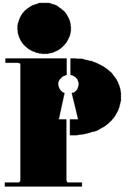

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2490

Appeal PA-050047-1

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information about environmental concerns relating to two adjoining properties for the time period "2002 – present". The requester is a corporation that owns one of the properties and is the plaintiff in litigation relating to environmental contamination.

The Ministry identified four reports prepared by an environmental consultant as the responsive records (the reports). Pursuant to section 28 of the *Act*, the Ministry notified an affected party, a corporation that is one of the defendants in the requester's litigation, and owns the other property identified in the request. The affected party had commissioned the reports from a firm of consultants and engineers. Section 28 requires notification of affected parties prior to disclosure of information that might be subject to the third party information exemption in section 17(1) of the *Act*. This notification permits affected parties to provide submissions to the Ministry on the issue of whether records that have been requested should be disclosed.

The Ministry received submissions from the affected party through its counsel. In these submissions, the affected party consented to the disclosure of two of the four reports, but did not consent to release the remaining two reports. Following consideration of the affected party's submissions, the Ministry issued a decision letter granting the requester access to all four of the reports.

Through its counsel, the affected party (now the appellant) appealed the Ministry's decision in relation to the two reports for which it did not provide consent for disclosure. For ease of reference, I will refer to the actions and positions taken by the appellant's counsel as being actions and positions taken by the appellant.

At mediation, no resolution was possible and the matter moved to the adjudication stage of the appeal process.

I began the adjudication process by sending a Notice of Inquiry to the appellant, initially, outlining the issues in the appeal and inviting it to make representations. The appellant responded by providing representations. Those representations included a copy of the appellant's representations to the Ministry at the request stage, opposing disclosure, and the appellant expressly adopts them as part of its representations in this inquiry.

I then sent a modified Notice of Inquiry to the Ministry and to the requester, enclosing a copy of the appellant's complete representations. The modifications in the Notice of Inquiry arose from the representations I received from the appellant. I invited the Ministry and the requester to submit representations, and the Ministry did so. I did not receive representations from the requester.

As a result of the appellant's representations, I will consider the issue of whether the appellant may raise the discretionary exemption at section 14(1)(f), and if so, whether it applies. The appellant's representations also allege that the request was frivolous or vexatious, a term that is

mentioned in section 10(1)(b) of the *Act* and section 5.1(b) of Regulation 460, made under the *Act*.

RECORDS:

The records at issue are:

> Record 1 – Fax cover sheet, dated August 20, 2004, from appellant's representative with attached report by named engineering firm A, dated August 20, 2004, entitled: "Response to MOE Technical Review Comments".
>
> Record 4 – Report by named engineering firm A, dated May 11, 2004, entitled "Summary of August 2003 Investigation by [named engineering firm B]".

DISCUSSION:

THIRD PARTY INFORMATION

The appellant submits that the mandatory exemptions found in sections 17(1)(a), (b) and (c) of the *Act* apply to the records. 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;
>
> (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;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct.)]. 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].

In order for section 17(1) to apply, 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 paragraph (a), (b), or (c) of section 17(1) will occur.

Part 1: type of information

The appellant submits that the records, which it describes as "environmental site reports", contain scientific and technical information. The Ministry submits that they contain technical information. These terms have been defined in previous orders, as follows:

> *Scientific information* is 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].

The records set out detailed information concerning testing and analysis conducted by an engineering and consulting firm in relation to environmental contamination, and in particular, they analyse the direction of groundwater flows and the location of particular sources of contamination.

In Order P-1235, Adjudicator Anita Fineberg considered the application of section 17(1) to "an engineering report prepared to document the environmental cleanup of contaminated soil at a former service station." She stated that "[t]he firm monitored the removal of petroleum storage and distribution facilities and petroleum-hydrocarbon impacted soil" and conducted testing to ascertain the condition of the soil and water at the site. The report at issue in Order P-1235 analysed the results of this testing and reached conclusions. Adjudicator Fineberg found that this record contained "scientific and/or technical information."

