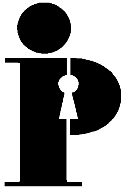

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2142

Appeal PA-020114-1

Ministry of Labour

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NATURE OF THE APPEAL:

The Ministry of Labour (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "…all information relative to an 'explosion' that occurred at [a named company's] plant … on June 18, 1998." The requester had in the past provided some service to the named company, and it appears that there is a history of litigation between them.

On December 21, 2001, the Ministry notified the named company as an affected party and sought its views regarding disclosure of the requested information. In doing so, the Ministry identified the requester to the affected party.

The affected party responded to the notice and objected to the disclosure of any information, largely because of who the requester was. After considering the affected party's views regarding disclosure, the Ministry issued a decision granting full access to the responsive records.

On April 18, 2002, the affected party (now the appellant) appealed the Ministry's decision to grant access. The appellant's letter of appeal did not provide a basis for the appeal, however, it is apparent from the objections it made to the Ministry that it is appealing the decision on the basis that the records are exempt from disclosure pursuant to the mandatory exemption in section 17(1) of the *Act*.

During mediation, the appellant consented to the disclosure of portions of the records to the requester as follows:

- Items 8, 10 and 11 may be released in full;
- Item 12 may be released, with the exception of the drawings found at page 10, Appendix A2, Appendix A3 and Appendix A6 (pages 2, 4-8);
- Item 13 may be released, with the exception of the drawing found on page 13; and
- Items 5 & 6 may not be released.

On August 9, 2002, the Ministry sent copies of the relevant records to the requester for his review. Upon review of the records, the requester advised the mediator that he wishes to pursue access to all the outstanding records that the appellant objects to releasing.

Further mediation could not be effected and the appeal was forwarded to adjudication. I sought representations from the appellant, initially. The appellant submitted representations in response. After reviewing them, in conjunction with the letter the appellant sent to the Ministry setting out its objections to disclosure, I decided that it was not necessary to seek representations from the other parties.

CONCLUSION:

The records at issue are not exempt under section 17(1) and should be disclosed to the requester.

RECORDS:

The following records (totaling 25 pages) remain at issue in this appeal:

- Item 5 – Furnace records from June 13-18, 1998 (8 pages)
- Item 6 – Furnace records for April-June 1988, July 1987 and October 1987 (6 pages)
- Item 12 – Hatch Report – only the drawing found at pages 10, A2, A3 (2 pages) and A6 (pages 2, 4-8)
- Item 13 – Inspection Report and correspondence – only the drawing at page 13

Additional Records

As I noted above, the Ministry made a decision granting access to all of the records that it identified as being responsive to the request (except for the records that the requester had already obtained). The Ministry had, prior to that, notified the appellant regarding a number of records and the appellant indicated that it objected to their disclosure.

In both the initial access decision and the August 9, 2002 covering letter to which the Ministry attached the records that it disclosed to the requester, the Ministry referred to a "summary report" and an "engineering report", advising that portions of these two documents were being withheld, in part, because of the appellant's objections to the disclosure of the records for which it had been notified. According to the Ministry, it inadvertently neglected to notify the appellant regarding the investigation and engineering reports, although, by the Ministry's own admission, these records appear to contain information similar to that included in the records at issue in this third party appeal.

During investigation into this issue by the Mediator during mediation, and again, at my request, during the inquiry stage, the Ministry explained the circumstances relating to its treatment of these records. It appears that, following the Ministry's initial decision, the requester and the Ministry agreed that the Ministry would postpone issuing an access decision about these records until the issues in the current appeal were resolved.

The Ministry indicated further that following the appellant's consent to disclosure of some of the records, it issued another decision regarding these records. The Ministry takes the position that the August 9, 2002 letter is a revised decision in which the Ministry made an actual access decision with respect to these records (the Ministry granted access and disclosed portions of them and withheld some of the rest on the basis of the mandatory exemption in section 21(1) of the *Act* (invasion of privacy) and because the remaining portions contained similar information to that which ultimately became at issue in this appeal.

