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

ORDER PO-2305

Appeal PA-030388-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Natural Resources (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appeal arises out of a request submitted by a requester (now the appellant) for information about various Ministry research projects. The Ministry located the responsive information, providing partial access to the information sought.

Among the information to which the Ministry denied access was five pages of information about a "Bait Development" project, referred to as Project Raccoon 09.09.02. In its decision, the Ministry relied on the mandatory exemption from disclosure in section 17 (third party information). The requester (now the appellant) appealed this decision.

As the issues in this appeal could not be resolved through mediation, it was referred to me for adjudication. I sent a Notice of Inquiry to the Ministry and to the two affected parties, initially, inviting them to provide representations in this appeal. I then sent the Notice along with non-confidential portions of these representations to the appellant, who also provided representations.

The issue before me is whether the information about Project Raccoon 09.09.02 is exempt from disclosure under section 17 of the *Act*. One of the affected parties is a scientist who has been engaged in collaborative research with the Ministry on the use of vaccine baits in controlling wildlife rabies. The other affected party is the vaccine bait manufacturer that supplied the baits used in the research.

DISCUSSION:

THIRD PARTY INFORMATION

Section 17(1) states:

> 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) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the affected parties 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders.

"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 PO-2010].

"Scientific information" has been defined as information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

"Technical information" is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While 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 [Order PO-2010].

"Commercial information" is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010].

The Ministry submits that the records contain information that falls under the organized field of knowledge known as biology/zoology. They describe research undertaken under the supervision of an expert in the field, on a specific aspect of the control of wildlife rabies using vaccine baits. As such, the Ministry submits that the information falls within the definition of "scientific information". The Ministry also submits that the records contain information relating to the composition of the vaccine and construction of the bait, which is in the nature of a "trade secret" or consists of technical information. As information about a product that is intended to be or is being marketed, it is also accordingly commercial information.

The affected parties submit that the records contain scientific information, as well as trade secrets and technical information.

The appellant's representations do not specifically address whether the information at issue falls within the types of information described in section 17(1).

I am satisfied that the records contain scientific information, in that they describe the observation and testing of hypotheses relating to the use of vaccine baits in the control of wildlife rabies, undertaken by an expert in the field. I am also satisfied that some of the information consists of trade secrets, as it reveals details about the composition of the vaccine and construction of the bait that is not generally known, and has potential economic value to one of the affected parties.

Accordingly, the records meet Part 1 of the test for exemption under section 17(1).

Part 2: supplied in confidence

Supplied in confidence

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

The Ministry and the affected parties submit that the information in the records was supplied to the Ministry in confidence. The information is part of an annual report that contains the research of the individual affected party during the course of that year, and was prepared under the umbrella of a four-year Collaborative Research Agreement between this party and the Ministry. The Ministry enclosed a copy of this agreement, which contains a provision protecting the confidentiality of information exchanged in connection with the project. The other affected party has submitted excerpts from its own contract with the Ministry, which also protect the confidentiality of information exchanged between the parties.

The appellant submits, among other things, that a great deal of information is publicly available on vaccines and baits. It has provided as an example a product description for fox rabies vaccine bait. It is also submitted that detailed information on baiting and baiting techniques frequently appears in publications such as the Ministry's "Rabies Reporter".

I find that the affected parties supplied the information to the Ministry in confidence. I am satisfied that at the time the information was provided, the affected parties held a reasonable expectation that this information would remain confidential. Their agreements with the Ministry make explicit references to confidentiality in relation to the exchange of information. Further, I accept the submission of one of the affected parties that an implicit understanding of confidentiality exists between parties engaged in co-operative research where intellectual property of a party is used.

The information provided by the appellant does not cast doubt on the reasonableness of this expectation of confidentiality. The product description relied on describes a vaccine that is in the marketplace and subject to licensing protection, whereas the type of vaccine bait used in the research project is still in research and development. The information provided in the Ministry newsletter about vaccine baits is general and does not contain the detailed information about the composition of the vaccine and construction of the baits found in the records.