Having conducted a detailed review of the records at issue in the appeal before me, I am satisfied that, like the record in Order P-1235, they contain both scientific and technical information, meeting part 1 of the test.

Part 2: supplied in confidence

Supplied

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].

The appellant submits that the records were supplied to the Ministry at the request of one of its officers. The Ministry concurs, indicating that it did not invoke its powers to compel production, and that the records were provided to it at the request of its Senior Environmental Officer. Even if the Ministry had compelled production, the records could still, in my view, be found to be "supplied". In any event, the Ministry is in the best position to know how it received the records. I accept the Ministry's submission, and find that the records were "supplied" to it.

In confidence

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].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The appellant submits that the records were supplied to the Ministry explicitly in confidence. It refers to the notation "Confidential" on the fax cover page of Record 1. The Ministry concurs, and also notes that each page of both reports is marked "confidential".

In my view, these notations are sufficient in the circumstances of this case to demonstrate an explicit expectation of confidentiality that had a reasonable basis. I find that part 2 of the test is met.

Part 3: harms

To meet part 3 of the test, the appellant must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to a 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 failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 17(1)(a)

Section 17(1)(a) requires that disclosure could reasonably be expected to ".. prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization".

The appellant submits that the requester has commenced an action against it which is ongoing, and provides a copy of the Statement of Claim. In its submissions to the Ministry at the time of the request, the appellant stated that its "competitive position *in said litigation* would be significantly compromised, and therefore be significantly prejudiced [emphasis added]." In my view, although the appellant's representations do not specifically address section 17(1)(a), the wording of this submission closely resembles that section, and I will consider whether a reasonable expectation of this harm has been established.

With particular reference to the litigation, the appellant notes that the requester had previously sought disclosure of the appellant's "expert reports", a request that was dismissed by Master Beaudoin of the Superior Court, and subsequently brought a motion for production of records 2, 3 and 4. As noted above, the appellant has consented to the disclosure of records 2 and 3, while record 4 (as well as record 1) remains at issue. At the time of the appellant's submissions to the Ministry at the request stage, the latter motion had been adjourned. The stated adjournment date had passed by the time the appellant provided its representations to me in this inquiry, but the appellant did not advise whether the motion had been heard, and if so, what the outcome was.

In its representations to the Ministry at the request stage, the appellant characterizes the request for access under the *Act* as:

> an attempt to get through the back door what Master Beaudoin declined to permit through the front door, is an attempt to gain an edge in that civil action, when such an edge has not been permitted by the Court, and accordingly is frivolous and vexatious and if granted could reasonably be expected to deprive [the appellant] of its right to a fair trial and impartial adjudication.

In my opinion, the reference to "competitive position" in section 17(1)(a) of the *Act* was not intended to include a litigant's competitive position in civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts.

The relationship between access under the *Act* and civil litigation is dealt with in section 64(1), which provides that:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

The legislature could have added a section precluding access under the *Act* to information that might be sought to be obtained through discovery in litigation, but it did not do so. In Order PO-1688, Senior Adjudicator David Goodis discussed the relationship between access under the *Act* and the discovery process. In that case, a third party appellant had argued that it was improper, in circumstances where the requester has commenced litigation against it, for the requester to utilize the access to information process under the *Act* as opposed to the discovery process under the Rules of Civil Procedure. He rejected this argument, and provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …

…

In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:

> The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the Municipal Freedom of Information and Protection of Privacy Act legislation, nor ban the publication of the contents of police files required to be produced under that Act. … In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

The interpretation that "competitive position" does not include the position of the parties to civil litigation is further supported by the legislative history of section 17. The Williams Commission report entitled *Public Government for Private People* (Toronto: Queen's Printer, 1980) (the Williams Commission report) described the purpose of the third party information exemption found in section 17 of the *Act* and made the following comment:

> … It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable.… Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be preserved. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.
>
> …

> *The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information.* [Emphasis added.]

It is clear from a review of the discussion in the Williams Commission report that the intent of the provision was to protect the information assets of business that might be exploited by competitors in the marketplace, rather than other litigants.

