two of which are not contained in the record. The appellant's submissions lack any detail as to how, in particular, disclosure of the air dispersion modelling information could allow a person to deduce production rates or methods.

In addition, the appellant has failed to provide sufficiently detailed information as to how, even if production rates or methods could be deduced from the record, disclosure of this information could cause harm to its competitive position. As I indicated above, it seems reasonable to conclude that, in some cases, disclosure of this type of information to a competitor could cause harm; however, the appellant has not given me detailed information about the nature of the industry, the extent to which this type of information is known or not known in the industry, or specifically how competitors could use this information to the appellant's disadvantage.
Finally, the appellant has failed to provide sufficiently detailed evidence to enable me to conclude that competitive harm could reasonably be expected to occur from disclosure of this particular record in any other sense. I am unable to conclude on the basis of the material before me how the air dispersion modelling information in the record could assist the appellant's competitors.

Therefore, on this basis, I conclude that part three of the test for exemption under section 17(1) has not been met, and thus the section 17(1) exemption cannot apply.

Although I am ordering disclosure of the record on the basis that section 17(1) does not apply, I feel that it would be useful in the circumstances to make a finding on the public interest override in section 23 of the Act, below.

PUBLIC INTEREST IN DISCLOSURE

Introduction

Section 23 of the Act reads:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

In order for the section 23 "public interest override" to apply, two requirements must be met: (i) there must be a compelling public interest in disclosure; and (ii) this compelling public interest must clearly outweigh the purpose of the exemption (Order P-1398, upheld on judicial review in Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner), [1999] O.J. No. 484 (C.A.)).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398, cited above).

Representations

In her representations, the requester's counsel states:

> . . . In view of his concerns, our client wants to have his own engineer review the application to assist with comments as to whether the new stack poses any increased health or safety risk to him and his family, and as to whether it meets the required emission standards.
>
> . . . . .
>
> Our client's engineer has reviewed the documentation which has been released, but advises that it is missing essential information as to the dispersion modelling and therefore he cannot evaluate the information.

In her supplementary representations, the requester's counsel submits:

> . . . we enclose with our letter, a letter from our client's engineer, dated May 3, 1999. [The engineer] wrote this letter expressly to respond to your request for further explanation as to why the missing information is required in order to carry out their engineering review.
>
> The dispersion calculations and modelling results are critical to the very subject matter that was posted on the EBR Registry. The EBR is a statute intended to provide for public notice and consultation with respect to specific types of instruments. In a manner of speaking, all such instruments will involve "technical" information. However, unless the technical information necessary to review the application is made available, the rights of the public to comment under the EBR will be rendered nugatory. This type of information is routinely released when members of the public wish to comment on matters posted to the EBR.
>
> . . . . .
>
> The right of the public to comment should not be compromised, no matter who the public is. In the instant case, the [requester], my client, has an even greater than usual concern about the pending application for an air approval, relevant to the safety of himself and his

> family. They have been impacted by two significant milk powder emissions, which completely coated the interior of their home through their high efficiency furnace air intake. After that, my client . . . suffered a nearly fatal exposure to an anhydrous ammonia leak from the plant while cleaning his troughs. He has been permanently impacted by this accident, which scarred his lungs. It is easy to understand why [he] and his family want their advice from an engineer retained by them, as to what comments they should make to the Ministry . . . with respect to the subject application for an air emissions approval.
>
> The [appellant] and its interest in commercial enterprise cannot be considered paramount to my client's family's right to be assured of their health and safety while living adjacent to the [appellant's] operations, when changes to emissions are proposed.

