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

# ORDER PO-2629

## Appeal PA07-162

## Ministry of the Environment

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## NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received the following request from an environmental group for access to information under the *Freedom of Information and Protection of Privacy Act* (the Act):

> Since 1997/1998 the Ministry of the Environment (MOE) has selectively required facilities to prepare Emission Summary and Dispersion Modelling (ESDM) Reports to demonstrate compliance with air pollution rules. This MOE auditing program is called Selected Targets for Air Compliance (STAC). With respect to this program we require copies of all of the MOE review reports of the ESDM reports submitted to the MOE under the STAC program since the programs inception.

The Ministry provided a Notice to the companies that submitted reports to it under the STAC program under section 28 of the *Act* and sought their views regarding disclosure of the requested information.

In regards to the current appeal, the Ministry provided a named company (the third party) a copy of the responsive record pertaining to it along with the section 28 Notice. After reviewing the third party's submissions, the records, and previous decisions of this office, the Ministry advised the third party that it had decided to grant full access to the records at issue.

The third party appealed the Ministry's decision to grant full access to the record at issue on the basis that section 17(1) applies to the information contained in it.

During mediation, the third party indicated that the record at issue (the 2004 STAC report) contains inaccuracies and that it had provided the Ministry with an updated 2006 ESDM report which it claims is more accurate.

The Ministry indicated that it has not yet reviewed the third party's 2006 ESDM Report under the STAC program. Therefore, at the time the request was made, the most current STAC report is the 2004 report at issue. The Ministry took the position that since the requester asked for the Ministry's review of the ESDM Report submitted by the third party, the ESDM Report on its own is not responsive to the request.

During mediation the mediator facilitated two teleconferences between the requester and the third party. Despite attempts by the third party and the requester to arrive at a mutually agreeable settlement, mediation was not successful and the file was forwarded to the adjudication stage of the process.

I sought representations from the third party, initially, and sent it a Notice of Inquiry setting out the facts and issues on appeal. The third party made representations, indicating that it wished its previous correspondence sent to the Ministry in response to the section 28 Notice to also be considered as part of its submissions.

After reviewing the third party's submissions, I decided that it was not necessary to seek submissions from the other parties.

## RECORD:

There is one record at issue, titled "Source Inventory and Dispersion Modelling Report Review". The record, dated January 2004, comprises an executive summary, a 23 page report and five appendices.

## DISCUSSION:

### THIRD PARTY INFORMATION

The third party submits that the mandatory exemptions in sections 17(1)(a), (b) and (c) apply to the record at issue.

Sections 17(1) (a) (b) and (c) 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].

For section 17(1)(a), (b) or (c) to apply, the third 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 paragraph (a), (b) or (c) of section 17(1) will occur.

**Part 1: type of information**

The third party claims that the record contains scientific, technical and commercial information relating to the company and its operation. These terms have been defined in previous orders of this office 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].
>
> *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 fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

In its decision letter to the third party the Ministry indicates that it agrees with the third party that the record is the result of technical and/or scientific study.

Having reviewed the record, I find that although the information in the record may relate to the third party and its operations and may have some monetary value to it, this information does not relate to the buying, selling or exchange of merchandise or services as that term is defined, and, therefore, does not qualify as commercial information. However, I agree with the Ministry and third party that it contains both scientific and technical information in accordance with those terms as defined above.

Therefore the requirements of Part 1 of the section 17(1) test have been established.

**Part 2: supplied in confidence**

In order to satisfy part 2 of the test, the third party must establish that the information was "supplied" to the Ministry by it "in confidence", either implicitly or explicitly.

The requirement that information be "supplied" to an 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].

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 third party submits that it provided a STAC Report to the Ministry with the clear understanding that it was a preliminary report, that it was not detailed and that it would be a basis for confidential discussions with respect to further information as required regarding possible environmental matters and changes to the third party's operations. The third party claims that the Ministry gave assurances at the time it was submitted that the material would only be used as the basis of the confidential discussions between them.

In its decision letter to the appellant, the Ministry acknowledged that the information in the record was supplied by the third party, explicitly in confidence.

The record at issue is the Ministry's review of the third party's ESDM Report. Although the record itself is a Ministry generated document, I find that it contains or would reveal information that was contained in the third party's report. Based on the submissions and my review of the record, I accept that the information in the record was supplied to the Ministry by the third party in confidence. Accordingly, the second part of the test has been met.

