Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3459

Appeal PA13-518

Ministry of the Environment and Climate Change

February 10, 2015

Summary: The ministry received a request for access to an environmental assessment report pertaining to particular property and issued a decision granting access to the report, in full. A third party appealed the ministry's decision, claiming the application of the mandatory exemption for third party information at section 17(1)(b) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator upholds the ministry's decision and orders it to disclose the report to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1)(b).

Orders and Investigation Reports Considered: Orders PO-1666, PO-1803, and PO-2629.

OVERVIEW:

[1] The appellant operates a soil recycling facility, where soil contaminated with petroleum hydrocarbons is remediated using biological treatment methods. This facility is regulated by the Ministry of the Environment and Climate Change (the ministry) under an environmental compliance approval (ECA) that authorizes the operation of the facility and includes the following condition:

> No processed soil may leave the Site except to be deposited at a property or site in accordance with one of the following criteria:

> (f) To any property, except a property considered a sensitive site as defined by Section 41 of O. Reg. 153/04, zoned for commercial or industrial land use and the soil meets the Table 2 Standards for the Residential/Parkland/Institutional Property Use.

[2] In early 2012, the appellant deposited soil that had been treated at its facility at a property located in the city of Kawartha Lakes. In June 2012, samples taken from the property indicated some exceedances of the Table 2 standards. According to the appellant, neither it nor the ministry understood at that time that other firms had also deposited fill at the property. At the ministry's request, the appellant retained an environmental consultant to undertake an environmental site assessment. The consultant performed the assessment and submitted its report to the ministry.

[3] The environmental consultant's report then became the subject of a freedom of information request made to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request stated in part:

> In July of 2012, the Peterborough MOE requested that more sampling be undertaken for the property at [the address of the property in question] in … Ontario. Please see the MOE letter attached and the highlighted section.
> …
>
> I am looking specifically for the results (report) of the limited subsurface investigation conducted at the site for the work plan that was submitted by [a named consulting firm]. I understand that the report/results was submitted to the MOE some time at the end of March 2013 (or around this time) and I am told by [a named person] at the Peterborough Office that the MOE is currently reviewing it. I also understand that MOE did some split samples for some of the soil samples taken during the completion of the work plan. I would like to receive the results of any MOE samples taken for [the address of the property in question] taken July 25th, 2012. I already have the results for what was taken prior to that time.

[4] The ministry identified a record responsive to the request, the "Phase II Environmental Site Assessment [the address of the property in question], City of Kawartha Lakes Ontario" dated March 20, 2013, including attachments. The ministry notified a third party, the appellant in this appeal, to obtain its view regarding disclosure of the record. The appellant objected to disclosure, relying on the mandatory exemption for third party information at section 17(1) of the *Act*. Specifically, the appellant argued that disclosure of the report could reasonably be expected to interfere significantly with ongoing negotiations between it, the ministry

and the property owner aimed at resolving outstanding issues with the fill. The appellant, therefore, contended that the report falls within the exemption at section 17(1)(a) of the *Act*. It also argued that the record is exempt under section 17(1)(b), as its disclosure could reasonably be expected to result in similar information no longer being supplied to the ministry, where it is in the public interest that it continue to be supplied.

[5] After considering the appellant's representations, the ministry issued a decision granting the requester full access to the record.

[6] The appellant appealed the ministry's decision to this office. As mediation did not resolve the appeal, the file was referred to the adjudication phase of the appeal process. I sought and received representations from the third party appellant, initially. In its representations, the appellant continued to rely on the application of the exemption at section 17(1)(b) of the *Act*, but withdrew its reliance on the exemption at section 17(1)(a).

[7] In accordance with this office's *Practice Direction 7* on the sharing of representations, the appellant's representations were shared with the requester and the ministry, both of whom also provided representations. In her representations, the requester raised the possible application of the public interest override at section 23 of the *Act*. The representations of the requester (with her name removed) and the ministry were shared with the third party appellant, who provided representations in reply. In addition, the ministry was asked to provide representations on the requester's public interest arguments, and did so.

[8] In this order, I find that the record is not exempt from disclosure under section 17(1)(b) of the *Act* and I order it to be disclosed to the requester.

RECORDS:

[9] The record at issue is the "Phase ll Environmental Site Assessment" report dated March 20, 2013, including attachments. I will refer to this record as the "report".

ISSUES:

[10] The only issue in this appeal is whether the report is exempt from disclosure pursuant to the mandatory exemption at section 17(1)(b) of the *Act* and, if so, whether I should nonetheless order disclosure pursuant to the public interest override at section 23.

