

ORDER PO-1924

Appeal PA-000101-1

Ministry of Labour

NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Labour (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of engineering drawings which illustrate two mobile work stations for International Bridge Authority that were submitted to the Ministry's Sault Ste. Marie office in 1999 by a named construction company (the company) and/or a named engineering firm (the engineering firm). By way of background, the appellant states that the two work stations were originally designed and drawn by his company and that his company "holds title to the copyright of these drawings".

Before making its decision respecting access, the Ministry notified the engineering firm of the request for the specified drawings it submitted to the Ministry on behalf of the company and asked for its views regarding disclosure. The engineering firm informed the Ministry that the company had a greater interest in the issue of disclosure of these records. Consequently, the Ministry notified the company of the request. The company objected to disclosure of the drawings and stated that it holds U.S. and Canadian patents for the mobile workstation. The company stated further that the technical details of the mobile workstation and in the patent protecting it are apparent from the detailed drawings submitted to the Ministry. The company explained, in considerable detail, the harms it believed could reasonably be expected to occur should the records be disclosed.

As a result, the Ministry denied access to the records pursuant to sections 17(1)(a) and (c) of the *Act* on the basis that they contain technical information that was supplied implicitly in confidence and that their disclosure could reasonably be expected to result in competitive harm or undue benefit to another party. In addition, the Ministry advised the appellant that, since ownership of the drawings is an issue between the parties, alternative access to the records may be available to him by way of civil litigation.

The appellant appealed the Ministry's decision. In his letter of appeal, the appellant reiterated his claim that he should have access to the records at issue on the basis that the drawings are his. He stated that "[the company] paid for the right to use our work but not keep it exclusively". He claimed that the company did not have the right to submit the drawings to the Ministry under their title block because engineering drawings are copyrighted to the author. The appellant explained that the drawings were created in electronic files and electronically transferred from the appellant's office to the company.

In support of his position, the appellant provided this office with a document containing the Professional Engineers Society (the PEO) position on copyright and a copy of a confidentiality agreement between it and the company dated December 2, 1995 and signed by the President of the company and the appellant. This agreement indicates that the company holds the patent for "a method and apparatus for shrouding and painting a bridge (the invention)" and that it retains all rights in relation to this invention, including patent, trademark, industrial design and knowhow, but excludes copyright (this term has been struck out and initialled by both parties). Clause two of the agreement provides that the appellant will not use or disclose confidential information relating to the invention for

a period of five years from the date of execution of the agreement. The agreement also contains the following two clauses (one typed and one handwritten):

4. All prototypes, photographs, drawings and documents relating to the invention forthwith are the property of the patentee and must be returned upon the request of the patentee. (the words drawings and documents have been struck out and initialled by both parties).
5. Copyrights for the engineering design and drawings are the property of [the appellant] (this clause is handwritten and is also initialled by both parties).

Mediation of this appeal could not be effected and the matter was moved into inquiry.

The usual practice of this office is to send a Notice of Inquiry to one or more parties first, usually the party or parties who bear the onus, who then make submissions. After reviewing these submissions, the Adjudicator may decide to seek representations from the other party or parties. In the circumstances of this appeal, it appeared to me that the issues relating to ownership of the drawings may be relevant to the application of section 17(1) to the records at issue. I therefore decided to vary this procedure, and sent a Notice of Inquiry to the Ministry, the company and the appellant at the same time. I provided the background to the issues (as set out above) and set out a number of specific questions directed at obtaining certain factual information that I required in order to proceed with the inquiry. The parties were asked to carefully review these questions and to provide detailed submissions and evidence in responding to them.

In addition, the appellant was requested to provide a copy of the drawings that were made by his company and in which it holds copyright, evidence relating to copyright, such as registration or other documentation that supports the copyright, and evidence that these drawing were provided to the company.

All three parties submitted representations in response. The appellant submitted a copy of three sets of drawings that were prepared by his company in 1995 and 1997. The company provided its representations in affidavit form.

After reviewing all of the submissions, I decided to seek further representations from the appellant only. I provided the appellant with the Ministry's representations in their entirety and the non-confidential portions of the company's submissions. The only portion of these submissions which I withheld contains the personal information of an identifiable individual, the disclosure of which may constitute an unjustified invasion of his personal privacy.

The appellant was asked to review these submissions (particularly those of the company), to provide further submissions on the application of section 17(1), and to refer to the submissions of the other parties where appropriate. The appellant was also requested to provide detailed evidence to support the factual allegations underlying his position relating to the question of whether the records were supplied in confidence as well as the

reasonableness of the company's expectation of harm should the records be disclosed to the appellant. The appellant provided representations in response.

