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

# ORDER PO-1803

Appeal PA-990236-1

Ministry of the Environment

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## NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a draft environmental inspection report prepared by a named environmental engineering consulting firm (the consultant) and sent to the Ministry by one of the companies that hired the consultant to prepare the draft report (the company). The requester is involved in litigation with the company.

The Ministry responded by issuing a fee estimate of $64.20, which was paid by the requester. The Ministry then notified the company of the appeal, pursuant to section 28 of the Act, and asked for submissions on whether the draft report should be disclosed. The company objected to disclosure. After considering the company's objections, the Ministry decided to disclose the record in its entirety.

The company (now the appellant) appealed the Ministry's decision, claiming that the draft report qualified for exemption under sections 17(1)(a), (b) and (c) of the Act.

I sent a Notice of Inquiry to the appellant. Because two other organizations (the affected persons), had jointly commissioned the report with the company, I also sent the Notice to them. I received representations from the appellant and both affected persons. After reviewing these representations I sent the Notice of Inquiry to the requester and the Ministry, together with the entire representations of the appellant and the affected persons. The requester and the Ministry also submitted representations. I then sent a Supplementary Notice to the Ministry, asking them to respond to particular questions concerning the possible application of section 17(1)(b). The Ministry submitted supplementary representations. Finally, I decided to provide the appellant and affected persons with an opportunity to reply to issues raised by the Ministry and the requester, and sent them a Supplementary Notice, together with the requester's entire representations and the relevant portions of the Ministry's representations and supplementary representations. No supplementary representations were submitted by the appellant or either of the affected persons.

## DISCUSSION:

### THIRD PARTY INFORMATION

In the circumstances of this appeal, the Ministry has decided to disclose the record to the requester. The appellant appealed the Ministry's decision, and the affected persons support the appellant's position. Therefore the onus is on the appellant and the affected persons, as the parties resisting disclosure, to establish the requirements of the section 17(1)(a), (b) and (c) exemption claims. These sections state:

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

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

For the record to qualify for exemption under these sections, the appellant and the affected persons must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

In its decision upholding my Order P-373, the Court of Appeal for Ontario commented on the meaning of the three-part test articulated above, as follows:

> 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 (C.A.)]

**Requirement One: Type of Information**

The appellant makes the following submission in support of the position that the record contains scientific and technical information:

> It is respectfully submitted that the investigation by engineers, which included results of subsurface investigations, soil, groundwater, soil vapour and surface water sampling and testing, constitutes scientific and technical information.

The appellant relies on the following definitions of scientific and technical information established by former Assistant Commissioner Irwin Glasberg in Order P-454:

> ... 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.
> ...
>
> ... 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.

All parties are in agreement that the record contains technical information. I concur. It was prepared by professionals in the field of environmental engineering and testing, and describes the operation of various processes and equipment related to that field (see also Orders M-907, M-1143, MO-1212, MO-1263, PO-1666 and PO-1732-F).

Therefore, I find that the first requirement has been established.

**Requirement Two - Supplied in Confidence**

In order to satisfy the second requirement, the appellant and the affected persons must show that the information was supplied to the Ministry, either implicitly or explicitly in confidence.

All of the parties agree that the record was supplied to the Ministry. Again, I concur, and find that the "supplied" component of the second requirement has been established.

In order to establish that the record was supplied either explicitly or implicitly in confidence, the appellant and the affected persons must demonstrate that an expectation of confidentiality existed at the time the draft report was submitted (Order M-169), and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

(1) Communicated to the Ministry 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 party prior to being communicated to the Ministry.

(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 provides detailed arguments in support of its position that the records were supplied to the Ministry in confidence. The appellant states:

> It is respectfully submitted that the document was explicitly supplied in confidence.
>
> Two copies of the [record] were supplied to [the Ministry], accompanied by a covering letter which stated:
>
> > "The [record] has been prepared on a privileged and confidential basis and it is being forwarded to you on the basis of the understanding that it will remain privileged and confidential."
>
> The Report was submitted, on a privileged and confidential basis, in order to elicit comments from the Ministry for the reasons set out previously ...