**Part 3: harms**

To meet this part of the test, the third party 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 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].

The third party expresses concern about the correctness of the Ministry's review of its ESDM Report, maintaining that its Report clearly showed that it was in compliance with the Ministry's standards. The third party believes that Ministry personnel modified the application of the data contained in its preliminary Report and thus incorrectly concluded that it was in "exceedance of standards for particulate emissions." The third party indicates further that despite this it continued in discussions with the Ministry regarding environmental matters and subsequently provided the Ministry with a more detailed emission report, which it contends confirms compliance with the standards.

The third party submits that disclosure of the record at issue "will prejudice its competitive position and will interfere with its contractual and other negotiations with third parties, including its suppliers, customers and government agencies, in a significant manner." The third party provides no additional explanation in either its original submissions to the Ministry or its submissions in response to the Notice of Inquiry as to how or why its competitive position will be prejudiced. Nor does it explain how, why or to what extent its contractual and other negotiations will be interfered with as a result of disclosure of the record at issue (section 17(1)(a)).

The third party also submits that release of the record will result in similar information no longer being supplied by it and by other companies in its position (section 17(1)(b)). Finally, the third party submits that release of the record will cause it undue loss, particularly in the circumstances where it believes that the review is incorrect (section 17(1)(c)). Other than its disagreement with

the Ministry's review of its ESDM Report, the third party provides no additional explanation, evidence or other basis to permit a conclusion that any of the harms in section 17(1) could reasonably be expected to occur.

In explaining its decision to disclose the record to the third party, the Ministry referred to section 168(1) of the *Environmental Protection Act* (the *EPA*), which states:

> …except as to information in respect of a deposit, addition, emission or discharge of a contaminant into the natural environment, every provincial officer shall preserve secrecy in respect of all matters that come to his or her knowledge in the course of any survey, examination, test or inquiry under this Act or the regulations and shall not communicate any such matters to any person…

The Ministry stated that it consistently releases information about contaminants released to the environment in accordance with this provision of the *EPA*. The Ministry relied on previous orders of this office (Orders PO-1666 and PO-1803) where it has been determined that the types of records similar to that at issue do not qualify for exemption under section 17(1) of the *Act*.

The Ministry stated further with reference to the third party's concern about the accuracy of its review, that it has already advised the requester that some companies had raised this concern. Nevertheless, again referring to previous orders of this office (Orders PO-1690 and MO-1377), the Ministry noted that this office has ruled that the accuracy of information is not a factor in considering whether to release such a record.

***Sections 17(1)(a) and (c)***

I find that the third party has failed to provide me with sufficiently detailed evidence to establish that disclosure of the record at issue could reasonably be expected to result in the harms contemplated under sections 17(1)(a) and/or (c). Apart from reiterating the wording of these sections, the third party has not explained the nature of the anticipated harms. Nor has it made any attempt to link disclosure of the record to the harms. In the face of the Ministry's position regarding disclosure of the type of information contained in the record, the third party has made no effort to distinguish its information from similar types of information that has consistently been disclosed by the Ministry.

I am not persuaded that inaccuracies, actual or perceived, could reasonably be expected to result in one of the harms under these sections. Commenting on the impact of inaccurate or incomplete information in regard to the harms under sections 17(1)(a) and (c), former Assistant Commissioner Tom Mitchinson stated in Order PO-1803:

> In addition, the appellant and affected persons have indicated that the draft report does not provide 'a comprehensive picture of the situation as the companion document to the Report is not yet complete' and that 'disclosure of the Report to a third party, then, will misinform and mislead the third party'. None of these

> parties has identified any specific errors, inadequacies or deficiencies contained in the draft, nor are any clear on its face. If the appellant and affected persons are concerned that errors would go unnoticed, they are certainly able to convey this information to the requester in order to avoid misinterpretation. Also, the draft report is dated June 8, 1998, more than two years ago. Given the nature of the report and the fact that it appears to be complete and comprehensive, I am puzzled that the final version has not been completed by this point. If it has, then it would be a record accessible under the Act if in the custody or under the control of the Ministry (see my discussion of section 17(1)(b), below), and can be provided to the requester by either the Ministry or the appellant, to be read in conjunction with the draft version.