Previous orders of this office have consistently adopted this view. For example, in Order PO-2293, former Assistant Commissioner Tom Mitchinson stated:

> 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, and MO-1706]. [Emphasis added.]

Even if I had concluded otherwise, and found that litigation qualified as a suitable venue for "competition" in the context of section 17(1)(a), I would not have found that the appellant had established this harm in the present circumstances. In my view, the appellant's representations on this point do not explain how its position would be harmed by disclosure. Beyond providing a basic description of the litigation, and saying that the records "in part respond" to the requester's claim, no explanation is provided of how disclosure of these particular records could reasonably be expected to harm the appellant's competitive position. In addition, such a reasonable expectation is not self-evident from even a careful review of their contents. I also note that Records 2 and 3, which deal with similar matters, and contain related (and in some cases identical) diagrams and test results, have been disclosed to the requester with the appellant's consent. In these circumstances, I would have expected the appellant to explain what is different about records 1 and 4 to justify their different treatment.

I find, therefore, that "detailed and convincing" evidence has not been provided, and the appellant has not satisfied part 3 of the test with respect to section 17(1)(a). As all three parts of the test must be met, I find that section 17(1)(a) does not apply.

Section 17(1)(b)

In order to meet the requirements of section 17(1)(b) of the *Act,* the appellant must demonstrate that:

1. the disclosure of the information in the records could reasonably be expected to result in similar information no longer being supplied to the institution; and

2. it is in the public interest that similar information continue to be supplied to the institution in this fashion.

The appellant submits that the information provided to the institution in this appeal relates to contamination of the natural environment and that it is in the public interest that requests for such information by the Ministry be honoured. If disclosed, the appellant submits that the result may be that similar information may no longer be supplied.

I note, however, that the Ministry has the power to issue an order under section 18 of the *Environmental Protection Act* to force production of reports of this kind. Although the Ministry states that it prefers to work cooperatively with industry, it does have the power to make an order for production.

For this reason, I find that the appellant has not met part 3 of the test under section 17(1)(b). The Ministry's statutory authority to order production of records such as those at issue in an appeal protects the public interest in the supply of this information to the Ministry, and disclosure could not reasonably be expected to result in similar information no longer being supplied. As all three parts of the test must be met, I find that section 17(1)(b) does not apply.

Section 17(1)(c)

Section 17(1)(c) requires that there be a reasonable expectation that disclosure would "result in undue loss or gain to any person…." Like sections 17(1)(a) and (b), "detailed and convincing evidence" is required to support the application of this section.

The appellant submits that the reference in this section to "undue loss or gain" is not limited to undue loss or gain in the marketplace and that disclosure of the records at issue will give the requester an advantage in the lawsuit.

I have analysed the relationship between the harms intended to be protected against under section 17(1)(a), above, and civil litigation. My reasoning under section 17(1)(a) stems from the view that section 17(1) is intended to protect the "informational assets" of businesses and others in the context of the marketplace. In my view, it applies with equal force in the context of section 17(1)(c).

In addition, it is in my view a curious and unsustainable argument to suggest that the outcome of a lawsuit before the civil courts could produce an "undue" loss or gain. The whole purpose of litigation, and the unswerving ambition of the Canadian judiciary, is to produce results that are fair and just. In my view, this argument cannot be upheld. Section 17(1)(c) cannot possibly include "undue gain or loss" in the context of litigation.

As well, even if I had reached a different conclusion in that regard, my assessment of the appellant's submissions under section 17(1)(a), and the contents of the records, apply with equal force in the context of section 17(1)(c). I find that "detailed and convincing" evidence has not been provided, and part 3 of the test is not met for section 17(1)(c). As all three parts must be met, section 17(1)(c) does not apply.

RAISING OF A DISCRETIONARY EXEMPTION BY THE APPELLANT

In correspondence to the Ministry written during the processing of the access request, as well as in representations made in response to the Notice of Inquiry in this appeal, the appellant sought to raise the potential application of the discretionary exemption found in section 14(1)(f) of the *Act* to the release of the records at issue.