> There was not only an objectively reasonable expectation of confidentiality on the part of the appellant at the time the Report was sent to the Ministry, but there was also an explicit understanding that the Report would remain confidential. This is stated in the quote from the letter set out above.
>
> The Report was prepared on a privileged basis in the context of litigation. Litigation privilege applies to the Report and it was only released to the [Ministry] "on the basis of the understanding that it would remain privileged and confidential". The Report contains highly sensitive information and there was more than a reasonably expectation that such information would be kept confidential.
>
> Finally, the Report is not complete. As mentioned, a companion Report is to follow. Access to one Report without the follow up, to a party who is not aware of the subsequent Report, would create an inaccurate and misleading picture of the facts. As such, it is reasonable that such a Report, would remain confidential until otherwise advised.

Both affected persons support the appellant's submissions, and the Ministry confirms that the covering letter referred to by the appellant contains the "confidentiality" statement. In addition, I note that the title page of the report indicates that it is "PRIVILEGED AND CONFIDENTIAL".

The requester, on the other hand, disputes the claim that the report was supplied in confidence. The requester states that part of the report concerns his property, and that prior to any work being undertaken by the consultant on that property, he advised the appellant by letter that:

> I have reviewed the draft work plan and have no objection to the proposed bore holes planned for the [requester's property], "as long as we receive copies of all reports of the results of the proposed work." [requester's emphasis]

The requester quotes the response received from the appellant as follows:

> ... In accordance with your letter, we understand that access to the [requester's] property has been granted for the purposes of installing the bore holes and conducting periodic monitoring. In exchange we will provide you with copies of all reports on the results of the proposed work.

The requester submits that:

> ... the appellant was put on notice and agreed, prior to the commencement of the work leading to the eventual report that the requester was to receive copies of all the reports of the results of the proposed work. Therefore, although the records would have been supplied in confidence with a view to non-affected parties, there is no disputing that the

> appellant was put on notice by the requester that he was to receive copies of all reports of the results of the proposed work.

While there may be circumstances in which an agreement outside the context of the Act mandating disclosure of a document could be relevant in deciding whether a reasonable expectation of confidentiality exists, I find that this is not the case in the present appeal. In my view, the limited disclosure contemplated by the agreement is a relevant factor to consider in assessing potential harms associated with disclosure under the third part of the section 17(1) exemption test, but it does not impact on the question of whether the appellant's overall expectation that the Ministry would keep the document confidential was reasonable.

Based on the representations provided by the appellant, the affected persons and the Ministry, I accept that the draft report was supplied by the appellant to the Ministry on the reasonably-held basis that it would be treated confidentially by the Ministry. This expectation was explicitly communicated to the Ministry, and the report itself was clearly marked as confidential. The appellant has provided representations sufficient to establish that the draft report has consistently been treated in a manner that indicates a concern for its protection from disclosure, and I accept that the draft report was originally prepared for a purpose which would not entail disclosure. I also accept that the draft report is not otherwise disclosed or available from sources to which the public has access.

For these reasons, I find that the criteria outlined in Order P-561 are present and the second requirement for the section 17(1) exemption claim has been established.

**Requirement Three - Harms**

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) supra and Order PO-1802).

**Sections 17(1)(a) and (c)**

The appellant and the affected persons' arguments on sections 17(1)(a) and (c) focus on ongoing settlement discussions among these three parties regarding responsibility for remediation work on the requester's property, and the potential litigation that might occur involving the requester should the record be disclosed.

The appellant submits:

> It is reasonable to expect that the negotiations of the [appellant and the affected persons], who jointly commissioned the Report, would be significantly interfered with if the Report is disclosed. As discussed, the Report does not paint a comprehensive picture of the situation as the companion document to the Report is not yet complete. The disclosure of the Report to a third party, then, will misinform and mislead the third party. Without the complete package of information, it is more than reasonable to expect an interested third party will take action, which would inadvertently interfere with the highly sensitive negotiations leading towards settlement. If the settlement negotiations are destroyed, the parties will be forced back to the significantly more costly, onerous and lengthy route of litigation. This will inevitably result in an undue loss for the three parties.

