



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER PO-1979-I

Appeal PA-000413-1

Ministry of Consumer and Business Services



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This appeal arises from a request made to the Ministry of Consumer and Business Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the regulation of boilers by the Technical Standards and Safety Authority (the TSSA) and the former Technical Standards Division of the (then) Ministry of Consumer and Commercial Relations.

The Ministry identified 197 records that were responsive to the request. It granted partial access to some records and denied access to others relying on a number of exemptions. The requester (now the appellant) appealed the Ministry's decision to this office.

During mediation, the appellant revised its request to include only four records: 75, 80, 91, and 92. The Ministry relies on section 17 (third party information) to deny access to these records. The appellant claims there is a public interest in disclosure of the records, pursuant to section 23 of the *Act*. The Ministry notified one affected party in this appeal which did not consent to the release of the four records.

I initially sent a Notice of Inquiry to the Ministry and one affected party. I later sent a Notice to two additional affected parties. The Ministry and two affected parties provided submissions.

One affected party raised the issue of custody/control in its representations. I have previously provided the Ministry and the other affected party with an opportunity to reply, and have received their reply representations. I have now reviewed all the representations on this issue and have determined that a further exchange of representations in that regard is not required. Accordingly, disclosure of the portion of the affected party's representations that deal with that issue, as well as the reply submissions of the Ministry and the other affected party concerning custody/control, will not be required. In addition, disclosure of parts of the representations that relate to matters other than the substantive issues in the appeals will not be required. This interim order therefore addresses only the disclosure of the parts of the representations of the Ministry and the two affected parties that relate to substantive issues other than custody/control.

ISSUE:

The Ministry requested that I share with the appellant only portions of its representations that were submitted in response to the Notice of Inquiry. The two affected parties requested that I withhold their entire representations that were submitted in response to the Notice. The purpose of this interim order is to rule on the extent to which these representations should be shared.

DISCUSSION:

Procedure for Sharing of Representations

In the Notice of Inquiry cover letter to the Board 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:

Adjudicator seeks representations from second party

The Adjudicator will send the same or a modified Notice of Inquiry to the second party, along with a copy of the first party's non-confidential representations, seeking representations from that party.

Second party submits representations

This second party then has **three weeks** to submit representations. In its representations, the second party must indicate clearly, and in detail: which information in the representations, if any, the party wishes the Adjudicator to withhold from the other party, and its reasons for this request (see confidentiality criteria below).

The Inquiry Procedure document later sets out the criteria for withholding representations:

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

- (a) disclosure of the information would reveal the substance of the 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 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 this matter

The Ministry's confidentiality request

The Ministry agreed to disclose portions of its representations to the appellant, but requested that other portions be withheld on the basis that their disclosure would reveal the substance of the record, as mentioned in paragraph (a) of the confidentiality criteria.

I am not satisfied that the Ministry's representations would reveal the contents of any of the records. The information about the records consists of general descriptions that would allow the appellant to understand the nature of the information at issue without in any way revealing the substance of the records. This information is therefore relevant to establishing the section 17 exemption claims. The remainder of the information to be disclosed is either background information that would already be known by the appellant or which on its face is of a non-confidential nature, and does not meet any of the confidentiality criteria.

With the exception of a portion of the Ministry's representations that does not relate to the substantive issues in this appeal, I find that the Ministry's representations should be provided to the appellant.

The First Affected Party's representations

The first affected party requested that its "representations and supporting affidavit material be treated as confidential and that no other party to the FOI appeal be provided access", but did not refer to specific confidentiality criteria to support its submission.

The relevant portions of the first affected party's representations and affidavit consist of the following types of information:

1. background information of which the appellant is already aware or which is non-confidential in nature;

2. information that is relevant to establishing the section 17 exemption claim;
3. information that reveals the actual content of the records in this appeal; and
4. information that would be otherwise exempt if contained in a record subject to the *Act*.

I find that the portions of the representations and affidavit containing the third category of information falls within the scope of paragraph (a) of the confidentiality criteria, and should not be disclosed to the appellant. I further find that portions of the representations and affidavit described in category 4 would be exempt under section 17(1)(a) and/or (c) if contained in a record subject to the *Act*, and this information falls within paragraph (b) of the confidentiality criteria and should not be disclosed.