RECORDS:

The records at issue in this appeal consist of fourteen (14) engineering drawings (24" x 36") all of which show that they were drawn on March 30, 1999.

DISCUSSION:

THIRD PARTY INFORMATION

Introduction

The Ministry and the company take the position that sections 17(1)(a) and (c) are applicable to the information contained in the records at issue. Those sections read:

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;
- (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 section 17(1)(a) 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) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

Part one: type of information

The Ministry submits that there are clear grounds for treating the requested drawings as technical information. The company takes the position that the records contain technical information as well as trade secrets. In this regard, the company states:

[The company] holds one US and one Canadian patents for the mobile workstation. This is a new approach for providing scaffolding and containment for bridges during the removal of paint on steel bridges structures and the application of new paint.

...

...The technical details in the "Mobile Workstation" are defined in the patent protecting it and the technical details and the trade secret details are further defined in the drawings submitted to the [Ministry].

It is in those detail drawings and manuals where the features are explained and accurately defined. Within these details are the trade secrets that [the company] is determined to protect. These technical details and trade secrets are the property of [the company]. These technical details and trade secrets are the very heart of the company and it is vital that they be protected from falling into the public domain.

...

The drawings contain the explicit technical details of a project that began as a prototype testing of a new concept...

...

[The company] purchased AutoCad software in an advanced version 1997 in order to prepare the new drawings. [The company] hired a Technologist to work on the drawings. The drawings were prepared by [a named individual] in the employ of [the company]...

...

... The [engineering firm] was retained as structural Engineers to review the strengths and perform calculations for safety factors etc. The [company] drawings also have the [engineering firm's] name on them and the stamp of [a named professional engineer] of the [engineering firm].

The terms "trade secret" and "technical information" have been defined by this office as follows:

Trade secret

“Trade secret” means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order M-29].

Technical Information

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* [Order P-454].

The records consist of engineering drawings of the mobile workstation prepared by a professional in the field and, as such, clearly fall within the definition of "technical information" as stated above. Accordingly, I find that the first part of the test has been met.

Part two: supplied in confidence

Part two of the three part 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 business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly (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 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 parties 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 Ministry refers to the submissions made to it by the company following the initial notification and notes that the company indicated that it does not make its engineering drawings public. The Ministry considers the company's practices with respect to confidentiality as sufficient to establish an implicit expectation that the drawings were supplied in confidence.

On this issue, the company refers to its patents for the mobile workstation and states:

Patents are instruments that are meant to be available to the public domain. The patent documents were sent to demonstrate the highly technical nature of these patents and the workstations that are described in the patents. It is the policy of [the company] not to release detail drawings or manuals or design criteria to the public domain...

...

The drawings, safety manuals and design criteria supplied by [the company] to the [Ministry] were supplied in confidence to demonstrate that the safety requirements of the Ministry were being met.

The company notes that both the drawings (which are at issue) and the safety manual (which is not at issue) contain confidentiality statements. With respect to the drawings, the notation provides:

CONFIDENTIAL
THIS DESIGN IS THE PROPERTY OF
[THE COMPANY]. THE INFORMATION
CONTAINED IN THESE DRAWINGS
CANNOT BE REPRODUCED IN WHOLE
OR IN PART WITHOUT WRITTEN
CONSENT

The appellant takes the position that there can be no reasonable expectation of confidentiality on the part of the company vis-a-vis the appellant. In this regard, the appellant alleges that the company submitted drawings in which the appellant holds copyright to the Ministry. The dispute relating to copyright appears to be at the heart of the appellant's access request. In other words, the appellant's position would appear to be that since the drawings submitted to the Ministry are one and the same as (or modifications of) the drawings he initially prepared for the company, the company cannot have any confidentiality expectations with respect to the appellant.

In responding to the appellant's allegations, the company states:

[The appellant was] retained by [the company] in the period 1995 through October 1997, to assist with the design of a mobile workstation. There were drawings prepared by [the appellant] for [the company] that contributed to the design of the workstations. The drawings contained designs developed by [the company] with the assistance of [the appellant]. [The company] paid for the design and the drawings and it is clear that [the company] owns the design. Each drawing [prepared by the appellant] contains the following box:

CONFIDENTIAL
THIS DESIGN IS THE PROPERTY OF
[THE COMPANY]. THE INFORMATION
CONTAINED IN THESE DRAWINGS
CANNOT BE REPRODUCED IN WHOLE
OR IN PART WITHOUT WRITTEN
CONSENT.