The Ministry has not identified these records as records at issue in the current appeal, apparently on the basis that because it did not notify the appellant about them, the appellant's appeal does not encompass them. It is not clear, however, whether the Ministry objects to them being incorporated into this appeal as records at issue.

At the time I drafted the Notice of Inquiry setting out the facts and issues at adjudication, it was my view that in order to deal with all of the issues pertaining to the appellant's third party interests in the records in an efficient and expedient manner, and to avoid duplication of process and unnecessary appeals arising from any subsequent decision the Ministry might make with respect to these records, it was only reasonable to incorporate these two records (or at least the portions which the Ministry has identified as being potentially included within the appellant's objections) into the current appeal.

I, therefore, included this as a preliminary issue in the Notice. I invited the appellant to make representations on whether I should consider its concerns relating to disclosure in connection with these two records at the same time as I address these concerns for the records that have been identified as being at issue.

In its representations, the appellant simply states:

> [B]efore the Company can make specific arguments against the disclosure of the 'investigative summary' report and an 'engineering' report, we need to see the documents. Assuming they arise out of the June, 1998 incident, we object generally, again, to the disclosure of all documents …

In the covering letter to the Notice of Inquiry, I advised the appellant that if it had any questions about the records, it should contact the Ministry's Freedom of Information and Privacy Co-ordinator. It does not appear that it did so. Moreover, despite several attempts by an Adjudication Review Officer to contact the appellant, and several messages left clearly describing the purpose of his calls, the appellant did not return them.

It appears that none of the parties have a serious interest in addressing this issue and the requester has agreed to pursue the records separately. In the circumstances, despite the probable delay and unnecessary duplication of process, I have decided not to address this issue and will, therefore, only consider the records identified above in my decision.

BURDEN OF PROOF:

Section 53 of the *Act* stipulates that the burden of proof that a record or part of a records falls within one of the specified exemptions in the *Act* lies upon the head. However, where a third party appeals the head's decision to release a record, the burden of proving that the record should be withheld from disclosure falls on the third party (Order 42). This is based on the principle that the burden of proof in law generally rests upon the party asserting the position.

This means that the party resisting disclosure (in this case, the appellant) must show how the information in the record satisfies all three parts of the section 17 test.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the parties resisting disclosure (in this case, the appellant) 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 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), (b) or (c) of subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 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.)]

Part 1: Type of Information

The appellant submits that the records are technical in nature "and should be considered a 'trade secret' regarding our internal operations". The terms "technical" information and "trade secret" have been defined in previous orders of 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 appellant does not explain how or why the records fall within either of these two categories of information. Based on my review of the records at issue, I am unable to conclude that the information qualifies as a "trade secret" within the meaning as defined above.

Items 5 and 6 are tables containing a number of columns of information relating to the operation of the furnace. The columns have been filled in by the operator at the time with either numbers, letters or comments.

The portions of Item 12 at issue comprise various drawings or standard operating procedure forms describing the structure itself or the operating procedures. Item 12 as a whole is a "report"

containing an evaluation of plant water-cooling system for the furnace. Similarly, the portion of Item 13 at issue is a drawing of the structure, included as part of an inspection report.

I am satisfied that all of the information at issue was prepared by a professional in the engineering field and describes the construction, operation or maintenance of a structure, process, equipment or thing. Accordingly, I find that the records all contain technical information.

Part 2: Supplied in Confidence

In order to satisfy part 2 of the test, the appellant must show that the information was "supplied" to the Ministry "in confidence", either implicitly or explicitly.

Supplied

The appellant asserts that the records at issue were all supplied to the Ministry "through our officers and attorneys in response to the Ministry's investigation."

Records 5 and 6 are "furnace records" completed by the appellant's employees. The records at issue in Record 12 form part of an appendix to an "Evaluation of Plant Water Cooling System" report, which appears to have been prepared for the appellant. The portion of Record 13 at issue consists of a drawing. Record 13 is a multi-document package containing a number of inspection and other records relating to the furnace.

