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

ORDER PO-2792

Appeal PA07-200

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 access to records relating to the granting of an Environmental Certificate for a leased parcel of land at a landfill site at a specified address to a named organization. The requester indicated that the records are to include a proposal for an earlier date that would span the time period from November 2005 to March 2006.

The Ministry issued an interim decision granting the requester partial access to the requested records. The Ministry advised that access to some records was denied pursuant to section 21(1) (personal privacy) of the *Act*. In addition, the Ministry advised that, pursuant to section 57 of the *Act*, a fee of $343.00 would apply to the records. The requester was asked to provide the Ministry with a 50% deposit in order to continue processing the requester. The requester submitted the deposit to the Ministry.

The Ministry notified an organization on the basis that it (the affected party) may have an interest in the disclosure of records at issue. The Ministry asked the organization to provide its views in relation to disclosure of the records at issue pursuant to section 17(1) of the *Act*.

The Ministry then issued a decision to the affected party advising that, as no submissions were made relating to the release of the records, the Ministry would be granting the requester partial access to the records. The Ministry advised the affected party that the information severed from the records include newspaper articles and Articles of Incorporation pursuant to section 22 (publicly available) of the *Act*.

The affected party's representative, now the appellant, appealed the decision of the Ministry to this office.

During the course of mediation, the Ministry confirmed that it was no longer relying on the application of section 21(1) of the *Act* to the records at issue. The original requester advised the mediator that he is not appealing the Ministry's decision relating to the application of section 22 of the *Act*. Specifically, he confirmed that he is not pursuing access to the newspaper clippings. In addition, the original requester confirmed that he is not seeking access to the Certificate of Incorporation.

The original requester raised the issue of a public interest in the disclosure of the records. As a result, section 23 of the *Act* has been added as an issue in this appeal. The parties were unable to resolve the remaining issues through mediation and the file was moved to adjudication stage of the appeals process. I initially sent a Notice of Inquiry setting out the facts and issues on appeal to the appellant. The appellant provided representations in response.

I then sent the Notice of Inquiry to the Ministry and the original requester, along with a complete copy of the appellant's representations. I received representations from both the Ministry and the original requester.

Finally, I provided the appellant with a copy of the non-confidential portions of the original requester's representations and invited him to make representations by way of reply. The appellant did not submit reply representations.

RECORDS:

The records at issue consist of 806 pages of record, as set out below in the following index:

RECORDS	PAGE NUMBERS	MINISTRY DECISION
Emails between Environmental Assessment Approval Branch (EAAB) staff and the District Office	1-8	Release in full
Attachments to last email from EAAB to District Office	9-16	Release in full
Fax from Engineering Department dated March 13, 2006	17-25	Release in full
Email of Nov. 24, 2005 between District Office and EAAB	26	Release in full
House Book Note re: Project	38-40	Release in full
Emails between EAAB staff and the District Office	41-42	Release in full
Photograph of building	43-44	Release in full
Email and House Book Note re: project	45-48	Release in full
Email between DO staff and City	49	Release in full
Application for Certificate of Approval from IDS	56	Release in full
City Council Resolution	57-63	Release in full
Letter from named organization on behalf of appellant re: revised certificate of approval application including attachments 1-11 which also have attachments	64-746 (pages 244-251 removed – Certificate of Incorporation)	Release in full
House Book Note re: project	747-748	Release in full
Emails between EAAB staff and appellant and District Office staff	749-760	Release in full
Appellant slide deck	761-789	Release in full

RECORDS	PAGE NUMBERS	MINISTRY DECISION
Emails between EAAB staff and reps fro appellant and District Office staff	790-817	Release in full
Appellant Project Statement	818-823	Release in full
Emails between EAAB staff and District Office staff	824-831	Release in full

DISCUSSION:

THIRD PARTY INFORMATION

The appellant submits that section 17(1)(a) applies to exempt the information at issue from disclosure. Section 17(1)(a) 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,
>
> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization

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) 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), (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:

> *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].