The drawings prepared by [the appellant] dated 1996 and 1997 were done under the direction of [the company]. The design concept was from [the company]. Many of the elements are unique to [the company]. [The appellant] contributed the expertise as structural Engineers. [The appellant] requested that he retain copyright of the drawings to prevent another structural engineer from taking his work.

The company describes the various disputes/potential disputes between it and the appellant. With respect to the copyright issue, the company asserts that the appellant's drawings were not copied. Further, the company states that only the drawings prepared by the appellant in 1996 or 1997 pertain to the "Confidentiality Agreement" dated December 2, 1995 (referred to above). The company explains in detail why and how new drawings were prepared for submission to the Ministry. In this regard, the company indicates that since the first equipment was built, it has undergone modifications. The company states further that the original drawings contained errors. In addition, the company wished to develop the drawings in 3D.

The company explains further that because of the appellant's copyright in the earlier drawings, it contacted the PEO in 1997 in order to determine how to proceed to have the

drawings done. The company indicates that the PEO advised them not to copy the original drawings but rather, to do them over again which, the company adds, is what it did. The company attached a copy of the 3D drawing to its representations which it states was used to make the drawings supplied to the Ministry.

Finally, the company indicates that copies of the original patents filed in Canada and the United States were supplied to the Ministry's Freedom of Information and Privacy Co-ordinator (and were subsequently forwarded to this office). The company notes that these patents are in the public domain. The company indicates that it applied for additional patents for certain features of the workstations. The company states that these patent applications were recently denied.

In response to the company's representations, the appellant states that:

1. [The company] admits tracing our engineering drawings for submission to the [Ministry].
2. In the years subsequent to our withdrawal of services to [the company], the working platforms and support structure are within full view on a public bridge, however, no design changes are apparent.
3. The patents filed are public documents and the ownership has been challenged. Therefore [the company] does not hold the patent at this time.
4. The copyright symbols are clearly displayed on [the appellant's] drawings and the drawings were redrawn without our permission.

The appellant attached a letter from the PEO which he believes supports his position. In this letter, the PEO responds to two questions posed by the appellant. With respect to the first question; are you telling engineers to just retrace another engineer's drawings?, the PEO replies:

The matter of the use of another engineering drawing by another PEO member has been the subject of complaints to PEO. In these cases, the allegations include that the PEO member has used an existing engineering drawing, without obtaining permission from the original design engineer.

The consideration by PEO's Complaints Committee (COC) of these complaints has concluded that it would be more appropriate to re-draw completely the existing engineering drawing, incorporating any required revisions. By doing so, the COC did not consider the conduct and actions of the PEO member as using an existing engineering drawing without obtaining permission from the original design engineer. However, a

complaint involving the possession and use of copied CAD files was referred to the Discipline Committee.

The Drawings

I have reviewed the drawings provided to this office by the Ministry (the records at issue) along with those provided by the appellant.

The company's drawings consist of 14 separately titled drawings. As I indicated above, they were drawn on March 30, 1999. The confidentiality statement on them is worded as the company states in its affidavit. On their face there is no indication that copyright has been asserted.

The drawings provided by the appellant consist of three different series.

The first series (series S) was drawn in 1995 and comprises 13 separately titled drawings (although only 11 were provided to this office). Each sheet in this series contains a "confidentiality" statement which indicates that the design is the "property" of the appellant. The title block for this series does not indicate that copyright has been asserted.

The second and third series (series P and B) were drawn in 1997 and consist of 11 and 12 separately titled drawings (respectively). The confidentiality statements on both series of drawings indicate that the design is the "property" of the company. Both sets of drawings, however, contain a copyright symbol beside the appellant's name in the title block.

All of the drawings represent the same basic structure and it must be expected that they would contain similar information, which they do. However, in many cases, the drawings are labelled differently in the title block section of each sheet. In some cases, the drawings submitted by the company show completely different objects/views of the structure from those drawn by the appellant. In the majority of the drawings (if not all) there are, at times subtle, and at other times significant, differences between the company's drawings and the three sets provided by the appellant. It is apparent on the face of the two sources of the drawings that they reflect the style and perspective of the individual draftsmen who prepared them.