One of the affected persons submits:

> In this case, as [the affected person] has already noted, [the appellant and the two affected persons], may expect to suffer the loss and costs associated with the renewal of litigation by [the requester], and will face the risk of loss if the settlement negotiations are impaired, and the comprehensive and appropriate remediation plan cannot be implemented due to disclosure of the Report, with its potential for misdirection as it is incomplete and in draft form.

The Ministry provides no submissions on these particular harms, and the requester relies on my findings in Order PO-1732-F in arguing that there is no reasonable expectation that the sections 17(1)(a) and/or (c) harms would occur through disclosure of the draft report in the circumstances of this appeal.

While I acknowledge that there appears to be an ongoing dispute among the parties, I am not persuaded that disclosure of the draft report could reasonably be expected to significantly interfere with any negotiations between the appellant, the affected persons and the requester in the context of resolving this dispute.

Significantly, the appellant has agreed to provide the requester with copies of all reports in exchange for being granted access to the requester's property for the purposes of environmental testing and monitoring. Although the record at issue in this appeal is a draft and not a final report, it consists of 47 pages of test results and analysis relating to environmental contamination, including contamination on the requester's property, together with more than 100 pages of supporting materials attached as appendices. Although the report is described by the appellant and affected persons as a "draft", there is no indication on its face that it was submitted in draft form. It is signed by the consultants who prepared it, cerlox-bound, and transmitted on the consultant's letterhead. I can accept that parts of this record may change when it is provided in final form, but it is clear that the bulk of work undertaken by the consultant as the basis for the report has been completed. Although it could be argued that the agreement between the requester and the appellant regarding the provision of "reports" does not extend to "draft reports", it is clear that the type of information intended to be provided to the requester through this arrangement is precisely the type of information

contained in the draft report. In my view, the appellant's position on the expectation of harm through disclosure of the draft report is not reasonable or supportable.

In addition, the appellant and affected persons have indicated that the draft report does not provide "a comprehensive picture of the situation as the companion document to the Report is not yet complete" and that "disclosure of the Report to a third party, then, will misinform and mislead the third party". None of these parties has identified any specific errors, inadequacies or deficiencies contained in the draft, nor are any clear on its face. If the appellant and affected persons are concerned that errors would go unnoticed, they are certainly able to convey this information to the requester in order to avoid misinterpretation. Also, the draft report is dated June 8, 1998, more than two years ago. Given the nature of the report and the fact that it appears to be complete and comprehensive, I am puzzled that the final version has not been completed by this point. If it has, then it would be a record accessible under the Act if in the custody or under the control of the Ministry (see my discussion of section 17(1)(b), below), and can be provided to the requester by either the Ministry or the appellant, to be read in conjunction with the draft version.

For these reasons, I find that the appellant and the affected persons have not established that disclosure "could reasonably be expected to" result in any of the harms contemplated by sections 17(1)(a) and/or (c) of the Act.

**Section 17(1)(b)**

The appellant argues that if the record is disclosed it will be unwilling to voluntarily provide such information to the Ministry in future.

In this regard, the appellant, supported by the affected persons, submits:

> It is indisputably in the best interests of the public that costly legal disputes be settled before they reach the courts. This is recognized by the courts and by the Provincial Government, as evidenced by the coming into effect of Rule 24.1 of the Rules of Civil Procedure, which makes mediation mandatory for civil actions commenced after the date upon which that Rule came into effect. This reflects the interest of the Provincial Government in reducing cost and delay in litigation and facilitating early and fair resolutions to disputes. The release of the Report would be in direct contradiction to this objective.
>
> The Report was provided to the [Ministry] to assist the three parties in the shared goal of settlement. The Report was provided to the Ministry with the explicit understanding that it be kept confidential and not disclosed. If the Report is released, and our explicit request for confidentiality is disregarded, it is without doubt that such confidential information will cease to be voluntarily supplied to the Ministry.

