

ORDER PO-2178

Appeal PA-030059-1

Ministry of Public Safety and Security

NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records maintained by the Office of the Fire Marshal (the OFM) relating to a particular consumer product. The Ministry located a number of responsive records and notified several affected parties pursuant to section 28 of the *Act*. The affected parties objected to the disclosure of the responsive records. The Ministry then issued a decision letter to the original requester and the affected parties advising that access to some of the records would be denied, in whole or in part, pursuant to various exemptions in the *Act*. However, the Ministry also indicated that it intended to disclose other records, and parts of records to the original requester.

One of the affected parties, now the appellant, appealed the Ministry's decision to disclose certain records on the basis that the information contained in these records was exempt under the mandatory exemption in section 17(1) of the *Act*. Along with its letter of appeal, the appellant provided extensive submissions in support of its contention that the records are exempt from disclosure under section 17(1). I will rely on those submissions in making my decision on the application of the exemption.

During mediation, the scope of the request was limited to just one record, a letter from the OFM to the affected parties dated December 10, 2001. The appellant objects to the disclosure of this record to the original requester on the basis that it is exempt under section 17(1).

As further mediation was not possible, the matter was moved to the adjudication stage of the appeals process. I decided to seek the representations of the appellant and the other affected party initially, as they bear the onus of demonstrating the application of the section 17(1) exemption to the record. I received submissions from the appellant indicating that it was no longer acting as the distributor for the product in Canada.

Because of the manner in which I will address the application of the exemption in this matter, it was not necessary for me to seek the representations of the Ministry or the original requester.

RECORDS:

The sole record at issue is a letter dated December 10, 2001 from the OFM to the affected parties, one of whom is the appellant.

DISCUSSION:

THIRD PARTY INFORMATION

The appellant objects to the disclosure of the record on the basis that it contains information that is exempt under sections 17(1)(a) and (c). These sections state:

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; or . . .

For a record to qualify for exemption under sections 17(1)(a) or (c), the parties resisting disclosure, in this case the appellant and the other affected party, 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) 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

Commercial information

The appellant submits that the record "refers to and describes the marketing strategies" for the product and includes information taken from "a test report that was supplied by the [appellant] to the Fire Marshal's office." It submits that the report contains commercial information "as it relates to the effectiveness of the product and is therefore directly related to the product's marketability. As such, it relates to and is connected with trade and commerce in general." The appellant also suggests that the letter contains information relating to the nature of the testing done on the product and that this information also qualifies as "commercial information" for the purposes of section 17(1).

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

I find that the record contains references to the marketing strategies employed by the appellant and the other affected party in their promotion of the product in question. In my view, this information is properly described as "commercial information" as it relates directly to the techniques employed in selling the product to the public. As a result, I find that the first part of the section 17(1) test has been met.

Part 2: Supplied in confidence

The appellant acknowledges that the record at issue was created by the OFM but argues that it contains information which the appellant supplied. It suggests that the disclosure of the record would permit "the drawing of accurate inferences with respect to the information actually supplied implicitly in confidence" to the Ministry. The appellant submits that the test reports referred to in the record were provided to the OFM with the reasonable expectation that they would not be disclosed. It argues that the test reports are not available to the public and were never intended to be released to the public. It goes on to submit that the disclosure of the record

would allow the public to draw inferences that it provided information to the OFM regarding the effectiveness of the product.

I have reviewed the contents of the record remaining at issue and find that it contains only marginal references to the test results provided by the appellant and the other affected party to the OFM. The test report is clearly referred to in the record but the contents of that report are not described in any detail. In my view, the record does not contain information which was supplied by the appellant or the other affected party to the OFM. Rather, the record states in very clear and unequivocal language the concerns of the OFM with the efficacy and safety of the product being marketed by the appellant and the affected party.

In my view, the appellant has not satisfied the requirements of part two of the test under section 17(1). I have not been provided with the kind of “detailed and convincing” evidence required to support a finding that the information in the record was “supplied” to the OFM by the appellant. As all three parts of the test must be met for the exemption to apply, I find that the record at issue is not exempt under the mandatory exemption in section 17(1).

ORDER:

1. I uphold the Ministry’s decision to disclose the record.
2. I order the Ministry to disclose the record to the original requester by providing her with a copy by **October 23, 2003** but not before **October 16, 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 record disclosed to the appellant in accordance with Order Provision 2.

Original signed by _____
Donald Hale
Adjudicator

_____ September 17, 2003