



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER PO-1780-I

Appeal PA-000003-1

Ministry of the Environment



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

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 all records in the possession of the Ministry relating to compliance by a named company with sections 2.1 and 2.2 of an Order made against it pursuant to section 18 of the Environmental Protection Act.

The Ministry notified the company under section 28 of the Act. The company objected to the disclosure of the responsive records to the appellant. Based on the submissions received from the company, the Ministry denied access to the records, claiming the application of the exemptions found in sections 17(1)(a) and (c) of the Act to them.

The requester, now the appellant, appealed the Ministry's decision. In her appeal materials, the appellant has raised the possible application of section 23 of the Act, the so-called "public interest override" and section 11 of the Act which obliges the Minister to disclose any record to the public where he or she has reasonable and probable grounds to believe that it is in the public interest to do so as the record reveals a grave environmental, health of safety hazard to the public. In addition, the appellant objects to the contents of the Ministry's decision letter, claiming that it lacks the particulars required by section 29(1)(b) of the Act.

During the mediation stage of the appeal, the appellant agreed to withdraw her reliance on the provisions of section 11.

I decided to seek the representations of the parties who are resisting disclosure of the records, in this case the Ministry and the company (the affected party), first. Both of these parties submitted representations.

ISSUE:

Both the Ministry and the affected party have requested that I withhold all of their representations from the appellant. The purpose of this interim order is to rule on these requests.

DISCUSSION:

Sharing of representations procedure

In the Notice of Inquiry cover letter to the Ministry and the affected party, I stated:

The representations you provide to this office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The *Inquiry Procedure* document states:

In its representations, the first party must indicate clearly, and in detail:

- which information in its representations, if any, the party wishes the Adjudicator to withhold from the second party; and
- its reasons for this request (see confidentiality criteria below).

The document later sets out the criteria for withholding representations, as follows:

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

The Ministry's confidentiality request

The Ministry addressed the confidentiality of representations issue in its submissions as follows:

This document is considered the confidential facts and evidence of the Ministry of the Environment for the sole purpose of defending our actions with respect to the request made by [the appellant] and no other purpose. It is intended for the exclusive use of staff of the
[IPC Order PO-1780-I/May 5, 2000]

Information and Privacy Commissioner/Ontario and in accordance with section 55(1) of the Freedom of Information and Protection of Privacy Act, may not be disclosed to the appellant or affected parties.

The Affected Party's confidentiality request

The affected party indicated to me simply that it objects to the disclosure of any of its representations to the appellant. The affected party did not elaborate on their objection.

FINDINGS:

Further opportunity to make submissions on the sharing of representations

Based on the *Inquiry Procedure* document, parties are not permitted a further opportunity to make submissions on the sharing of representations issue, barring exceptional circumstances. The opportunity to do so is provided at the time the original representations are made. There are no exceptional circumstances which would take this case outside the norm. As a result, this interim order constitutes my decision on this issue, and I will not be providing the Ministry or the affected party with an additional opportunity to make submissions in this regard.

The Ministry's representations

Having reviewed the representations of the Ministry in their entirety, I find that with one exception, they do not fit within any of the confidentiality criteria described in the material that accompanied the Notice of Inquiry.

The Ministry's generalized claim of confidentiality is insufficient to establish a basis for my withholding these portions of the representations. I have not been provided with any submissions which refer to the specific confidentiality criteria set forth above. On their face, the representations do not contain any indication that those portions which are not highlighted on the copy that I have attached to the Ministry's copy of this interim order would be exempt or otherwise confidential in nature. Further, some of the information in the representations is already within the knowledge of the appellant, for example, the introduction section of the submission, which describes the history of the request and the subsequent appeal.

The information which I have decided to disclose to the appellant consists of generalized references to the records at issue that do not go so far as to reveal the substance of the records claimed to be exempt. The remainder of the information to be disclosed is either in the nature of additional background information which on its face is of a non-confidential nature or which consists of submissions of law and/or argument.

I accept that the disclosure of one phrase in paragraph 4 of the Introduction portion of the Ministry's representations would reveal the substance of the records at issue in this appeal, thereby satisfying

paragraph (a) of the confidentiality criteria. Accordingly, this portion of the Ministry's representations will not be shared with the appellant.

To the extent that the Ministry's position appears to be based on the Commissioner's lack of authority to make a decision to share the representations of one party with another, I would draw the Ministry's attention to the reasons of Mr. Justice Cosgrove in *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)* (June 3, 1999), Toronto Doc. 103/98 (Ont. Div. Ct.) in an order granting the Commissioner's sealing order as asked. In refusing to extend the sealing order to the Ministry's non-confidential representations in that case (and four others heard at the same time), Mr. Justice Cosgrove said:

I have engaged counsel in discussions on sections 52(13) and [55(1)] of the Act. I am, with respect, unable to agree that these sections (in the context of the whole legislation) support the proposition that it was intended that representations be excluded. I have concluded that the Act does not warrant the sealing of the representations. . . .

This principle shall apply unless representations are otherwise ruled confidential by the Commissioner.

It is clear that the Divisional Court does not consider that section 55(1) has the effect on the confidentiality of the representations in the matter before me as advanced in the Ministry's submissions, and that the court agreed that decisions on the confidentiality of representations should be made by the Commissioner.

For the above reasons, I have decided that the Ministry's representations, with the exception of that portion in paragraph 4 on page one which I have highlighted, should be shared with the appellant. The highlighted portion of the representations which I am providing to the Ministry with a copy of this order will not be shared with the appellant due to confidentiality concerns.

The affected party's representations

As noted above, the affected party also objects to the disclosure of any portion of its representations to the appellant. Again, the affected party did not provide me with any specific references to the confidentiality criteria described in the materials which accompanied the Notice of Inquiry. Based on my review of the representations, I find that portions of them meet the confidentiality criteria expressed in paragraphs (a) and (b) as their disclosure would reveal the substance of the records at issue or the information contained in the representations would itself be exempt from disclosure under section 17(1) of the Act.

Those portions of the representations which are not to be shared with the appellant make specific reference to the commercial, financial and technical information contained in the records pertaining to the business activities of the affected party. However, those portions of the representations which should be shared with the appellant contain only generalized statements which do not go so far as to reveal the substance of the records which the affected party claims to be exempt under section 17(1).

I have highlighted on a copy of the representations of the affected party those portions of its submissions which will **not** be shared with the appellant. The remainder of the representations do not, however, meet the confidentiality criteria and should be provided to the appellant.

PROCEDURE:

I have attached to the respective copies of this interim order a copy of each party's representations in the form in which they will be sent to the appellant. I intend to send the non-highlighted portions of the Ministry and the affected party's representations to the appellant, together with a Notice of Inquiry, no earlier than **May 19, 2000**.

Original signed by: _____
Donald Hale
Adjudicator

_____ May 5, 2000