I am satisfied, on review, that all of these documents were prepared by or for the appellant and were provided by the appellant to the Ministry.

The introduction to the report comprising Record 12 indicates that the Ministry required the company to produce the documents at issue.

Previous orders of this office have addressed whether information provided or obtained pursuant to reporting requirements or statutory obligations is "supplied in confidence" within the meaning of this section.

Some of these orders have found that information, which is provided to an institution under a mandatory legislative reporting requirement, is "supplied" for the purposes of section 17 of the *Act* (see Order P-345).

Other orders, however, have found that when an inspector attends at the premises of a facility, and makes various observations about the place pursuant to a legislative requirement, the information in subsequent inspection reports generally comes from the inspector's observations. In these cases, the conclusion is that the information was collected by the inspector, as opposed to being provided to him by the facility and is generally not considered to have been supplied to the institution (see Order P-1392).

In my view, the rationale underlying both approaches is similarly applicable where the Ministry "otherwise" requires certain information to be provided to it, as in the current situation. Since I have found that the appellant provided the information to the Ministry, as opposed to Ministry staff obtaining it through their own observations, I conclude that it was supplied within the meaning of this section.

In Confidence

In regards to whether the information was supplied in confidence, part two of the 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 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 institution 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 person 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]

In responding to this issue, the appellant states that the records were implicitly supplied in confidence:

> They were carefully prepared and specifically done to provide adequate detailed information to the Ministry regarding our operations with the implicit understanding that they were provided for this sole purpose. Had our attorney ever advised us that these documents may be given to the public in the future, we would have explicitly marked them as confidence.
> …

> These documents were supplied to the Ministry in implicit confidence. These documents were never shared with any third party, nor supplied voluntarily to the Government for any other purpose. They were supplied to the Ministry to comply with the Order. Had we ever imagined they would be shared, the Company would have explicitly marked them. To be certain, this information is not otherwise disclosed or available from any other sources to which the public has access. These documents were prepared for our internal purpose of maintaining our furnace operations, not for disclosure to any third party. They were provided to the Plant manager and the officers only and maintained in our Control Room.

In its decision letter to the appellant regarding its objections to disclosure, the Ministry commented on the second part of the test as follows:

> [I]t does not appear that the second part of the test has been met. There is only one document in our investigation report which even raises the confidentiality question; that is the memo from [a named employee] on July 7, 1998 to "worker members" of the joint health and safety committee directing them not to take any [appellant's] records out of the plant or to share any records with any parties other than the [Ministry]. But, as noted, the memo was addressed solely to the worker members on the JHSC. It also predates a number of the records that are now in issue, and it makes no distinction between [the appellant's] records – all are placed on the same footing.
>
> Apart from [the employee's] memo, there is nothing else in the investigation report which suggests that any of the records were supplied in confidence. Of note, many of the records in issue had to be provided as result of orders issued by the [Ministry] during the investigation of the furnace explosion. Although providing information to comply with an order is still considered to be a "supply" of information, it is also necessary to demonstrate an expectation that the information would be treated confidentially. There is simply nothing in the report that would support this expectation of confidentiality…

I agree with the Ministry's position. Apart from the appellant's hindsight on this issue, there is nothing in the records, taken as a whole, or the appellant's submissions which suggests that

- the appellant communicated that the records were submitted in confidence
- the appellant had an expectation that the records were being submitted in confidence
- the appellant prepared and submitted the records for a purpose that would not entail disclosure

Although the appellant claims that the records were prepared for internal purposes, it acknowledges that they were prepared to respond to the Ministry's requirements as part of its investigation into the explosion. I am not persuaded that it is reasonable in these circumstances to assume that information, even information that may typically not be disclosed outside of the appellant's own offices, would be provided with an expectation of confidentiality. Therefore, I

find that the appellant has failed to provide sufficiently detailed evidence to establish a reasonable and objective basis to conclude that the records were supplied in confidence.