In response, the Ministry wrote to the appellant and advised that the Ministry was not claiming section 14 to deny access.

This raises the issue of whether an affected person or third party appellant can rely on the application of a discretionary exemption to claim that access to a record should be denied in circumstances where the institution has not claimed the exemption. Former Assistant Commissioner Tom Mitchinson considered this issue in Order P-257 where he stated:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released. If, during the course of an appeal, a head indicated a change in position in favour of release of information not covered by sections 17(1) or 21(1), again, this would almost always be an acceptable course of action, consistent with the purposes of the *Act*.
>
> In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

I agree with the comments of the former Assistant Commissioner and will apply these principles in this appeal. I have reviewed the correspondence referred to above, the submissions of the parties and the records at issue. For the reasons that follow, I find that this is not an appeal in

which there are unusual circumstances which require that I consider the application of a discretionary exemption that the Ministry has elected not to claim.

It is not apparent that there are any exceptional circumstances in this appeal that warrant allowing the appellant to raise the discretionary exemption in section 14(1)(f). There is evidence before me that the Ministry did turn its mind to the application of the discretionary exemption in the exchange of correspondence between the appellant and the Ministry that took place prior to the commencement of this appeal, and exercised its discretion not to claim it. The appellant does not allege that the Ministry exercised its discretion in an improper manner or that the Ministry has failed to exercise its discretion. Nor is there any persuasive evidence in the submissions, the correspondence, or the record itself that would lead me to that conclusion. In my view, it is apparent that the interests of the appellant have been fully considered by the Ministry in its decision not to claim section 14(1)(f).

In arriving at my conclusion with respect to this issue, I have also taken into account the purpose of the discretionary exemption in section 14(1)(f) that the appellant seeks to rely upon. The purpose of the provision is to protect institutions and affected parties against a "real and substantial risk" that harm might result from the release of the records. The exemption is not available as a protection against remote and speculative dangers. [Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* [2003] O.J. No. 2182 (Div. Ct.)]. Previous orders of this office have stated that for section 14(1)(f) to apply, it is not sufficient to identify the fact that litigation is in process. [Orders 48, P-326 P-126]

In this case, the appellant provided very brief representations in response to the Notice of Inquiry, and relied on an enclosed copy of its submissions to the Ministry at the request stage, which had been prepared six months earlier. It is regrettable that the appellant did not see fit to update the facts as of the time of its submissions in the inquiry. Those representations state that the records "respond to" the litigation against it, and if they are disclosed, the requester "may gain" an unfair advantage in the litigation. The appellant has also provided a copy of the Statement of Claim.

In its earlier submissions to the Ministry at the request stage, which as noted, were also attached to its later representations in this inquiry, the appellant states that the action is ongoing, and has been the subject of several interlocutory orders. As outlined earlier, the appellant states that one motion for production was refused, and a second one had been adjourned. Although the outcome of the second motion would appear to have been determined when the appellant provided its representations in this inquiry, the appellant does not state what that outcome was, or explain (if this was the case) that the motion had been further adjourned. In its earlier submissions to the Ministry, the appellant submits that the request is an attempt to get by the back door what the Master in the first attempt to gain production had declined to permit through the front door. The appellant also advises that, as of the time of its submissions to the Ministry at the request stage, discoveries had not yet been held. Again the appellant does not update this information in its submissions to me in this inquiry.

Despite providing this background information, the appellant has not provided any detailed explanation as to why this is one of the "rare" cases when the Commissioner should intervene and allow an affected party to claim a discretionary exemption that normally only the Ministry could rely on. The appellant's arguments are general in nature and despite the fact that the appellant commissioned the records at issue and has them in its possession, its representations do not refer to the contents of the records in any detail, beyond the somewhat puzzling statement that they "respond to" the litigation. I have reviewed the records and the Statement of Claim, and although I acknowledge that there is an overlap between the litigation and the areas covered in the records, this link is not, on its own, sufficient to establish that this is one of the "rare" cases when the appellant should be permitted to rely on a discretionary exemption not claimed by the Ministry.

