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

ORDER PO-2797

Appeal PA08-326

Ministry of the Environment

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NATURE OF THE APPEAL:

The requester submitted a request to the Ministry of the Environment (the Ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> …a copy of all Ministry of Environment communications with and about [named trade association] representing pesticide manufacturers, or any of [above-named trade association]'s agents, from Oct. 3, 2003 until the present.
>
> I am interested in communications between environment ministry officials, between environment ministry officials and the premier's office and between environment ministry officials and [above-named trade association].

The Ministry located responsive records and notified the named trade association (the third party) pursuant to section 28(1)(a) of the *Act*, to seek its views regarding disclosure of the information in the records that may affect its interests, with reference to the exemption in section 17(1) of the *Act*. Copies of the records relating to the third party were attached to the Ministry's notification letter.

In response, the third party indicated that it objected to the disclosure of certain records, and described the specific pages in its letter. After considering the third party's submission, the Ministry issued a decision letter to the third party advising that it had decided to grant full access to the information submitted by it.

The third party (now the third party appellant) appealed the Ministry's decision.

During mediation, the mediator contacted the requester who indicated that she is still seeking access to the withheld records pertaining to the third party, claiming that there exists a public interest in the disclosure of the withheld records, in reference to section 23 of the *Act*.

The mediator also held discussions with the third party appellant who explained that it had consented to the disclosure of most of the records originally requested in response to the Ministry's notification. The third party appellant continued to object to the disclosure of the records that were described in its submission to the Ministry in response to the section 28(1) Notice. The third party appellant maintained that the exemptions in sections 17(1)(a) and (c) of the *Act* apply to these records.

Also during mediation, the Ministry disclosed the records that are not at issue in this appeal to the requester.

Subsequently, the mediator clarified the third party appellant's position with respect to one additional record (page A0021359_24). The third party appellant confirmed that it consented to the disclosure of this page to the requester, and it was later disclosed to the requester by the Ministry.

No further mediation was possible and the file was transferred to the adjudication stage of the appeal process. I sought representations from the third party appellant, initially, and sent it a Notice of Inquiry setting out the facts and issues on appeal. The third party appellant submitted representations in response. After reviewing them, I have decided that it is not necessary to seek submissions from the other parties.

RECORDS:

The 8 records remaining at issue total 27 pages and consist of summaries of meeting notes and a power point presentation. I note that several pages are duplicate copies. In particular, Records 3 (pages 26, 27 and 28), 5 (pages 34, 35 and 36) and 6 (pages 43, 44 and 45) are duplicate copies of Record 1 (pages 9, 10 and 11). As well, page 68 of Record 4 is a duplicate copy of page 11 of Record 1. Any decision I make regarding Record 1 will apply equally to the duplicate copies as identified above.

DISCUSSION:

THIRD PARTY INFORMATION

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

Sections 17(1) (a) 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;
>
> …
>
> (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) 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) or (c) of section 17(1) will occur.

Part 1: type of information

The third party appellant submits that the records at issue contain technical and/or scientific information. In its letter to the third party appellant advising of its decision to disclose, the Ministry acknowledged that the records "are the result of technical and/or scientific study." 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].

The records at issue pertain to the regulation of pesticide use in Ontario. Very broadly speaking they relate to scientific and/or technical processes, and in some cases refer to information that would fall within either of these two classes of information. Much of the information, however, contains only general or peripherally relevant technical and/or scientific information. However, for the purposes of this discussion, I accept that the records meet the first part of the section 17(1) test.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the third party appellant 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 appellant submits that the information contained in the records was explicitly supplied in confidence. The Ministry appears to agree. Apart from these statements, the third party appellant does not provide any additional information to assist in determining this issue.

Some of the records at issue have been clearly marked as confidential. Others have no such markings. Nevertheless, I accept that there was an explicit expectation that the information contained in the records would be treated confidentially.

With respect to whether the information was supplied by the third party appellant, I find that Record 8 was clearly supplied to the Ministry by the third party appellant. Records 1 and 2 are meeting notes and analyses. According to the Ministry's index, Record 2 was prepared by the third party appellant, and I accept that this record was supplied to the Ministry by the third party appellant.

Record 1 contains information resulting from discussions between the Ministry and the third party appellant. I find that some of the information in this record was not supplied by the third party appellant, but either sets out the result of discussions or contains the Ministry's contribution to the discussion. Disclosure of this information would neither reveal nor would it permit the drawing of accurate inferences regarding the information that was provided by the

third party appellant. Portions of this record would reveal information provided by the third party appellant.

