



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2170

Appeal PA-020376-1

Ministry of the Environment



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of the Environment (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

As background, a request was submitted to the Ministry for access to all records about a property at a given civic address in Brantford, Ontario, which relate to environmental concerns, orders, spills and investigations/prosecutions. The Ministry located a number of responsive records and notified a company (now the appellant) of its request, inviting it to provide its views on disclosure of the records. The appellant objected the release of the records. Subsequently, the Ministry issued a decision in which it stated that it intended to provide full access to the records to the requester. The appellant filed an appeal with respect to this decision.

I sent a Notice of Inquiry to the appellant, initially, inviting it to submit representations on the facts and issues raised by the appeal. In its representations, the appellant indicated that it did not oppose the release of four of the records at issue. The appellant's representations were sent to the Ministry and to the requester, along with a Notice of Inquiry, and these two parties were also invited to submit representations. I then sent the representations of the Ministry and of the requester to the appellant, inviting it to submit a response on the issue of whether disclosure of the information in the remaining record at issue could reasonably be expected to result in the harm specified in section 17(1)(b) of the *Act*. The requester has not provided any further representations.

CONCLUSION:

The remaining record at issue is not exempt from disclosure. I order release of all of the records to the requester.

RECORDS:

The remaining record at issue is a Phase I Environmental Site Investigation Report (the Report) dated January, 1996.

DISCUSSION:

THIRD PARTY INFORMATION

General

Section 17(1) of the *Act* provides:

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; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. It has been described as designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions" (see Order PO-1805).

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of information which, while in the possession of government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

In applying section 17(1), prior orders have sought to strike a balance between the public policy in favour of public scrutiny of government activities, and third party economic interests. Prior orders have held that in order to support an exemption from disclosure under this section, institutions or affected parties must establish 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 10(1) will occur.

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

Background

The background to this request is contained in the Ministry's representations. The appellant owns a property adjacent to land which has groundwater contaminated with trichloroethylene (TCE) (the adjacent property). This issue has attracted significant attention from the media, residents, and local politicians. The Ministry issued an order to the owner of the adjacent property requiring it to define the extent of the contamination in groundwater, and to monitor contaminant levels in air in basements of homes that are located within the contaminant plume. This owner has submitted various reports to the Ministry, subsequent to which the Ministry issued an order requiring the owner to submit a remedial work plan and schedule to address on-site contamination and to control contaminant movement from the property.

A second site was then identified as a suspected contributing source of TCE contamination. The Ministry has reviewed other sources of TCE discharges in the area and asked others for Phase I Environmental Site Assessments in order to evaluate the extent of contamination. The record at issue relates to the investigation of TCE contaminated groundwater at the appellant's property.

On my review of the representations and material before me, I find that Part 3 of the test for exemption (reasonable expectation of harm) has not been established. As all parts must be satisfied in order for section 17(1) to apply, it is unnecessary for me to consider Parts 1 and 2 of the test.

Part 3

Representations

In the appellant's submissions, it confirms that the Phase I environmental site assessment (the Report) was provided to the Ministry during the course of the Ministry's investigations of the TCE contamination in the area of the appellant's property. The appellant states that the Report was provided to it on a confidential basis at the time of its acquisition of the property. It was supplied to the Ministry in confidence and voluntarily and not in connection with any exercise of statutory authority in connection with its property.

The appellant submits that disclosure of the Report could reasonably be expected to result in the harm specified in section 17(1)(b), that is, "similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied." It submits that the Report was provided to the Ministry on a voluntary basis in response to an informal request, to assist the Ministry in its investigation of TCE contamination.

The appellant states if the Report is released and the explicit request for confidentiality is disregarded, confidential information that can assist the Ministry in ongoing investigations of third parties will not be provided on a voluntary basis.

The Ministry submits that it has not invoked section 17(1)(b), and that the appellant has not met this part of the test. The Ministry's position is that the release of the Report would not result in any of the harms outline in section 17(1).

The Ministry agrees that counsel for the appellant voluntarily supplied the Report. The Ministry refers to the provisions of the *Environmental Protection Act* (the *EPA*) relating to contamination of the natural environment and the Ministry's authority to take action to investigate contamination. It also provides a copy of its policy on access to environmental evaluations. The Ministry submits that under the *EPA*, information about contaminants released to the environment has always been considered public information.

Analysis

I accept that it is the Ministry's practice to obtain records such as the Report before me through voluntary disclosure from property owners. I also accept that it has the statutory authority, where voluntary compliance is not forthcoming, to order disclosure. In such circumstances, I find that it has not been established that disclosure of the Report under the *Act* could reasonably be expected to result in similar information no longer being supplied to the Ministry. As long as the Ministry has the statutory authority to order submission of this information to it, this harm is not likely to ensue. My finding is supported by Order P-974, which considered similar information and arrived at the same finding with respect to the harm in section 17(1)(b).

The appellant's submissions focus on the contention that disclosure under the *Act* will result in less *voluntary* compliance with a Ministry request for information. I am not convinced, in the context of the Ministry's powers under the *EPA*, that it has been shown that this result will follow. In any event, the harm identified in section 17(1)(b) is not limited to the voluntary provision of information.

The appellant has not asserted that any of the other harms specified in section 17(1) may occur as a result of the disclosure of the Report. In the result, I find that Part 3 of the three-part test for exemption under section 17(1) has not been established. The Report is not exempt from disclosure under section 17(1). However, I have decided to sever some incidental personal information found on pages 2-1 to 2-2 of the Report, on the basis of section 21(1).

ORDER:

1. I order the Ministry to disclose the records, with the exception of the severed portions, to the requester. For greater certainty, I have enclosed with the order sent to the Ministry a copy of pages 2-1 to 2-2 of the Report, highlighting the portions to be withheld.

2. I order disclosure to be made by sending the requester copies of the records, as severed, no later than **August 29, 2003** but not before **August 22, 2003**.
3. In order to verify compliance with my directions, I reserve the right to require the Ministry to provide me with a copy of the records sent to the requester.

Original signed by: _____
Sherry Liang
Adjudicator

_____ July 31, 2003