In short, the appellant has not adduced any persuasive evidence that exceptional circumstances exist that warrant a consideration of the discretionary exemption found in section 14(1)(f).

In view of this finding, it is not necessary for me to consider the application of section 14(1)(f) to this appeal. Nevertheless, I have decided to consider its application to respond to the appellant's representations with respect to this issue.

LAW ENFORCEMENT

Section 14(1)(f) states:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (f) deprive a person of the right to a fair trial or impartial adjudication;

Where section 14(1)(f) uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The purpose of the discretionary exemption and the test for its application are set out above. The appellant is required to show a real and substantial risk of interference with the right to a fair trial.

In *British Columbia v. Imperial Tobacco Canada Ltd.,* [2005] 2 S.C.R. 473, the Supreme Court of Canada considered the meaning of the right to a fair civil trial in the context of a challenge by a number of manufacturers to the constitutional validity of the British Columbia *Tobacco Damages and Health Care Costs Recovery Act,* S.B.C. 2000, c. 30. The appellants in that case argued that reverse onus provisions that differed from the ordinary rules of court violated the right to a fair civil trial contrary to the *Charter.* Although the circumstances of that appeal are

quite different from those before me in this appeal, I find the comments of Major J., writing for the majority, instructive. He stated, at pp. 504-505:

> Additionally, the appellant's conception of a "fair" civil trial seems in part to be of one governed by customary rules of civil procedure and evidence. As should be evident from the analysis concerning judicial independence, there is no constitutional right to have one's civil trial governed by such rules. Moreover, new rules are not necessarily unfair. Indeed, tobacco manufacturers sued pursuant to the Act will receive a fair civil trial, in the sense that the concept is traditionally understood: they are entitled to a public hearing, before an independent and impartial court, in which they may contest the claims of the plaintiff and adduce evidence in their defence. The court will determine their liability only following that hearing, based solely on its understanding of the law as applied to its findings of fact. The fact that defendants might regard that law (i.e., the Act) as unjust, or the procedural rules it prescribes as unprecedented, does not render their trial unfair.

I agree with the comments of Justice Major and adopt them here. It is far from self-evident, as the appellant appears to suggest, that the right to a fair trial in a civil proceeding is necessarily affected by the disclosure of the records at issue in this appeal even if they might not have been available to the requester under the Rules of Civil Procedure. Whether disclosure of records under the *Act* will have an impact on a party's right to a fair trial must be decided on the facts of each case.

Previous orders of this office have dealt with similar arguments to that advanced by the appellant in this appeal. In Order 48, former Commissioner Sidney Linden had an opportunity to consider the application of section 14(1)(f). In that appeal, two civil litigation proceedings were pending before the courts. The Ministry was a defendant in one and was at risk of being added as a defendant in the other. The Ministry submitted that it would have been "unfair and prejudicial if a party to a legal proceeding could obtain production of all of the opposition's documents, even those that are not required to be produceable under the rules, without even complying with the rules of the court." The Ministry relied on section 14(1)(f) and claimed that the disclosure would "deprive" the institution of the right to a fair trial in the civil proceedings. Former Commissioner Linden stated:

> ..the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act*, 1987 is unfair. The exemption provided by subsection 14(1)(f) should be considered in the context of the governing principles of the *Act* as outlined in section 1, and, in my view, in order to demonstrate unfairness under section 14(1)(f), an institution must produce more evidence than the mere commencement of a legal action. Had the legislators intended the *Act* to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists, and, in my view, subsection 14(1)(f) or section 64 can not be interpreted so

> as to exempt records of this type without offending the purposes and principles of the *Act*.

Also, as outlined above in the discussion of Order PO-1688, including the reference to *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, the existence of rules relating to the production of documents in litigation does not necessarily demonstrate that access under the *Act* is unfair. As Justice Lane notes in the *Doe* case, "[i]t may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the *Act*; if so, then so be it…." In my view, the appellant's submissions here, unsupported by any probing analysis, amount to an assumption that any overlap is sufficient to prove interference with the right to a fair trial. I disagree.