I adopt these definitions for the purposes of the current appeal.

The appellant submits that the records contain proprietary technical information regarding the nature and function of its technological processes and operation.

The Ministry submits that the records at issue contain scientific and technical information. The Ministry states that the records are based on a scientific study and involve a technical application which the appellant proposed to install at a landfill site. The application and supporting information were prepared by a technical firm who are experts in the field of landfill operations. The application and proposal consists of approximately 700 pages out of the approximately 830 pages of record at issue. Further, the application and supporting information describe in detail the operation of the proposed pilot project as well as the environmental impact of the operations. The Ministry states that other than the House Book notes and the City Council Resolution, all the records satisfy the requirements of the definition of "technical information".

Based on my review of the records, I find that only some of the records contain technical and/or scientific information. These pages of records consist of emailed discussions between Ministry staff, the appellant, or a named city and refer to the Certificate of Approval process or other administrative processes. I find that any discussion of the waste management operation at the landfill site is discussed in general and non-scientific terms and does not qualify as scientific or technical information. The following records do not contain the level of discussion necessary to be considered technical or scientific information for the purposes of section 17(1).

- Pages 1-8 (emails)
- Pages 17-25 (fax between Ministry and city)
- Page 26 (email)

- Pages 38 – 40 (House Book Note)
- Pages 41-42 (emails)
- Pages 43-44 (photographs)
- Page 45-48 (email and House Book Note)
- Page 49 (email)
- Page 56 (Ministry computer printout)
- Pages 57-63 (city council resolution)
- Pages 64-72 (administrative documents between the appellant and the Ministry)
- Pages 749 – 760 (emails)
- Pages 761-789 (appellant's slide deck)
- Pages 790 – 817 (emails)
- Pages 818 – 823 (Project Statement)
- Pages 824 – 831 (emails)

As stated above, I find that these records do not contain scientific or technical information for the purposes of section 17(1) of the *Act*. As all three parts of the test for section 17(1) must be met in order to qualify for exemption under section 17(1), and no other exemptions are claimed for them, I will order the Ministry to disclose these pages of the records to the original requester.

The only pages of the records that contain scientific and technical information are the following:

- Pages 9 – 16 (emails)
- Pages 73 – 746 (Certificate of Approval Application as well as attachments)

I find that the email discussions in page 9-16 of the records contain technical information about the appellant's proposal for the Certificate of Approval. In particular, this email chain is a discussion by the Hazardous Waste Engineer at the Ministry and other individuals within the Ministry. Pages 73 – 746 consist of the appellant's application for the Certificate of Approval and various attachments. The application for Certificate of Approval contains engineering information about the waste management process, as well as scientific studies about the process. I find that this information is scientific and technical information for the purposes of section 17(1).

Accordingly, pages 9 – 16 and 73- 746 contain scientific and technical information which satisfies part 1 of the test for the application of section 17(1).

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 contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

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]

Representations

The appellant did not address the "supplied" issue except to explain that it submitted the materials for the application for Certificate of Approval so that the Ministry could best assess potential environmental impacts of granting the certificates.

On the issue of "confidentiality" the appellant submits that the information in the records is subject to confidential licensing agreements with the appellant's business partners in Canada, the United States and elsewhere. The appellant further states that the Ministry knows that its

submissions for the Certificate of Approval contained confidential proprietary information, and has in the past honoured the appellant's third party confidentiality obligations by not disclosing the information during the approvals process.

The Ministry submits that in order to receive the Ministry's approval to operate a facility or process that involves discharging contaminants into the natural environment, a proponent is required to submit sufficient information to the Ministry. Thus, the information provided by the appellant for the application of the Certificate of Approval meets the definition of supplied.

