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

ORDER PO-1702

Appeal PA-990073-1

Ministry of Citizenship, Culture and Recreation

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NATURE OF THE APPEAL:

The Ministry of Citizenship, Culture and Recreation (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to copies of all licence reports prepared by a named archaeological consultant between 1980 and 1998, and a form submitted by this individual to the Ministry under the Ontario Heritage Act (the OHA).

The Ministry identified 19 responsive records: 18 archaeological reports, and one form. Before responding to the requester, the Ministry notified the named individual pursuant to section 28 of the Act. This individual (the affected party) consented to disclosure of the form, and objected to disclosure of the 18 reports.

The Ministry then issued its decision to the requester, granting access to the form, and denying access in full to the 18 archaeological reports pursuant to sections 17(1)(a), (b) and (c) of the Act. The Ministry also claimed sections 14(1)(l) and 18(1)(a) to exempt archaeological site location information; section 21(1) to exempt personal information from certain portions of the records; and section 22(a) as the basis for denying access to information the Ministry claimed was in the public domain.

The requester (now the appellant) appealed the Ministry's decision. The appellant also identified public interest considerations in the appeal letter, thereby raising the possible application of section 23 of the Act.

Mediation was not successful, and a Notice of Inquiry was sent to the Ministry, the appellant and the affected party. The appellant had previously submitted an access request to the Ministry for similar records, as had another individual in a second separate request. The Ministry denied access in response to both of these other requests, and the Ministry's decisions were upheld on appeal (Orders P-1347 and P-1599), on the basis that the records qualified for exemption under section 17(1)(b) of the Act. For this reason, I asked the appellant in the Notice to provide reasons why the present appeal was distinguishable from the two previous similar appeals.

Representations were submitted by all three parties. The Ministry's representations make no reference to the sections 18(1)(a) or 22(a) exemption claims. Both of the exemptions are discretionary, so I will assume that they have been withdrawn by the Ministry and I will not consider them further in this inquiry.

DISCUSSION:

THIRD PARTY INFORMATION

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

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

The Ministry and/or the affected party share the onus of establishing all elements of this mandatory exemption claim.

Part One

Type of Information

The Ministry submits that archaeology is recognized as an organized field of knowledge with natural, physical and social science components. The Ministry states that the information contained in the records stems from fieldwork done over a number of years in the Collingwood area. The Ministry points out that each record sets out the details of the rationale, methods and results of the archaeological fieldwork and presents these in narrative form and in the form of maps and/or photographs.

The affected party's representations support the Ministry's position, and add that the scientific and technical information includes results, interpretations and conclusions, and in some instances innovative techniques which were employed during the fieldwork.

The appellant submits that the records do not contain any of the categories of information listed in section 17(1) "since the affected party is not a professional archaeologist".

The terms "scientific information" and "technical information" were both defined by former Assistant Commissioner Irwin Glasberg in Order P-494, and have been applied in many subsequent orders of this Office. Former Assistant Commissioner Glasberg defined these terms as follows:

> 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.

Having reviewed the records and the representations of the Ministry and the affected party, I find that the records contain information which meets the definitions of both scientific and technical information established by former Assistant Commissioner Glasberg. The records contain "information belonging to an organized field of knowledge in either natural, biological or social sciences or mathematics" and "relate to the observation and testing of certain hypotheses or conclusions undertaken by an expert in the field" (scientific information). The records also contain information "belonging to an organized field of knowledge which would fall under the general category of applied science or mechanical arts" (technical information). This finding is consistent with the findings in Orders P-1347 and P-1599 involving similar records and circumstances. I also note that all of the records at issue in this appeal were created by the affected party in his capacity as a licencee under the archaeological licencing provisions of the OHA.

Part Two

In order to satisfy part two of the test, the Ministry and the affected party must establish that the information was **supplied** to the Ministry, either implicitly or explicitly **in confidence**.

Supplied

The Ministry and the affected party both submit that the records were supplied by the affected party pursuant to the reporting obligations under section 65(1) of the OHA. This section requires every licencee to furnish a report to the Ministry containing full details of the work done, including details of all artifacts, a description of the site, stratigraphic information and the exact location of the site.
Orders P-1347 and P-1599 held that these types of reports were supplied to the Ministry, and I find that the records at issue in this appeal were similarly supplied, for the same reasons.