As noted above, detailed and convincing evidence is required to support a reasonable expectation that disclosure would interfere with this right, and that evidence would have to demonstrate a "real and substantial risk" of interference. For the reasons explored here, and in my discussion of whether the appellant should be permitted to claim section 14(1)(f) in the first place, I find that the appellant's submissions on section 14(1)(f) fall far short of this standard. Accordingly, if I had permitted the appellant to claim it, I would find that the section does not apply based on my review of all the evidence before me, including the appellant's representations, the Statement of Claim and the records.

FRIVOLOUS OR VEXATIOUS REQUEST

As referenced several times in this order, particularly in the discussion of section 17(1)(a), above, the appellant's submissions to the Ministry at the request stage, which were attached to its representations in this inquiry, characterize the request for access under the *Act* as:

> … an attempt to get through the back door what Master Beaudoin declined to permit through the front door, is an attempt to gain an edge in that civil action, when such an edge has not been permitted by the Court, *and accordingly is frivolous and vexatious* and if granted could reasonably be expected to deprive [the appellant] of its right to a fair trial and impartial adjudication. [Emphasis added.]

In that same part of this letter, the appellant submits that the real purpose of the request is to obtain documents for use in a civil proceeding and relies upon section 5.1(b) of Regulation 460. The appellant submits that the request in this appeal is:

> … an improper collateral attack on an Order of the Court, which the head should not be a party to (see: *Garland v. Consumers Gas* [2004] Supreme Court of Canada); and on such basis it is submitted that the request has been made in bad faith or for a purpose other than to obtain access; [and]
>
> .. as the filing of documentation with [the Ministry] … was originally prompted by [named parties to the civil action], the request has been made in bad faith.

These submissions raise the possible application of the "frivolous or vexatious" provisions of the *Act* and Regulation 460. A preliminary issue in that regard is whether the appellant is entitled to rely on those provisions, or whether they can only be claimed by the Ministry.

Section 10(1)(b) states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > *the head is of the opinion* on reasonable grounds that the request for access is frivolous or vexatious. [Emphasis added.]

Section 27.1(1)states:

> A head who refuses to give access to a record or a part of a record *because the head is of the opinion that the request for access is frivolous or vexatious*, shall state in the notice given under section 26,
>
> > (a) that the request is refused because *the head is of the opinion* that the request is frivolous or vexatious;
> >
> > (b) *the reasons for which the head is of the opinion* that the request is frivolous or vexatious; and
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 50 (1) for a review of the decision. [Emphases added.]

The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

A review of these provisions makes it very clear that they exist for the benefit of "institutions" under the *Act*. Section 10(1)(b) sets a condition precedent for its application that "the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious". This theme is repeated in the notice requirement established by section 27.1(1). Similarly, sections 5.1(a) and (b) of Regulation 460 prescribe that:

> A head … shall conclude that the request for a record or personal information is frivolous or vexatious if:
>
> > (a) *the head is of the opinion* on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

(b) *the head is of the opinion* on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access. [Emphases added.]

In my view, the universal requirement in these provisions that *the head* (i.e., the head of an institution under the *Act* – see the definition in section 2) must have *formed an opinion* that the request is frivolous or vexatious make it even more difficult for an affected party or appellant to rely on these provisions than to rely on a discretionary exemption, as discussed above. In fact, based on the statutory wording, I believe this is an insurmountable hurdle. I find that the appellant is not entitled to rely on these sections, *per se*.

This does not mean, however, that parties are precluded from arguing that a request, in the context of an appeal under the *Act*, is an abuse of process at common law. Although the claimant was an institution, Order M-618 considered such a claim on the basis of common law principles, prior to the addition of the "frivolous or vexatious" provisions to the *Act*. In this regard, former Commissioner Tom Wright stated:

> I have been referred to ample and persuasive legal authority for the proposition that, as an administrative tribunal exercising quasi-judicial functions, the Commissioner is "master of his own process". On this basis I believe that I have the necessary authority to control what I identify as abuse of that process which would frustrate the intent of the Legislature in creating both a freedom of information regime and an office for its administration.
>
> The authority of an administrative tribunal to prevent abuses of its own process is affirmed in the judgment of Misener J., of the Ontario Court (General Division), in Sawatsky v. Norris (1992), 10 O.R. (3d) 67. Judge Misener considered that, even absent the express power to deal with abuses of process granted by section 23 of the Statutory Powers Procedure Act R.S.O. 1990, as amended, a review board under the Mental Health Act "has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right" (at p. 77).