DISCUSSION:

[11] Section 17(1)(b) of the *Act* provides:

> 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,
>
> (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;

[12] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1]

[13] For section 17(1) to apply, the party or parties resisting disclosure, in this case 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;

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.

Requirement 1: scientific or technical information

[14] 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

[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

> the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[2]
>
> *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.[3]

[15] The appellant submits that the report contains scientific and/or technical information, i.e. the results of the analysis of soil and groundwater samples and borehole logs prepared by the environmental consultant retained by the appellant. The ministry agrees with this position and the requester does not dispute it. Having reviewed the report, I find that it contains scientific and/or technical information.

Requirement 2: supplied in confidence

[16] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[4]

[17] 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.[5]

[18] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[6]

[19] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

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[2] Order PO-2010.
[3] Order PO-2010.
[4] Order MO-1706.
[5] Orders PO-2020 and PO-2043.
[6] Order PO-2020.

- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[7]

[20] The appellant submits that the report was supplied in confidence to the ministry by the environmental consultant on the appellant's instructions. It submits:

> "(a) Only [the environmental consultant's] staff, the Appellant and the Appellant's legal counsel had any access to the … report prior to its submission to the MOE.
>
> (b) The … Report is not available from sources to which the public has access.
>
> (c) The … Report clearly states that it was prepared … for the exclusive use of the Appellant, the MOE and the Property owner.
>
> (d) The … Report was prepared in order to assist the Appellant, the MOE and the Property owner to better understand the quality of the fill deposited on the Property and to determine what actions, if any, might be necessary or advisable to deal with the fill. Such a purpose would never entail public disclosure of the record.
>
> (e) The … Report may contain information that has the potential to affect the value of the Property. It may be reasonably assumed that the Property owner would never have consented to the assessment work in the first place had she been aware that the results may become publicly available."

[21] The ministry, too, submits that the report was submitted in confidence, as the report itself states that it was prepared for the exclusive use of the appellant, the ministry and the property owner.

[22] The requester submits that, because she has not seen the report, she cannot comment on whether it was supplied to the ministry with a reasonable expectation of

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[7] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

confidentiality. She suggests that a relevant factor would be whether the report is expressly marked "confidential".

[23] I find that the report was supplied to the ministry in confidence. It contains an explicit provision that it was prepared for the exclusive use of the appellant, the ministry and the property owner. While such a statement will not always be indicative of a desire to keep a report confidential (it could, for example, be included in an attempt to limit liability for reliance on the report by others), I find that the surrounding circumstances outlined by the appellant and summarized above support the view that the report was supplied to the ministry in confidence.

Requirement 3: harms

[24] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[8]

[25] 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 the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[9]

[26] Previous orders have found that section 17(1)(b) does not apply where a ministry has the authority to compel the supplying of information, even if the ministry would prefer to have the information supplied voluntarily.[10]

[27] The parties made representations on whether disclosure of the report would 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. As this is a point of significant disagreement among the parties, I will set out their positions on this requirement in some detail.

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[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[9] Order PO-2435.
[10] Orders PO-1666, PO-1803, PO-2629.

The appellant's representations

[28] The appellant submits that the ministry asked it to undertake an assessment of the fill at the property on a voluntary basis, and that it was not aware at the time of the extent to which other firms had also deposited fill at the property. The appellant submits that it has since demonstrated that its fill was uncontaminated, and that the contamination must originate from the fill of others. It submits that disclosure of the report has the potential to create an erroneous impression that the appellant deposited contaminated fill at the property.

[29] The appellant submits that it will not voluntarily undertake a similar assessment again if such confidential information must be disclosed publicly. It submits that the ministry relies extensively on the voluntary cooperation of industry to carry out its day-to-day environmental protection mandate and that it is manifestly in the public interest that such voluntary cooperation continue.

[30] The appellant acknowledges that previous orders of this office[11] have found that section 17(1)(b) does not apply where an institution has the authority to compel the supplying of the type of information at issue. It argues, however, that the ministry did not have the authority in this case to compel the appellant to undertake the work documented in the report. In particular, it submits:

(a) The Director had no jurisdiction to issue a control order under section 7 of the *Environmental Protection Act* (EPA), because there is no basis for a finding that a contaminant was discharged in contravention of section 14.

(b) The Director had no jurisdiction to issue a remedial order under section 17 of the EPA, because there is no evidence that there was any discharge of a contaminant into the natural environment. There is also no evidence to suggest that exceedances of Table 2 standards have caused any land, water, property, animal life, plant life or human health or safety to be injured, damaged or endangered.

(c) The Director had no jurisdiction to issue a preventive measure order pursuant to sections 18 and 157.1 of the EPA, because there is no evidence of any adverse effects resulting from the deposit of fill on the property.