In my view, these comments are similarly relevant to the circumstances of the current appeal. In this case, the Ministry has already advised the requester that some of the companies that were reviewed had concerns about the accuracy of the review similar to those expressed by the third party. It appears that the third party has already been in discussions with the requester about the information at issue. Moreover, in contrast to the situation in Order PO-1803, the third party has now completed a new and more detailed ESDM Report, and has submitted it to the Ministry, thus bringing it within the purview of the *Act*. In the circumstances, I agree with the Ministry that disclosure of the record at issue could not reasonably be expected to result in the harms in sections 17(1)(a) or (c) simply because the third party disagrees with or has concerns about its accuracy.

***Section 17(1)(b)***

With respect to the third party's submission regarding the application of section 17(1)(b), a number of previous orders of this office have addressed similar arguments made with respect to reports concerning environmental contamination and clean-up efforts provided to the Ministry in the context of its administration of the *EPA*. These orders have found records similar to the record at issue in the current appeal not to qualify for exemption under section 17(1)(b) of the *Act* (Orders P-1595, M-1143, PO-1707, PO-1732-F, PO-1666 and PO-1803).

I summarized the rationale for these decisions in Order PO-1666:

> With respect to section 17(1)(b) ..., the Ministry acknowledges that it would prefer to work co-operatively with the industry, however, it submits that the EPA provides the authority for it to obtain this type of record in any event.
>
> …Although the Company has strenuously objected to the disclosure of the records, I am not persuaded that the harms which it believes will come to pass should they be disclosed could reasonably be expected to occur. In particular, I am not convinced that the Company, or any other similar company in the industry would no longer supply this type of information to the Ministry. The EPA clearly requires specific types of information and establishes the legal authority to obtain

> it. Although, as the Ministry indicates, it would prefer to have this information provided voluntarily, it indicates that it is prepared to compel its production under the authority of the EPA, if necessary. Consequently, I find that section 17(1)(b) does not apply.

Expanding on this rationale, former Assistant Commissioner Tom Mitchinson noted in Order PO-1803 that there is a public interest in making the maximum amount of information in the area of environmental contamination and clean-up efforts available. He noted further that this view is reflected in the provisions of the *EPA*, which provide the necessary authority to the Ministry to ensure that the public is fully informed of issues impacting the environment.

Assistant Commissioner Mitchinson found that the public interest signified by the wording of section 17(1)(b) must have some connection to the policy mandate of the institution with custody or control of the record at issue. In the case of the Ministry of the Environment, its policy mandate relates to the protection of the environment.

Assistant Commissioner Mitchinson observed that it is significant that the Ministry, which has the mandate to protect the public interest in matters relating to the environment, does not express any concern that similar information will not be supplied in future, nor that the continued supply of similar information is in the public interest. He concluded:

> Because section 17(1) is a mandatory exemption, in my view, it is fair to infer from the Ministry's position that it has determined that disclosure of the record would not interfere with the kinds of public interests that the Ministry's mandate seeks to protect. Given the Ministry's experience with issues of this nature, in particular the types of information it requires to protect the natural environment on an ongoing basis, the Ministry's position that section 17(1)(b) does not apply is a significant consideration.

The record at issue in the current appeal relates to "contaminants released to the environment", and according to the Ministry, falls under the *EPA*. In my view, the reasoning enunciated in the previous orders referred to above is relevant to the facts of this case and I adopt it for the purpose of this decision.

In providing the third party with an explanation for its decision to release the record at issue, the Ministry set out the legislative basis for its decision as well as the previous decisions of this office pertaining to similar types of information. It is significant to note that the Ministry does not express any concern about similar information not being supplied in the future or that the continued supply of similar information is in the public interest. The third party's submissions make no effort to distinguish this clear line of reasoning in previous orders of this office. I find, therefore, that the third party has failed to establish that disclosure of the record at issue could reasonably be expected to result in similar information no longer being supplied, where it is in the public interest that similar information continue to be supplied.

Accordingly, I find that the record does not qualify for exemption under section 17(1)(b).

In summary, I find the record does not qualify for exemption under sections 17(1)(a), (b) or (c), and should therefore be disclosed.

## ORDER:

1. I uphold the Ministry's decision to disclose the record at issue.

2. I order the Ministry to disclose the record at issue to the requester by sending him a copy by January 14, 2008 but not before January 9, 2008.

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 record that was disclosed to the requester.

Original signed by: December 12, 2007
Laurel Cropley
Adjudicator