Finally, there is no indication of who prepared Record 7: the index provided by the Ministry does not identify the author, nor on its face, does it contain information that would permit me to determine the author. However, for the purpose of this discussion, and based on the context in which the record appears, I accept that it was either supplied by the third party appellant or its disclosure would reveal information provided by the third party appellant.

Accordingly, the second part of the section 17(1) test has been met for Records 2, 7 and 8 and portions of Record 1. Because of my findings below under "harms", it is not necessary for me to specify which portions of Record 1 were or were not supplied by the third party appellant.

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].

In responding to the Ministry's third party notice, the third party appellant essentially recited the wording in sections 17(1)(a) and (c). The Ministry rejected the third party appellant's claim on the basis that it did not provide detailed and convincing evidence to support the alleged harms.

In its letter of appeal, the third party appellant provided slightly more information. The third party appellant indicated that it represented companies engaged in consumer pest control product businesses. It stated that, if the records are disclosed, its members would be prejudiced in developing, gaining regulatory approval, marketing and selling consumer products *vis a vis* companies not represented by it, both in Ontario and other provinces where their products are offered for sale. The third party appellant referred in particular to the information in Record 1 and 8, but did not specify how the harm will come about if the records are disclosed.

In its representations submitted in response to the Notice of Inquiry that was sent to it, the third party reiterates its earlier comments and adds that its "member companies make up a large proportion of the sales of these product types and competitors that are not [its] members will be in a position to use this competitive information if the records are released."

In its confidential representations, the third party appellant provides some additional argument. However, the third party appellant's representations overall, do not explain how the development, marketing and selling of its members products could reasonably be expected to be

compromised, particularly where regulatory approval may be required for their sale and use in the identified industry.

After reviewing the third party appellant's representations, I am not persuaded that either of the harms in section 17(1)(a) or (c) could reasonably be expected to arise as a result of the disclosure of the records at issue. My decision is based, in part, on the failure of the third party appellant to provide detailed and convincing evidence regarding the anticipated harms from disclosure. The third party appellant's representations contain only bald assertions and general claims of harm. Moreover, the records at issue do not, on their face, suggest that such harms could reasonably be expected to occur from disclosure.

I also note that the third party appellant is a trade association. In its 2007/2008 Annual Report, the third party appellant describes one of its roles in this highly regulated industry as "Advocacy"; "to advocate on behalf of members for science-based regulations and legislation to ensure a world-renowned regulatory system." With respect to its activities in Ontario in regards to proposed legislation, the third party appellant's Annual Report vowed to "continue to challenge regulators to create sound public policy."

The records at issue pertain to this regulatory advocacy. In Order PO-2793-I, Adjudicator Frank DeVries commented on trade associations and their role in the regulatory context. Although related to the trade association's own claims of harm pursuant to section 17(1)(b), which is not an issue in this appeal, in my view, his comments have some relevance generally with respect to the activities of trade associations and the relationship between a trade association and its members. He stated:

> …Affected party C is a trade association. One of the purposes of this association includes lobbying government on matters which would impact affected party C's members. In that regard, I find that information contained in records which reflect the input provided by affected party C on behalf of its members, and which does not otherwise reveal information supplied in confidence by its members, could not reasonably be expected to no longer be provided to the government. Given that one of the stated purposes of affected party C is to provide input to government, I do not accept affected party C's argument that it would be reluctant to provide similar information in the future if the information at issue is disclosed. However, in the event that the records contain information relating to other affected parties, or would reveal such information, the information may qualify for exemption.

I agree with these comments. In reviewing the records at issue in this appeal, I was cognizant of the concerns that the third party appellant might have regarding confidential and proprietary information, which can be directly or indirectly attributed to its members. The third party appellant has not specified any such information, and the records themselves do not appear to contain this type of information. Rather, they contain policy positions and general considerations that the third party appellant wished to bring to the Ministry's attention as part of its advocacy role within the regulatory context.

For the above reasons, I find that the third party appellant has failed to provide sufficiently detailed and convincing evidence to support a finding that disclosure of the records at issue could reasonably be expected to result in either of the harms in sections 17(1)(a) or (c) of the *Act*. Accordingly, the records at issue are not exempt from disclosure pursuant to section 17(1).

Because of this decision, it is not necessary for me to consider whether the public interest override in section 23 applies in the circumstances.

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 her a copy by **July 31, 2009** but not before **July 27, 2009**.

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: June 25, 2009
Laurel Cropley
Adjudicator