Findings

Based on the submissions of the company and the Ministry, I am satisfied that the drawings were supplied to the Ministry by the company. I also accept that the company had a reasonably held expectation that the records would be held in confidence. Although I do not accept that the confidentiality statement on the records, in and of itself, demonstrates an express request that the Ministry maintain the records in confidence, this statement does support a more general concern about unauthorized use of them. In my view, this expectation is consistent with an expectation of confidentiality at the time the drawings were submitted to the Ministry. Further, the expression of this expectation is

consistent with the company's normal practices insofar as its treatment of detailed drawings is concerned as indicated in the sworn affidavit of the President of the company. I also note, as the appellant himself points out, that the drawings prepared by the appellant contain a similar statement, which in my view, supports a general expectation of confidentiality with respect to these types of drawings. Finally, the confidentiality agreement between the appellant and the company that was provided to this office by the appellant supports generally the extent to which the company has gone to protect the confidentiality of its design.

The company acknowledges that patents are in the public domain. I have reviewed the patent information provided by the company relating to the mobile workstation and although it contains a number of "figures" depicting the structure, these do not contain the same level of detail as the drawings that it submitted to the Ministry. On the one hand, it might be expected that drawings of this nature would comprise the accompanying documentation for the patent application and thus be placed in the public domain. In his affidavit, however, the President of the company states that this information has not been "released to the public domain".

In responding to the company's submissions, the appellant simply asserts that the patents filed are public documents and the ownership has been challenged. On this basis, the appellant concludes "[t]herefore [the company] does not hold the patent at this time". The appellant does not provide any documentary evidence to support either allegation. I find that the appellant has failed to provide sufficient evidence to substantiate his allegations, and I therefore give his submissions very little weight in assessing this issue.

I have no credible evidence before me that contradicts the President's sworn statement. Accordingly, I accept, based on the uncontroverted sworn evidence before me, that although there is much information in the public domain relating to the mobile workstation, not all information is public, and in particular, the records at issue.

Consequently, I find that the company has supplied the records at issue to the Ministry implicitly in confidence, at least as far as the public is concerned. As I noted above, the appellant suggests that this expectation of confidentiality does not apply to him.

Previous orders of this office have recognized that the identity of a requester is not determinative of the issues to be decided at inquiry. In general, these orders have found that disclosure under the *Act* is disclosure to the world (See: Order M-96, upheld on judicial review in *Ontario Secondary School Teachers' Federation, District 39 v. Wellington County Board of Education et al.* (20 December 1994), Toronto 407/93 (Ont. Div. Ct.), leave to appeal refused (16 October 1995), Doc. M15357 (C.A.)). In this case, the appellant insists that, in the circumstances, his identity is "highly" relevant to the issues on appeal. In my view, it is not necessary for me to address this issue for the reasons cited below.

I do not accept the appellant's interpretation of the company's representations. The appellant believes that the company has admitted to "tracing" his engineering drawings. In my view, the company's representations do not even allude to "tracing" of the

drawings. On the contrary, the company has clearly stated in the sworn affidavit of the President that the drawings were prepared afresh through the use of new design technology. Further, the response provided by the PEO to the appellant appears to support the approach taken by the company in the preparation of the new drawings for its mobile workstation.

The company has provided detailed representations regarding the changes it has made to the structure itself and the patents it currently holds for the mobile workstation. As I noted above, the company has provided its representations in affidavit form. The company has also provided evidence of its patents. Further, a review of the drawings prepared by the company suggests that they reflect at least some differences in the structure from those prepared by the appellant.

In contrast, the appellant simply asserts that no changes have been made to the structure and that the company does not hold the patent at this time. As I noted above, the appellant does not provide any evidence in support of his observations and assertions.

In reviewing the submissions of both parties along with the various versions of the drawings, I prefer the sworn evidence of the company as it relates to the creation of the drawings, including the alterations that were made to the structure. The company's affidavit describes clearly and in considerable detail a chain of events leading to the eventual creation of the records by it. The appellant's representations, on the other hand, focus on the copyright his company holds in drawings made by him, but do not address in any meaningful way the company's submissions on this issue. Moreover, the evidence provided by the appellant in support of his position tends, to support that of the company. Based on the evidence before me, I am not persuaded that the drawings submitted to the Ministry by the company are the same or mere modifications of those originally prepared by the appellant.

In my view, the drawings submitted to the Ministry by the company are sufficiently different from those prepared by the appellant that any expectations of confidentiality it has with respect to the public would be similarly applicable to the appellant. Accordingly, I find that the second part of the section 17(1) test has been met.