The requester's engineer states in its letter attached to the requester's supplementary representations:

> In 1998, [we were] requested by [the requester] to conduct a technical review of the [appellant's application to the Ministry] . . . The original information forwarded to [us] for review consisted of the supporting information that was identified on the application that could be released to the public. Subsequently, additional information was released by the [Ministry]. The following summarizes the information forwarded to [us] as of the date of this letter with respect to this application:
>
> - the Application for Approval (Air); and
>
> - parts of the supporting documentation (4 pages) which are noted as follows:
>
>   - stack discharge summary,
>   - contaminant emission summary,
>   - supporting data for natural gas boilers, and
>   - site and roof plans.
>
> Information not provided to date includes:
>
> - milk and whey process data sheets and flow diagrams (Sections 12.2.1 and 12.2.2);
> - milk and whey contaminant emission supporting data (Sections 12.4.2 and 12.4.3); and
> - dispersion calculations and modelling results (Appendix F).
>
> It is [our] understanding that Section 12.2.1, 12.2.2, 12.4.2, and 12.4.3 will not be released as a result of previous decisions.

The documentation provided for review consists of three key pieces of data, which are:

(a) stack discharges:
(b) location information; and
(c) modelling results.

To assess the stack discharge parameters, review of the process data and flow diagrams is required to be completed. As previously noted, this information will not be released and as such the discharge parameters will be accepted at face value and as inputs to the dispersion modelling.

To assess the dispersion modelling component, review of the dispersion calculations [is] required. The dispersion calculations should include the input parameters for all stacks and the various scenarios that have been modelled. Obtaining Appendix F will allow for a partial technical review to be completed of the air application, and in particular, the dispersion modelling component. The information provided to date does not allow any type of technical review to be conducted as the basic assumptions used to develop the modelling results have not been provided.

In summary, without data, a technical review is not able to be completed for this application.

The Environmental Commissioner of Ontario states:

Section 23 of [the Act] provides for a "public interest override" to apply to situations where a compelling public interest in the disclosure of information outweighs the purpose for keeping information confidential. The [EBR] clearly provides that the protection of the environment and the prevention, reduction, and elimination of pollution is in the public interest. These principles are expressed in the Preamble and in section 2 of the EBR.

The EBR provides mechanisms to the public to ensure that designated government ministries act in the public interest when making decisions about the environment. As explained in the ECO's previous submission, the disclosure of information is crucial if these mechanisms are to work effectively. It follows accordingly that the disclosure of information regarding the environmental impacts of pollution emissions is also in the public interest.

Therefore, it is the submission of the ECO that the disclosure of information regarding the environmental impacts of pollution can be characterized as a compelling public interest as stated in section 23 of [the Act]. The ECO refrains from commenting on whether this public interest outweighs the purpose of the exemption from requiring information to be disclosed in the facts in the specific case at hand.

Is there a compelling public interest in disclosure?

In Order P-1398, Inquiry Officer John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In upholding Inquiry Officer Higgins's decision in Order P-1398, the Court of Appeal for Ontario in Minister of Finance (above) stated:

> . . . in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at p. 1].

In light of the Court of Appeal's comments, I am adopting Inquiry Officer Higgins's interpretation of the word "compelling" contained in section 23.

In my view, there is a public interest in the disclosure of the record at issue in this case. The requester and the requester's engineer have stated, and I accept, that release of this record is required in order to conduct a technical review of the material submitted by the appellant in support of the proposal which, in turn, is required in order to make meaningful submissions to the Ministry on whether or not it should grant the appellant's application for a certificate of approval. Although the requester clearly has a personal, private interest in making submissions on the appellant's proposal, the appellant's interest also coincides with a greater public interest of the community surrounding the appellant's plant, and the general public as a whole. This view is supported by the fact that the appellant is represented in this appeal, and for the purpose of the EBR consultation process, by counsel employed by an environmental public interest group. The involvement of this group suggests a broader public interest in disclosure of this record. This is consistent with Order P-270, in which then Commissioner Tom Wright found that the requester, a group active in the area of nuclear energy issues, had a public interest in disclosure of the records at issue in that case.

The public has an interest, from the perspective of protecting the natural environment and protecting public health and safety, in seeing that the Ministry conducts a full and fair assessment before deciding whether or not to grant the appellant a certificate of approval to discharge air emissions into the natural environment. This necessarily entails disclosure of the relevant data contained in the record. In addition, the public has an interest in knowing the extent to which the appellant's proposal to change its operations, if implemented, will impact the environment.