I agree with former Commissioner Wright, and will consider whether the request, in the context of the appeal before me, is an abuse of process insofar as I am required to address it in this inquiry.

Because the principles that would apply to an allegation that a request is an abuse of process or "frivolous or vexatious" at common law are, to a significant extent, the foundation of the frivolous or vexatious provisions of the *Act*, I will refer to previous decisions in that regard, and other case law on the subject, in deciding this issue.

An analysis of the appellant's argument indicates that the allegation of a "collateral attack" is the foundation of its argument that the request is made for a purpose other than to obtain access, and part of the basis for its argument that the request is made in bad faith, both of which are mentioned in section 5.1(b) of the Regulation (quoted above). I will address this issue first, followed by a further discussion of "a purpose other than to obtain access" and "bad faith".

Collateral Attack

As noted, in its representations to the Ministry at the request stage, which were attached to its representations in the inquiry, the appellant argued that the access request amounts to a collateral attack on an order of the court in the civil proceeding, and thereby constitutes a purpose other than to obtain access. As discussed above, when those representations were provided to the Ministry, one motion for disclosure had been dismissed by the Master, and a second motion had been adjourned. When the appellant filed its representations in this inquiry, some six months later, it did not update this information, though it appears likely that the second motion would have been resolved by then. While that does not assist the appellant's argument concerning collateral attack, I have decided to dismiss it on a different basis, as a matter of law.

The appellant bases its collateral attack argument on *Garland v. Consumers' Gas Co.* [2004] 1 S.C.R. 629 (SCC). This case involved a court challenge to the practice of the Consumers Gas Company to charge flat rate late fees that were alleged to contravene the provisions of the *Criminal Code* in relation to permissible interest charges. The charges had been approved by order of the Ontario Energy Board (OEB). With respect to the doctrine of collateral attack on the OEB order, the Court stated:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen,* [1983] 2 S.C.R. 5594, at p. 599, this Court described the rule against collateral attack as follows:
>
>> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked [page 662] collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

I have decided that the appellant's assertion of a collateral attack cannot be sustained because of the extremely different and separate processes involved. It is simply not tenable to claim that a request under the *Act* can be considered a collateral attack on a motion for production in a civil action.

Using the language of the court in the *Garland* case, the object of this request for access is "not to invalidate or render inoperative" the order of the court. The object of this request is to gain access to a record through the totally independent mechanism of an access request under the *Act*. This same request could have been made by *all* members of the public, not just this requester.

In this regard, I note that one of the bases relied on for rejecting the collateral attack argument in *Garland* was that the party bound by the OEB order was not the same as the party bringing the court challenge. In the present case, the requester is the moving party seeking production in the civil action, but as I have just noted, this party is making a request under the *Act* that could be made by any member of the public. There is no principled basis for differentiating the requester from other members of the public, and disenfranchising the requester under the *Act* because it is also involved in litigation.

If the fundamental purpose of the rule against collateral attack, as described by the Court in the *Garland* decision, is to "maintain the rule of law" and preserve the "repute of the administration of justice", the request in this case does not conflict with that purpose. This office has no authority to make an order that would affect the litigation process. Nor is the requester in the wrong forum in any sense of that word when making this request. The requester is asserting a right under the *Act* that was clearly intended to co-exist with any rights that the requester may have to production of records in the context of litigation.