In Confidence

The Ministry and the affected party both submit that the records were supplied in confidence.

The Ministry's representations are similar to those I considered in Order P-1599. The affected party's submissions on this issue support the Ministry's position. The affected party also provides a copy of a licence issued to him by the Ministry, which includes a specific clause that imposes confidentiality requirements as a condition of the licence.

The appellant states that "[t]here is no evidence that the reports were supplied to the Ministry in confidence either implicitly or explicitly". He goes on to submit:

> Prior to about 1989, all licence reports were readily accessible to all qualified professionals. Further, there is no evidence that the reports were copyrighted as was the case in another request for access to reports.
>
> If all archaeological reports submitted to [the Ministry] since 1975 are confidential, then there is no need for the Ontario Heritage Act and no need to submit reports since these effectively become personal documents. The purpose of archeology is do (sic) document the history of this province. It is not to allow the acquisition of collections of artifacts, data and reports for the personal enjoyment, amusement etc. of the individual licenced by the Minister.

I find that the following statements from Order P-1599 are also relevant in the present appeal:

> The Ministry explains that prior to 1996, its practice was to make reports such as Records 1 and 2 available, for viewing purposes only, to a restricted group of persons, such as licenced archaeologists, researchers undertaking legitimate archaeological research, provincial ministries or agencies or municipalities. However, copies were not provided without the written permission of the authors. The Ministry reviewed this practice in June 1996, and determined that viewing would no longer be permitted in the absence of consent by the authors, and a formal request under the Act would be required before authority was given to view or receive copies of these types of records.
> ...
>
> In my view, when Record 1 [in that appeal] was supplied to the Ministry, there was clear understanding that its content would not be disclosed to others in the absence of consent. Although Record 2 [in that appeal], which was prepared in December 1992, does not contain the same explicit reference to confidentiality, I am satisfied that it was provided to the Ministry with a similar expectation of implicit confidentiality. It is also relevant to note that previous orders of this office have held that information does not automatically lose its confidential character simply because it is provided to an institution pursuant to a mandatory reporting requirement (Orders P-345 and P-359).

For these same reasons, I find that the affected party held a reasonable expectation of confidentiality when the records at issue in this appeal were supplied to the Ministry, and part two of the section 17(1) test has been established.

Part Three

Harms

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

These two parties explain that the records were provided to the Ministry pursuant to section 65 of the OHA. At a minium, 14 points of information must be included in each report under Regulation 881 of that statute. However, the Ministry asks that the records contain information that goes beyond the statutory requirements, and has produced a set of guidelines which require additional information. The quality of a report which meets this standard is much higher than that required by the statute and regulation. The Ministry submits that should the records be disclosed, future reports would not contain information to this extent.

The Ministry adds that the additional information contained in the reports contributes enormously to the wealth of knowledge concerning the heritage of Ontario and is a resource of intrinsic value to all Ontarians. Thus it is in the public interest that the Ministry continues to receive as much detailed information as possible in these reports, and the Ministry relies on the findings of Orders P-1347 and P-1599 in support of its position.

The appellant agrees that the OHA requires minimal reporting on archaeological investigations. He goes on to state:

> The affected party has provided far more information that (sic) required by the Act and its regulations. For this he is to be commended. However, it is the affected party who decides what is to be in the report. If only minimal information were provided, it would still provide the appellant with the information needed.

Again, in my view, statements I made in Order P-1599 are also relevant in the present appeal:

> I accept that information of this nature will be more likely to be provided to the Ministry when professionals, such as the affected parties, are confident that materials will not be subject to disclosure outside the Ministry. I also agree that there is a public interest in ensuring that information related to these activities continues to be supplied to the Ministry. Accordingly, and based on the representations provided by the Ministry and the affected parties, I find that the harm described in section 17(1)(b) could reasonably be expected to occur if the records are disclosed, and the third requirement for the test has been established.

For these same reasons, I find that the third part of the test has been established in the present appeal, and that all records qualify for exemption under section 17(1)(b) of the Act.