Part three: harms

Introduction

The Commissioner's three-part test for exemption under section 17(1), and 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 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.)].

In order 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].

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the phrase “could reasonably be expected to”, which appears in the opening words of section 17(1):

The words “could reasonably be expected to” appear in the preamble of section 14(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, 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)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In my view, the Ministry and/or the company must provide detailed and convincing evidence to establish a “reasonable expectation of probable harm” as described in paragraphs (a) and/or (c) of section 17(1).

Section 17(1)(a) and (c): prejudice to competitive position and undue loss or gain

In its affidavit, the company states:

... The technical details in the “Mobile Workstation” are defined in the patent protecting it and the technical details and the trade secret details are further defined in the drawings submitted to the [Ministry].

It is in those detail drawings and manuals where the features are explained and accurately defined. Within these details are the trade secrets the [the company] is determined to protect. These technical details and trade secrets are the property of [the company]. These technical details and trade secrets are the very heart of the company and it is vital that they be protected from falling into the public domain.

[The company] has spent six years in the process of developing the mobile workstation and invested many hundreds of thousands of dollars in the period. The business of scaffolding and enclosing bridges is very competitive. The business is hazardous and safety regulations must be adhered to. [The company] has introduced a different design to the industry and [the company] has developed a number of associated methods and techniques that it wants to keep as trade secrets. These are contained in the technical details of the drawings submitted to the [Ministry]. [The company] approach is more capital intensive than other methods and it is not an easy task to sell the concept. Competitors are primarily US based companies that are well established and well financed. It is a mistake to assume that it is easy for [the company]. The survival of [the company] and the very ability of [the company] to compete can not be accomplished if technical drawings and safety manuals and design criteria, (all of which are part of trade secrets) are released to the public domain.

Therefore [the company] demonstrates that undue loss will result ... if drawings containing trade secrets and technical details are released to the public domain. At the same time it is very likely that windfall gain will be conveyed to others in the industry should they receive the information without any investment in obtaining that information.

The company also notes that its recent patent applications were denied and states:

However, this actually makes it even more important that the drawings and manuals of [the company] be protected because certain trade secrets are not patented and therefore lack that kind of protection.

In responding to the company's submissions, the appellant states:

In response to your recent request, we would like to deal with matters only pertaining to our request to release of the drawings submitted to [the Ministry] so that we may bring our concerns to the RCMP to lay charges for copyright infringement. In [the company's] deposition, they put forward many arguments that are untruthful or slanderous, and we do not wish you to nor will we address them in this forum. The matter at hand is the release of drawings copyrighted to [the appellant] but submitted to the [Ministry] under [the company's] title.

Findings

The appellant's representations do not address this part of the section 17(1) test. Rather, he simply reiterates his position that the Ministry should 'give me back what is mine'. As I indicated above, the appellant has not established that the records at issue are the same as, or mere modifications of, the drawings he originally made of the mobile workstation such that withholding them from him would, in essence, result in an absurd application of the exemption in section 17(1).

In my view, disclosure of the records at issue could reasonably be expected to prejudice significantly the competitive position of the company in what would appear to be a competitive and highly specialized industry. In this regard, I find that disclosure of the records at issue could reasonably be expected to provide competitors with details of the company's design which could then be used to either enhance the competitor's position in the development of its own structure or through critical comment on the design within the industry and/or during the competitive process, which the company admits is not easy to sell in the first place.

Moreover, I am satisfied that, based on the patent information provided by the company, the design of the workstation is unique to the company and that disclosure of the drawings could reasonably be expected to reveal specific features of the design. Although much of the design would appear to be protected by patent, some of it apparently is not. Further, I accept the company's uncontradicted submissions that the information contained in the records at issue is additional to the information contained in or submitted in connection with the patents which is, admittedly, public information. It is not unreasonable to expect that analysis of the drawings would not only permit competitors to know the unique features of the design but would also facilitate modifications using these drawings as the starting point without any of the preliminary investment. In my view, this could reasonably be expected to constitute an undue gain on the part of another party, most likely a competitor.

I am satisfied that the company has provided detailed and convincing evidence to establish a "reasonable expectation of probable harm" to its competitive position should the records at issue be disclosed (section 17(1)(a)). The company has similarly established a reasonable expectation that disclosure could result in undue gain to its

competitors (section 17(1)(c)). Accordingly, I find that all three parts of the section 17(1) test have been met and the records are exempt from disclosure.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____

Laurel Cropley
Adjudicator

_____ July 11, 2001