Accordingly, I find that the appellant has failed to satisfy the second part of the section 17(1) test. Since all three parts of the test must be satisfied in order to rely on the exemption in section 17(1), I find that it does not apply.

Despite this finding, I will also address the third part of the test.

Part 3: Harms

Introduction

To discharge the burden of proof under the third part of the test, the appellant 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 (Order P-373).

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, 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.)]. [Orders PO-1745 and PO-1747].

As I noted above, the primary basis for the appellant's objections to disclosure is the identity of the appellant. In its representations, the appellant refers to its letter to the Ministry in which it objected to disclosure, and indicates that the letter outlines the requester's history with the appellant, his business interests, and why it is reasonable to assume that disclosure to him would result in monetary harm to the appellant (subsection (c)).

This is the case of a once profitable business relationship that turned sour and ultimately resulted in litigation between the parties. The appellant does not believe that the requester has any legitimate reasons for requesting the information but, rather, is attempting to gain access to the records to cause "serious economic harm to us through the disclosure of our confidential information to our competitors."

The appellant explains that the requester is a professional engineer who has been involved in the installation of other furnaces. The appellant notes that a former employee had made "significant" changes to the original technical design of the furnace, which had originally been provided by the requester such that the appellant's production was increased. The appellant

believes that the requester is able to use the information at issue to determine specific operations of the furnace and then transfer this information to his business associates.

The appellant submits that, "it has always been [the requester's] desire to find out what … modifications were made … in an attempt to determine how our increased production was achieved."

The appellant notes, however, that the particular facility is not currently in production. Although, it "is our strong conviction that when market conditions improved, the [named] facility will be back up and operating at full capacity."

The appellant claims that providing the requester with the information at issue would provide him with "a serious competitive advantage" (subsection (a)), claiming that:

> The majority of the documents are highly sensitive and furnace specific which do not lend themselves to his review without the strong likelihood of competitive harm to us.

Commenting on these submissions, the Ministry stated in its letter to the appellant:

> [I]t does not appear that the submissions concerning the types of harm that could reasonably be expected to arise from disclosure are sufficiently detailed to satisfy the third part of the test. A claim is made that productivity gains resulted from technical design changes to the furnace introduced by [the named employee] but nothing is provided to substantiate this. Nor does it appear that many of the records contain the type of detailed technical information that the submissions advert to. This is especially so with a number of the reports that the Ministry required [the appellant] to obtain.

I agree with the Ministry's observations regarding the submissions made by the appellant. In my view, they consist of little more than general assertions and speculation. They do not provide the kind of "detailed and convincing" evidence that is necessary to support a conclusion that one of the harms in section 17(1)(a) or (c) could reasonably be expected to occur should the records be disclosed.

Moreover, the Ministry's response to the appellant put it on notice that in order to meet the requirements of this part of the test, it would have to provide more compelling evidence to support its assertions.

Rather than elaborating on and providing supporting evidence, the appellant chose to rely on the same submissions. Based on these submissions, those provided in response to the Notice of Inquiry and the records themselves, I find that the appellant has failed to satisfy the third part of the test.

Summary and Conclusion

To recap my findings in this order, although the first part of the test has been met in that the records at issue contain technical information, they were not supplied "in confidence". Thus the second part of the test has not been met. Nor has the appellant established that any of the harms in section 17(1) could reasonably be expected to occur from disclosure. The appellant has, therefore, failed to meet the third part of the test.

Failure to meet any part of the section 17(1) test results in a finding that this section does not apply, and I so find. Since no other exemptions have been claimed or would appear to apply, the records at issue should be disclosed to the requester.

ORDER:

1. I uphold the Ministry's decision.

2. I order the Ministry to disclose the records at issue to the requester by providing him with a copy of them by **June 9, 2003** but not before **June 4, 2003**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the requester in accordance with Provision 2.

Original signed by: May 6, 2003
Laurel Cropley
Adjudicator