My finding is consistent with one of the fundamental, public interest purposes of the EBR which, as the ECO has stated, is the protection of the environment, in part by providing mechanisms to ensure that government

ministries act in the public interest when making decisions about the environment. I agree with the ECO's submission that disclosure of relevant information is crucial if these mechanisms are to work effectively and that, therefore, disclosure of a record regarding the environmental impacts of proposed air emissions, such as the record in this case, would be in the public interest.

Further, this finding is consistent with Orders P-270 and P-1190 (upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)), in which compelling public interests were found in the disclosure of nuclear safety records. Although the circumstances in these cases were not the same as those found here, what is common to all of these cases is that the records at issue concerned environmental matters with the potential to affect the health and safety of the public.

In addition, the Environmental Appeal Board has recognized the importance of disclosure of relevant information about proposals in the consultation process under the EBR, particularly as it relates to the subsequent leave to appeal process:

> . . . the process followed in this case also reveals problems in the interpretation of the EBR. There appears to be a problem, for example, when the Ministry's Director withholds much of the relevant information about an approval process from the public because she perceives it to require confidentiality, but the Ministry's Access to Information and Privacy Co-ordinator considers most of the concealed information not to be confidential. There is a problem when leave applicants must make their applications to this Board based on information that is incomplete and out-of-date, because they have not been provided with relevant information (Residents Against Company Pollution Inc. v. Ontario (Ministry of Environment and Energy), [1996] O.E.A.B. No. 29, at p. 46).

In the same decision, the Board also stated (at p. 7):

> If the right to apply for leave to appeal is to be meaningful, it may be necessary to develop mechanisms to ensure that leave applicants have access to the documentation upon which the Director based his or her decision, whether generated before or after the comment period.

In another decision on an application for leave to appeal under the EBR, the Board stated:

> The [EBR] is a statute passed specifically for the purpose of enhancing the access of ordinary people to the government's process of making decisions that may affect environmental quality (Northwatch v. Ontario (Ministry of Environment and Energy), [1996] O.E.A.B. No 46, at p. 4)

and (at p. 12):

> Counsel for the Director also submits that . . . "the usual independent, rigorous and exhaustive review process will follow". Whether the usual review process is independent, rigorous and exhaustive may be a matter of opinion . . . This submission amounts to an exhortation to "trust us". However, the purpose of section 38 of the EBR is not to force the citizenry to trust its government, but to make the government more accountable to the citizenry by providing an opportunity to verify claims of independence, rigorousness and exhaustiveness.

Whether or not the appellant's proposal is granted may have serious implications for the natural environment and for the health and safety of the requester and the broader community surrounding the appellant's plant. Because of the potential seriousness of the impact of the Ministry's decision, it is critical that the consultation process under the EBR be conducted in a fair, open and efficient manner, and that, to this end, the requester be given timely disclosure of the record, which is clearly relevant to the issues in the consultation process. In addition, it is highly important that the public be made aware of the potential impact of the appellant's proposal on the environment, in the event it is implemented.

On the basis of the above, in my view, the public interest in disclosure in this case is "compelling" as that word has been interpreted in section 23. Accordingly, I am satisfied that there is a compelling public interest in the disclosure of the record at issue under section 23 of the Act.

Does the compelling public interest in disclosure "clearly outweigh" the purpose of the section 17(1) exemption?

The purposes of section 17(1) of the Act were articulated in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> . . . The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).

Clearly, the purposes of the section 17(1) exemption are serious, and are intended to protect the public interest in the manner expressed by the Williams Commission. However, in this case, the public interest in protecting business interests is clearly outweighed by the compelling public interest in disclosure of this record for the purposes of advancing the fairness and comprehensiveness of the EBR/EPA approval process, informing the public about the potential effects should the certificate of approval be granted, and

ultimately enhancing environmental protection and public health and safety. Therefore, I find that section 23 would apply to override the application of section 17 in this case.