Part 3: harms

The third part of the test under section 17(1) requires that the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in that section will occur. To meet this part of the test, the institution and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry submits that disclosure of the information would reveal important product details used in the bait, and that competitors to the commercial affected party could use this information to improve or modify their products, thus prejudicing the competitive position of this party. The Ministry also submits that the individual affected party is concerned that disclosure of the information will deprive him of priority to publish articles based on some of the information at issue and as a result, this party is considering no longer continuing collaborative research with the Ministry. If disclosure leads to this result, it is said, the public interest would be harmed in that this individual's experience will no longer be available in this area of research.

The Ministry states that it expects the data contained in the records to be published in the Journal of Wildlife Diseases in 2005 or 2006.

The appellant disputes the assertions of harm. He submits that the state of rabies control programs in North America is well-established and even the withdrawal from research of the individual affected party is unlikely to harm the fight against rabies. Further, the appellant states that the Ministry has overstated the value of the vaccine bait industry. The appellant also submits that oral rabies vaccines have already been widely successful in controlling wildlife rabies.

Upon review, I find that it has been shown that disclosure of the information in the records can reasonably be expected to lead to the harms specified in section 17(1), in relation to both affected parties.

In undertaking the research project, the individual affected party anticipated the possibility that he would, once the project was completed, publish an article based on the data. I accept the Ministry' submission that the affected party may decide to end his relationship with the Ministry based on the prospect that premature disclosure will deprive him of priority of publication.

It is clear that the appellant disputes that the research in which the Ministry and the affected parties are engaged is necessary or even contributes to the public interest. However, even if the value of a particular scientific project is debatable, I am satisfied that it is in the public interest that the Ministry be able to attract the services of members of the scientific community in conducting research. I accept that the premature disclosure of research data that compromises the publication of articles based on the data will affect the Ministry's ability to engage such services, thus leading to the harm described in section 17(1)(b).

In this project, the Ministry also collaborated with a vaccine bait manufacturer, the commercial affected party. The research required the use of materials and information supplied by this affected party, which are not publicly known. I am satisfied that disclosure of the information can reasonably be expected to lead to prejudice to the competitive position of this affected party within the meaning of section 17(1)(a), or undue loss or gain within the meaning of section 17(1)(c), in that it will reveal information about products under development and affect licensing or patenting opportunities. My finding here does not depend on whether the value of the bait industry is as described in the Ministry's submission or as described in the appellant's submission. Even I accept that the Ministry overstated the number of baits distributed for rabies

control, the commercial affected party is nevertheless operating in a competitive environment where there is a competitive advantage in guarding details about research and development of new products.

In conclusion, I find that all three parts of the test under section 17(1) have been met. Section 17(1) applies to exempt the information from disclosure.

PUBLIC INTEREST OVERRIDE

Although it was not noted as an issue in dispute in the Mediator's Report, the appellant throughout his submissions referred to the public interest in disclosure of the information. It is stated, for example, that "[t]his is publicly funded research that should be open to scrutiny." The appellant also submits that

> [i]t is very clear that there has not been an independent risk analysis or evaluation done on the Ministry's rabies program in at least a decade, with funding allocations seemingly made on the basis of self-promotion and unsupportable fear-mongering. The rabies "industry" is a closed circle of scientists, present and former government employees, the vaccine and bait manufacturers and fur trappers who feel entitled to a high degree of secrecy in spite of relying on the public purse.

The appellant also questions the public value of the research, stating that successful oral vaccine programs already exist and questioning therefore whether funding should be directed at such a research program.

Section 23 of the *Act* permits the disclosure of information that would otherwise be exempt, in circumstances where "a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

I am not satisfied that such a compelling public interest exists in this case. The appellant's public interest arguments address issues of funding allocations and research priorities. The information at issue provides a report on scientific research findings during the course of a multi-year project. I am not convinced that this data contributes to the kind of public debate sought by the appellant. Also, as it is anticipated that the results of the research will eventually be published, this information will be available to the appellant at that time to enable him to engage in public debate about the merits of this type of project.

Further, even if disclosure may contribute to a debate on a matter of public interest, I am not convinced that this interest in disclosure outweighs the purpose of the exemption. Among other things, as applied in this case, the exemption in section 17(1) also advances a public interest in that it encourages collaborative research projects by protecting the information of parties engaged in those projects during their course.

In conclusion, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

I uphold the decision of the Ministry.

Original Signed by: August 11, 2004
Sherry Liang
Adjudicator