This is confirmed by the order of Justice Lane, cited above, in the *Doe* case. In *Doe*, Justice Lane issued an order prohibiting publication of information obtained in the civil discovery process, including publication by third parties. An application was made by a party to the civil litigation in that case under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to the contents of police files that were to be produced in the discovery process. Justice Lane stated that his order in the civil proceeding was not intended to interfere with the operation of *MFIPPA*, and would not bar the publication of records obtained under *MFIPPA*. I have previously reproduced the relevant comments of Justice Lane, but they bear repeating here:

> In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

Although the context of a publication ban in civil proceedings, as compared to a request under the *Act*, is not an exact analogy to an order refusing production as compared to a request under the *Act*, it is very close, and I find Justice Lane's analysis, which speaks directly to the relationship between civil actions and requests under the *Act*, to be persuasive.

I therefore conclude that even if there were an order in the civil proceeding that dealt specifically with the production of the records at issue, the request could not be considered a "collateral attack", and the requester is not prohibited from making an application under the *Act* for that reason.

Accordingly, I dismiss the appellant's "collateral attack" argument as a basis for finding that the request was for a purpose other than to obtain access, or made in bad faith. I will now consider whether there is any other basis for finding that those objections have any validity.

Purpose Other than to Obtain Access

I considered an argument that intended use in litigation was "for a purpose other than to obtain access" in Order MO-1924. In that appeal, the institution denied an access request on the basis that the requester was attempting to "expand" the discovery process in the pending civil litigation by requesting access under the *Act*. The institution claimed that this amounted to an improper purpose and was frivolous or vexatious. The following comments are applicable here:

> The [institution] also suggests that the objective of obtaining information for use in litigation with the [institution] or to further the dispute between the appellant and the [institution] was not a legitimate exercise of the right of access.
>
> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have "a right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

Order MO-1924 includes a review of previous orders of this office and the courts on this issue:

> I note that records protected by litigation privilege are subject to the solicitor-client privilege exemption at section 12. In addition, section 51 expressly addresses the relationship between the *Act* and the litigation process. This section states:
>
> 1. This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
>
> 2. This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.
>
> The Legislature clearly considered the relationship between the *Act* and the litigation process, and could have chosen to go beyond the section 12 exemption to limit the application of the *Act* where the requester is engaged in litigation with an institution. It did not do so. In my view, the [institution]'s argument on this point is entirely without merit.

My analysis on Order MO-1924 went on to review the analysis of Senior Adjudicator Goodis in Order PO-1688, in which he references Order 48 and the *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* case. As I have reproduced that discussion in my analysis of section 17(1)(a), above, I will not repeat it. In essence, these decisions reject the idea that requests under the *Act* are not permissible where there is related litigation.

In my view, the analysis in these previous decisions is equally applicable here. The requester is entitled to make an application for access to the records at issue and any intention to use those records in a civil proceeding would not constitute a "purpose other than to obtain access" as those words are used in section 5.1(b) of Regulation 460.

Bad Faith

The appellant also makes passing reference to the other ground in section 5.1(b) of the Regulation, relating to a request made in "bad faith". I have already rejected the argument that the request is a "collateral attack" on judicial determinations, but the appellant also alleges that because the requester "promoted" the filing of the records with the Ministry, the request is in bad faith. The appellant does not elaborate on this argument.

In Order M-850, former Assistant Commissioner Mitchinson commented on the meaning of the term "bad faith". He stated that "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of a dishonest purpose or moral underhandedness. He went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with secret design or ill will.

Based on the evidence and argument before me, I am not persuaded that the requester has engaged in underhanded behaviour. The mere fact that the requester may have encouraged the records to be filed with the Ministry falls far short of demonstrating that it was behaving in an underhanded or dishonest fashion, or "operating with secret design or ill will". I find that the requester's decision to exercise its rights under this *Act* does not constitute "bad faith".

I therefore dismiss the appellant's "frivolous or vexatious" arguments, whether they are considered in the context of the *Act*, or in the context of abuse of process at common law.

ORDER:

1. I uphold the decision of the Ministry to disclose the records.

2. I order the Ministry to disclose Records 1 and 4 to the requester by sending him a copy by **September 1, 2006** but not earlier than **August 28, 2006**.

3. In order to verify compliance with provision 2, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the requester.

Original signed by: July 27, 2006
John Higgins
Senior Adjudicator