My finding that the "public interest override" would apply in these circumstances is supported by the legislative history of the Act. It is clear that the Legislature intended that the public interest in protecting business by way of the section 17 exemption should yield in circumstances where disclosure of the information is in the public interest because it relates to matters of environmental protection. In discussing whether or not the proposed commercial information exemption should be subject to a "public interest override", the Williams Commission stated:

> . . . In short, if the public interest in disclosure of matters relating to environmental protection, public health and safety and consumer protection is not explicitly stated, it is likely to appear in strained interpretations of other phrases in the exemption. For this reason, we recommend the adoption of a limitation of this kind . . . We recommend that the limitation make express reference to the public interest in such matters as the protection of the environment, consumer protection and public health and safety.

Although ultimately the Legislature did not incorporate specific language in the section 23 public interest override referring the public interest in the protection of the environment, consumer protection and public health and safety, in my view, it is reasonable to assume that in adopting more general language in section 23, the Legislature intended that the override could apply in these types of circumstances, among others. This view is reinforced by Assistant Commissioner Tom Mitchinson's finding in Order P-1190 with regard to nuclear safety records.

The Legislature also recognized the significant weight which should be attributed to information concerning environmental protection and public health and safety matters. Section 11(1) reads:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Section 18(2) reads:

> A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless . . .

I do not suggest that either section 11 or 18(2) would necessarily apply in the circumstances of this case; however, it is clear that the Legislature recognized the special importance of environmental protection and public health and safety information, and indicated that in certain circumstances it must be disclosed despite any other exemption in the Act.

The conclusion that there is a compelling interest in disclosure that clearly outweighs the purpose of the section 17(1) exemption is also supported by statements made by the Supreme Court of Canada about the importance of environmental protection and public health and safety, although made in different contexts. For example, in R. v. Sault Ste. Marie (1978), 85 D.L.R. (3d) 161 (S.C.C.), a case dealing with prosecution for water pollution, the court stated (at p. 170),

> . . . It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration.

In R. v. Canadian Pacific Ltd. (1995), 125 D.L.R. (4th) 385 at 417-418 (S.C.C.), the court said:

> . . . Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the Exxon Valdez oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming, and air quality have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that, individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, Crimes Against the Environment [Working Paper 44 (Ottawa: The Commission, 1985], which concluded at p. 8 that:
>
> > ... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.
>
> . . . environmental protection [has] emerged as a fundamental value in Canadian society . . .

In R. v. Hydro-Québec (1997), 151 D.L.R. (4th) 32 at 99, 102 (S.C.C.), the court stated:

> . . . [P]ollution is an "evil" that Parliament can legitimately seek to suppress. Indeed, . . . it is a public purpose of superordinate importance; it constitutes one of the major challenges of our time . . . the stewardship of the environment is a fundamental value of our society.

In addition, the Supreme Court of Canada has recognized the important public interest in allowing the public to scrutinize the regulatory activities of government through access to information legislation:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry . . . Rights to state-held

> information are designed to improve the workings of government; to make it more effective, responsive and accountable . . . [Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385 at 403 (S.C.C.) per La Forest J. (dissenting on other grounds)].

As I found above, the appellant did not meet the onus of proving the application of section 17(1) to the record. However, even if the appellant had discharged its onus, the interests sought to be protected at section 17(1) would have been clearly outweighed by the compelling public interest in disclosure.

DISCLOSURE MECHANISMS UNDER THE ACT AND THE EBR/EPA

In its submissions, the requester's counsel stated:

> It is somewhat surprising to the writer that the Ministry even thought it appropriate or necessary to advise us that we would have to submit a request pursuant to the [Act] in order to obtain the application information. This is of great concern because it implied that the right to comment under the EBR will be lost when the public is obliged to await [an Act] request, which normally takes far longer than the comment period during which comments are to be made under the EBR.