The requester argues that the Ministry has the statutory ability to require the information contained in the record from the appellant and the affected parties. The requester relies on the findings in Order PO-1666 as well as section 168 of the Environmental Protection Act (the EPA) in support of his position.

The requester further submits:

> It is the requester's submission that whether or not the record in question was submitted to the Ministry for the purpose of obtaining input regarding the apportioning of liability between the appellant and the affected parties, makes no difference. The record at issue is a Subsurface Investigation Report. Regardless of the request that may have been made by the appellant or the affected third parties, the records in question are records which the Ministry is fully within its power to compel production under the [EPA].
>
> The fact that information would be less likely to be supplied to the institution is not sufficient to comply with the provisions of Section 17(1)(b).
>
> It is the requester's position that the information provided by the appellant and the affected parties is not distinguishable from the information that is otherwise provided to the Ministry of the Environment, or that the Ministry may compel from the appellant or affected parties. Given Sections 13, 15, 18, 19 and 168 of the Environmental Protection Act, as well as the public interest override provisions in Section 23 of the Act, it is definitely in the public interest that information similar in nature to the record in question continue to be supplied to the Ministry in future. However, there has been no cogent evidence produced by the appellant or third parties, other than bald assertion, that such information will not continue to be suppled to the Ministry in the future.

In previous orders of this Office, reports concerning remediation of contaminated property provided to the Ministry in the context of the Ministry's administration of the Environmental Protection Act have been found not to qualify for exemption under section 17(1)(b) of the Act.

Adjudicator Laurel Cropley summed up the position in the following quotation from Order PO-1666:

> With respect to section 17(1)(b) ..., the Ministry acknowledges that it would prefer to work co-operatively with the industry, however, it submits that the EPA provides the authority for it to obtain this type of record in any event.
>
> I have considered the arguments raised by both the Ministry and the Company. I would like to point out that both parties have provided extensive and detailed submissions on this issue. Although the Company has strenuously objected to the disclosure of the records, I am not persuaded that the harms which it believes will come to pass should they be disclosed could reasonably be expected to occur. In particular, I am not convinced that the Company, or any other similar company in the industry would no longer supply this type of

> information to the Ministry. The EPA clearly requires specific types of information and establishes the legal authority to obtain it. Although, as the Ministry indicates, it would prefer to have this information provided voluntarily, it indicates that it is prepared to compel its production under the authority of the EPA, if necessary. Consequently, I find that section 17(1)(b) does not apply.

(See also Orders P-1595, M-1143, PO-1707 and PO-1732-F)

Applying this reasoning, it is clear that the final version of the consultant's report would not qualify for exemption under section 17(1)(b). What is unique about this appeal is that the record at issue is a draft report, not a final report, and the draft was submitted to the Ministry on a voluntary basis at a point in time before the consultant had made a final determination as to the reasons for contamination and the extent of remediation required on the requesters's property.

In my view, the public is best served by having access to the maximum amount of information in the area of environmental contamination and clean-up efforts. This view is reflected in the provisions of the EPA, which provide the necessary authority to the Ministry to ensure that the public is fully informed of issues impacting the environment. The appellant and the affected persons, in apparent good faith, and with a view to resolving environmental concerns associated with contamination on the requester's property, decided to involve the Ministry and to rely on its expertise in apportioning responsibility. The question of collective responsibility does not appear to be at issue; only the relative division of responsibility among the three parties.

In the Supplementary Notice of Inquiry I sent to the Ministry during the course of this inquiry, I posed a number of specific questions concerning the applicability of section 17(1)(b) in these circumstances:

1. For what reasons does the Ministry believe that disclosure of the record would not result in the harm described in section 17(l)(b) of the Act. In addressing this issue, the Ministry is asked to specifically provide a response to the following:

> Orders M-1143, P-1595, PO-1666, PO-1707 and PO-1732-F dealt with records similar in nature to the record in this appeal. In those previous orders, it would appear that the records were provided to the Ministry as part of the Ministry's process of managing compliance with environmental standards and, while these records may have been provided voluntarily, it would also appear that the Ministry could compel the production of the records. In the present appeal, however, it appears that the record may have been submitted to the Ministry for the purpose

of obtaining input regarding the apportioning of liability between the appellant and the affected parties.