I must now determine whether the remaining information fits within paragraph (c) of the confidentiality criteria. To meet the test under (c), the parties must establish that the information was communicated in confidence, this confidentiality must be essential to the relationship between this office and the party, the community must believe that the relation between the party and this office should be fostered, and the injury to the relationship from disclosure would be greater than the benefit gained.

It is clear that the information was communicated with a reasonable expectation of confidentiality. In the circumstances of an appeal, the ability for the IPC to keep information provided by a party confidential is an essential aspect of the relationship between them. The relationship between the IPC and the parties to an appeal is mandated by statute, and is therefore one that the community believes ought to be fostered. The only part of this test that might not be met in this case, or that might be met only by part of the information, is the aspect that requires weighing the damage caused by disclosure against the possible benefit to be conferred. Generally speaking, the most compelling kind of benefit provided by the disclosure of representations is enhancement of the fairness of the appeal process. In assessing whether to disclose representations, or a particular passage, the potential to benefit fairness is generally the most important factor to weigh against the possible harm disclosure might cause. The degree to which fairness will be enhanced depends to a great extent on the nature of the information contained in the passage under consideration, and its relevance to the issues being decided.

As regards much of the representations and affidavit, I have concluded that the benefit to fairness that results from disclosure outweighs any possible harm. I find that those passages do not meet the confidentiality criteria and should be disclosed. There are other passages, however, where harm would outweigh the benefit to fairness and for those, I uphold the first affected party's request for non-disclosure.

The Second Affected Party's representations

The second affected party submits that its representations should not be shared with the appellant. The second affected party indicates that parts of its representations reveal the substance of the records, and

that this information would be exempt if it were contained in a record subject to the *Act*. It also argues that the information in its representations was provided on a confidential basis to the IPC, and that it is protected under its Access and Privacy code and not available to members of the public. Finally, it indicates that in future, it will not be able to provide information to this office if it is not assured of confidentiality.

I accept that the disclosure of one sentence and part of another in the submission relating to the harms that may reasonably result from allowing the appellant access to the record would be exempt under section 17(1)(a) and/or (c) if contained in a record subject to the *Act*. Accordingly, these portions of the second affected party's representations meet the requirements of paragraph (b) of the confidentiality criteria, and will not be shared with the appellant.

As regards the remaining representations of the second affected party, I am not satisfied that they would reveal the contents of the records, nor that they would be exempt if contained in a record subject to the *Act*, and confidentiality criteria (a) and (b) therefore do not apply.

The second affected party also relies on the section 3 exemptions in its Access and Privacy Code (the Code), but does not state which particular exemptions apply in this situation. The second affected party does not explain how its Code impacts on the IPC's process for the disclosure of representations, but even assuming that the Code might relate to paragraph (c) of the confidentiality criteria, I am not satisfied that the privacy provisions of the Code apply, and for this reason as well I have concluded that the requirements of paragraph (c) are not met. As regards the argument that confidential information may not be provided to this office in future, it is my view that any injury to the relation between the parties and this office that would result from disclosure of the information would not be greater than the benefit gained from the correct disposal of this matter.

I have weighed the benefit of fairness against the possible harm caused by disclosure, and I find that the appellant ought to receive the portions of the second affected party's representations, other than those to which paragraph (b) applies, in order to meet the case against it. Therefore, except for the portions to which paragraph (b) applies, I will order that the second affected party's representations be shared with the appellant.

PROCEDURE:

I have upheld the requests of the Ministry and both affected parties as to parts of their representations, and have found that other parts are not relevant to the substantive issues being dealt with in this exchange of representations. In the result, therefore, portions of the representations will be withheld. I have attached to the copy of this interim order being provided to the Ministry and the affected parties a copy of that party's representations in which the sections I intend to withhold are indicated with highlighting. I intend to disclose the severed representations to the appellant no earlier than **January 4, 2002** for the purpose of seeking representations from the appellant.

Original signed by:
Dawn Maruno
Adjudicator

December 14, 2001