As stated earlier, the appellant was asked in the Notice to provide reasons why this appeal should be distinguished from his previous appeal (Order P-1347) and the other appeal (Order P-1599) involving different parties but similar records and issues. He states that: "[t]he appellant, along with a number of other professional archaeologists, believes that [the Act] did a great disservice to the study of the history of this province in Order 1347", and refers to articles written following the issuance of Order P-1347 which purportedly support his view. He also states:

> This appeal is different because the affected party is an amateur, with no apparent formal training in archaeology. Should he be allowed withhold (sic) these reports, prepared as part of his hobby, it will mean that all amateurs will be allowed the (sic) withhold these reports, thus negating any value the Ontario Heritage Act has. The logical outcome is that there is no need for an Archaeology section in [the Ministry] and that all reports currently stored by the Archaeology Section should either be destroyed or returned to their authors.
>
> This request is different that (sic) Order P-1599 in that the appellant is a professional archaeologist who has worked at an Ontario University of (sic) 26 years, has directed the University's Museum of Archaeology for 23 years and is the senior-most practising and one of the most prolific archaeologists in the Province. (a copy of my CV is available on request).

The Ministry included with its representations an affidavit sworn by the Ministry's Manager of the Heritage Operations Unit. His affidavit includes the following statements which explain the licensing scheme under the OHA:

> ... under Part VI of [the OHA], the Minister has a wide range of powers with respect to the conservation and protection of resources of archaeological value in Ontario. The [OHA] provides for licensing by the Minister of any person who wishes to carry out archaeological exploration, fieldwork or surveys. The Heritage Operations Unit administers the licensing process through the Archaeology Licence Office.
> ...
>
> The activities of all persons searching for material remains on archaeological sites or the sites themselves fall within the definition of archaeological activity and all such persons must obtain licences before undertaking any search activity, that is, archaeological work.
>
> Licensing such searches serves to regulate archaeological fieldwork in Ontario, ensuring that:
>
> a) archaeological work is conducted competently,
> b) archaeological sites are recorded in the Ministry's database,
> c) reports of archaeological investigations are written and filed at the Ministry,

d) objects of archaeological significance are catalogued and held in safekeeping,
e) information is available to manage the archaeological resource.

> There are 6 classes of archaeological licences. Each has conditions attached which regulate the archaeological activity which can be conducted by the licensee. For example, amateur archaeologists are often issued licences which allow only surface collection of artifacts and site mapping, whereas licences issued to professional archaeologists often permit a broader range of activities, including full-scale excavations.
>
> Section 65 of the [OHA] requires every licensee to furnish a report to the Minister containing full details of the work done, including details of all artifacts, a description of the site, stratigraphic information and the exact location of the site. This is required within a reasonable time after the close of each season's filed work.

Archaeological fieldwork undertaken in Ontario is regulated through a detailed licencing scheme set up under the OHA and its regulations. The scheme provides for different types of licences based on different activities and, as outlined in the Manager's affidavit, recognizes the participation of both amateur and professional archaeologists within the overall licencing system. It is clearly not within my jurisdiction or competence to determine whether the affected party is an "amateur", as suggested by the appellant. However, it is also not necessary for me to do so since, in my view, the distinctions raised by the appellant between the present appeal and the previous ones based on the professional status of the affected party are simply not supportable under the licencing scheme of the OHA.

COMPELLING PUBLIC INTEREST

The appellant raised public interest considerations in his letter of appeal, and section 23 was added as an issue in the Notice.

Section 23 of the Act reads as follows:

> 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.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the personal information exemption.

It is important to note that section 17 is a mandatory exemption whose fundamental purpose is to ensure that third party interests are maintained. In my view, where the issue of public interest is raised, one must

necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption.

The appellant's representations make no specific reference to section 23 or to the requirements of this section.

Having reviewed the records, I am not convinced that disclosure of the information contained in the records is necessary in order to advance the public interest in this matter. In my view, the appellant has failed to provide evidence to demonstrate the existence of a compelling public interest in disclosure of this information, nor that disclosure of the records would clearly outweigh the purpose of the mandatory section 17(1) exemption claim.

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

Because of these findings, it is not necessary for me to consider the application of sections 14(1)(l) or 21 of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: August 17, 1999
Tom Mitchinson
Assistant Commissioner