Further, the Ministry notes, on page 4 of the application, the appellant indicated that the material was being submitted in confidence. The Ministry states further:

> None of the information is routinely available to the general public. As a result of the Environmental Registry posting, only information that the proponent has not marked as confidential is routinely made available to the public.
>
> The ministry is keenly aware of the sensitivities of releasing information submitted by a third party for an application for a certificate of approval. As a result, the ministry maintains the confidentiality of the information.

Analysis and Finding

Based on my review of the records I find that pages 9 – 16 do not meet the supplied requirement of the part 2 test for section 17(1). These pages consist of emailed messages involving Ministry employees and I find that this information was not "supplied" by the appellant; nor would its disclosure permit the drawing of accurate inferences with respect to the information supplied by the appellant. As no further exemptions were claimed for this information, I will order that it be disclosed to the requester.

Pages 73 – 746 consist of the appellant's application for the Ministry's certificate of approval including a number of attachments. I find that this information was supplied by the appellant to the Ministry for the purposes of obtaining the certificate of approval and as such meets the "supplied" requirement for section 17(1). Further, based on the representations of the appellant and the Ministry, I find the confidentiality aspect for section 17(1) has also been met for these records. I am satisfied that the appellant had a reasonable expectation of confidentiality at the time it submitted the application to the Ministry. The appellant had expressed the need for confidentiality of the records and the Ministry concurs that the information submitted in the application is treated in such a way to maintain their confidentiality.

Accordingly, I find that pages 73-746 meet the requirements for part 2 of the test for the application of section 17(1), and I will now consider the harms aspect of the three-part test under section 17(1).

Part 3: harms

To meet this part of the test, the institution and/or 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].

Section 17(1)(a): prejudice to competitive position

The appellant submits that disclosure of the records at issue could reasonably be expected to prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations. In support of its position, the appellant submits:

> Much of this technological information is subject to strictly confidential technology licensing agreements with [the appellant's] business partners in Canada, the United States and elsewhere. To its knowledge, [the appellant's] waste-to-energy gasification process is unique in Canada. The disclosure of this information would violate [the appellant's] contractual obligations with its business partners, potentially leading to financial sanctions against [the appellant] and the loss of its licensing rights to the technology it presently lawfully employs under the Certificates of Approval.

The appellant also states that it would be improper for the Ministry to require the appellant to disclose confidential information in the application process and then release this same information to the public, which includes its competitors.

On the issue of the harm, the Ministry submits that the appellant is in the best position to identify the harms that may reasonably result if the information is released to the public.

The original requester submits that the appellant has not provided detailed and convincing evidence of the harm. The original requester states that the appellant should be required to give proof of its claim that its "waste-to-energy gasification process" is unique in Canada. Further, the original requester states that the Ministry rejected the appellant's claims of harm upon disclosure at the time of the initial receipt of the request. He further submits that the appellant should provide proof of its statement that it operates under valid licenses for these proprietary processes.

The appellant was asked to respond to the original requester's representations, but it did not do so.

Finding

As stated above, the appellant must provide detailed and convincing evidence to establish a reasonable expectation of harm. In the present appeal, I conclude that the appellant has failed to do so. While I find that the records at issue contain detailed technical and scientific information about the appellant's processes, I am unable to find that disclosure of this information could reasonably be expected to either prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the appellant. The appellant provided me with no more than the mere assertion of harm and has not provided me with evidence of its licensing agreements, or the proprietary nature of its processes. Further, based on my careful review of the records, I am unable to discern that this information is included in the records before me. Moreover, I conclude that the appellant provided me with insufficient evidence of the competitive nature of its business and the contractual or other negotiations that disclosure would interfere with. Accordingly, I find that section 17(1)(a) does not apply to exempt pages 73 – 746 from disclosure, and I will order this information to be disclosed to the original requester.

ORDER:

1. I order the Ministry to disclose the records to the original requester by **July 24, 2009** but not before **July 17, 2009** by providing the original requester with a copy of the records.

2. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Ministry pursuant to order provision 1 to be provided to me.

Original signed by: June 18, 2009
Stephanie Haly
Adjudicator