I find these statements persuasive. The EBR indicates that 30 days notice must be given prior to the ministry deciding whether or not to implement a proposal (section 22). While this is a statutory minimum, it suggests that the Legislature intended for the consultation process to be relatively speedy, in the interests of all concerned. On the other hand, the Act sets up a process whereby requests must be responded to in 30 days, with the ability of institutions to extend this time period, as well as a statutory right of appeal. Overall, the process can extend well beyond the initial 30-day period, depending on the particular case. While the process under the Act is relatively speedy, it was clearly not designed to accommodate the very short processes envisioned by the EBR. In addition, the Ministry has discretionary powers under the EBR to provide relevant information to the public (by way of the Registry) or to any individual member of the public for the purpose of enhancing the fairness and openness of the EBR consultation process (s. 27). Further, in my view, it would appear that the Ministry has sufficient expertise in balancing the interest of openness and fairness in the consultation process in furtherance of protecting the environment, against the competing interest of the protection of commercial interests, to make an initial determination on disclosure. In addition, the Ministry may be in a position to impose reasonable pre-conditions to granting access to sensitive commercial information, in appropriate cases, to lower the risk of harm to applicants through secondary uses or disclosures, beyond the primary purpose of facilitating the consultation process.

In light of the incompatible timing parameters of the two systems, and the fact that the Ministry has the power and expertise to control the extent of disclosure in the consultation process, in my view the Act is not an appropriate disclosure mechanism for the purposes of the EBR. My statement should not be construed as meaning that the requester or the Ministry has acted improperly, or that the Act would never be the appropriate avenue for seeking information relevant to an EBR matter. Rather, in my view, the Ministry

should not as a matter of general policy direct members of the public seeking information for the purpose of an EBR consultation to the Act, but should address the issue using its own expertise and statutory powers.

The same holds true, in my view, for any subsequent proceedings beyond the initial consultation process, such as a leave to appeal application to the Board. This application must be made within 15 days of notice of the minister's decision, and Regulation 73/94 requires the Board to render a decision on the application for leave within 30 days, which may be extended only under "unusual circumstances", and thus is intended to be advanced quickly. Although it is not expressly stated in the Act, the Board may have powers to order disclosure of relevant information under the Statutory Powers Procedure Act (SPPA) (s. 5.4). The Board clearly has such powers on appeal, in the event leave is granted (SPPA, s. 5.4; EBR, s. 45).

My views are reinforced by statements made by the Board:

> . . . it is apparent that if the EBR right to apply for leave to appeal is to be meaningful then the information and expert opinion relied upon by the [Ministry] Director must be accessible to leave applicants. Very few people will have the time, resources and experience to use the [Act] when compiling their submissions under severe time constraints [Re Knowles (1997), 26 C.E.L.R. (N.S.) 71 at 79].

In addition, the ECO has suggested that the Ministry should be disclosing relevant information in a more timely way in the context of the EBR:

> The ECO has consistently maintained that adequate information is necessary for the effective functioning of the EBR and has always urged ministries to provide the public with as much information as possible. Both the 1994-1995 and 1997 ECO annual reports recommended that ministries ensure that full contact information be included in every Registry notice and that details be provided on where the public could find more information. An ECO special report to the Legislative Assembly of Ontario in October 1996 also expressed concern that ministries failed to provide timely information to the public [Environmental Commissioner of Ontario, Report 1998: Open Doors - Ontario's Environmental Bill of Rights (Toronto: 1999)].

SHARING OF REPRESENTATIONS

In her submissions, counsel for the requester seeks access to the submissions made by the other parties to this appeal, and indicates that she does not object to sharing her client's submission with the other parties as well.

Section 52(13) of the Act reads:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the

> Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In Order 164, Commissioner Linden stated:

> . . . I agree that the words "no person is entitled" to see and comment upon another person's representations means that no person has the right to do so. In my view, the word "entitled", while not providing a right to access to the representations of another party, does not prohibit me from ordering such an exchange in a proper case. Subsection 52(13) does not state that under no circumstances may I make such an order; it merely provides that no party may insist upon access to the representations.

While I clearly have the authority to order the mutual exchange of some or all of the parties' representations in a proper case, in my view, such an order is not necessary here, given the outcome of this appeal.

ORDER:

1. I uphold the decision of the Ministry.

2. I order the Ministry to disclose the record to the requester no later than **July 21, 1999**, but not earlier than **July 16, 1999**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the requester.

Original signed by: June 16, 1999
David Goodis
Senior Adjudicator