2. In view of this possible distinction, the Ministry is asked to provide representations on whether the circumstances under which the record was provided to the Ministry in this appeal are distinguishable from the circumstances in the above-noted previous orders for the purposes of section 17(1)(b) of the Act.

3. The Ministry is asked to provide representations on whether the record is compellable under the Environmental Protection Act (the EPA) and to explain the relevance of section 168 of the EPA to the record.

4. The Ministry is further asked to provide representations on whether it is in the public interest that information similar in nature to the record, or records submitted in similar contexts, to continue to be supplied to the Ministry in future.

The Ministry's responses to these questions were quite sketchy, but did not raise concerns on the Ministry's part that disclosure could potentially impact on the likelihood that similar records of this nature would be supplied in future in similar circumstances. The Ministry stated:

> Section 168 of the Environmental Protection Act indicates:
>
> "Except as to information in respect of the deposit, addition, emission, or discharge into the natural environment, every provincial officer shall preserve secrecy in respect of all matters that come to his or her knowledge in the course of any survey, examination, test or inquiry under this Act ...".
>
> This means that the Ministry would release this type of information were [it] not a draft report.
>
> The Ministry in the circumstances of this request is not invoking section 17(1)(b) of the Act.
>
> The Ministry does not have the authority to order the production of the record in question. The Ministry does have the right to order the production of a final report.

I agree with the appellant that there is a broad public interest in having legal disputes settled before they result in costly court processes. However, in my view, this does not satisfy the more specific requirement that it be "... in the public interest that similar information continue to be so supplied" as required by section 17(1)(b). The public interest signified by the wording of section 17(1)(b) must have some connection to the policy mandate of the institution with custody or control of the record at issue. In the case of the Ministry of

the Environment, its policy mandate relates to the protection of the environment, not the settlement of civil litigation disputes.

Moreover, the EPA contains a number of sections allowing the Ministry to protect the public interest as it relates to this environmental protection mandate. The Ministry can require production of information relating to the discharge of contaminants into the natural environment (sections 13(1), 15(1) and 18); require notification to the Ministry where a contaminant has been discharged (sections 13(1) and 15(1); and require property owners and others to, among other things, "study and report to the director upon" measures to control the discharge of a specified contaminant, the effects of the discharge of a specified contaminant, and the natural environment into which a specified contaminant is likely to be discharged (section 18(1)).

It is also significant to note that the Ministry is taking the position that section 17(1) does not apply to the record at issue, including section 17(1)(b). In its representations, the Ministry, which has the mandate to protect the public interest in matters relating to the environment, does not express any concern that similar information will not be supplied in future, nor that the continued supply of similar information is in the public interest. Because section 17(1) is a mandatory exemption, in my view, it is fair to infer from the Ministry's position that it has determined that disclosure of the record would not interfere with the kinds of public interests that the Ministry's mandate seeks to protect. Given the Ministry's experience with issues of this nature, in particular the types of information it requires to protect the natural environment on an ongoing basis, the Ministry's position that section 17(1)(b) does not apply is a significant consideration.

The Ministry's position also supports the view that the particular circumstances of this appeal, including the fact that the record is a draft report and that it was provided on a voluntary basis, are not distinguishable from previous orders (Orders M-1143, P-1595, PO-1666, PO-1707 and PO-1732-F) dealing with remediation of contaminated property in the context of section 17(1)(b) of the Act.

For all of these reasons, I find that the record does not qualify for exemption under section 17(1)(b).

In summary, I find the record does not qualify for exemption under sections 17(1)(a), (b) or (c), and should therefore be disclosed.

## ORDER:

1. I order the Ministry to disclose the record in accordance with its original decisions, by sending the requester a copy of the record by **August 16, 2000** but not before **August 11, 2000**.

2. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the requester pursuant to Provision 1.

Original signed by: July 11, 2000
Tom Mitchinson
Assistant Commissioner