[11] See, for example, Orders PO-1666, PO-1803, and PO-2629.

(d) The Director had no jurisdiction to issue a waste removal order pursuant to section 43 of the EPA. The ministry has elected not to regulate commercial fill as "waste" under the EPA. In any event, the levels of contamination found in samples taken from the fill on the Property are not such that the fill would meet any objective definition of waste under the EPA.

(e) The Director had no jurisdiction to issue a water management conformity order under section 44 of the EPA, because the fill does not constitute waste for the purposes of the EPA.

(f) There was no jurisdiction for a provincial officer to issue an order under section 157 of the EPA, as there is no evidence that the appellant contravened a provision of the EPA or the regulations, a provision of an order or a term or condition of an environmental compliance approval. Further, the appellant argues that section 157.0.1 of the EPA is intended to compel a response to reasonable inquiries for available information, and could not have been used to compel the appellant to retain consultants to undertake significant field work and prepare a report.

[31] The appellant further submits that, even in circumstances where there is sufficient statutory authority to issue an order, it is in the public interest that industry instead be encouraged to proceed voluntarily and cooperatively. It submits that disclosure of information such as the report will send a message to the appellant and to industry generally that a benefit of proceeding voluntarily and cooperatively, the ability to keep information confidential, no longer exists with this ministry.

The ministry's representations

[32] The ministry submits that information about contaminants released into the natural environment has always been considered public information. The ministry considers disclosure of such reports part of its obligation to keep the public informed of the activities it undertakes to protect the environment.

[33] The ministry notes that, when contamination of soil and ground water is discovered, the impact may not be limited to the property in question, but may also extend to adjacent properties. As part of its obligations to protect the natural environment, the ministry needs to know the extent of the contamination at the fill site. Pursuant to section 18(1)6 of the EPA, the ministry submits that it could have compelled the appellant or the property owner to supply the environmental testing information to it. However, the ministry prefers to work co-operatively with industry, rather than issuing orders. As a result, very few such orders are actually issued.

[34] The ministry submits that, in previous orders, such as Orders P-1235 and PO-2170, similar types of information were ordered to be disclosed, as the requirements of section 17(1)(b) were not met.

The requester's representations

[35] The requester submits that a provincial officer could have issued an order under section 157(1)(c) of the EPA, which states:

> A provincial officer may issue an order to any person that the provincial officer reasonably believes is contravening or has contravened,
>
> > A term or condition of an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under this Act.

[36] Section 157(3) provides that such an order may contain a wide range of provisions including any direction relating to achieving compliance with a condition of an ECA or relating to preventing the continuation or repetition of the contravention.

[37] With her representations, the requester submitted a letter that the ministry wrote to the City of Kawartha Lakes in July 2012, advising that the soil samples from the property indicated non-compliance with the environmental compliance approval (ECA) issued to the appellant. That letter states in part:

> Analysis of the samples collected on April 19, 2012 indicated that the fill material met the ministry's Table 2 standards and therefore [the appellant was] complying with their ECA.
>
> [The ministry] continued to receive complaints from concerned citizens regarding the fill operation at the site. On June 21, 2012, district staff returned to site and collected four random samples from four different locations in the fill area. The samples were submitted to the ministry's laboratory for analysis.
>
> …The results from the fill samples collected on June 21, 2012… indicate numerous exceedances of the applicable standards as specified in condition 35(f) of [the] ECA... and therefore, indicate non-compliance with the ECA.
>
> The ministry has requested that [the appellant] retain the services of a qualified consultant to undertake a comprehensive assessment of fill material deposited at the site to ensure compliance with [the] ECA…

[38] The requester submits that the ministry had reasonable grounds to believe the soil came from the appellant. She also submits that similar reports can continue to be supplied to the ministry when the ministry believes it is necessary. For example, the ministry could equally have compelled a similar report from the property owner as it has done with other sites in the past. The requester notes that the ministry has ordered land owners to conduct further sampling or assessment on their property in cases where contaminants above Tables 2 and 3 were identified.

The appellant's reply representations

[39] In reply, the appellant takes issue with the ministry's stance that information about contaminants released into the natural environment has always been considered public information. The appellant also takes issue with the requester's statement that the ministry's officer had grounds to issue an order under section 157 of the EPA. The appellant states that the ministry officer who wrote the July 25, 2012 letter might have believed at the time that only the appellant had taken fill to the site, but in fact only about one-third of the fill at the site came from the appellant, and so the ministry officer had no basis to conclude that the appellant was not complying with its ECA.

Analysis and conclusion

[40] The appellant expresses concern that disclosure of the record can reasonably be expected to result in similar information no longer being supplied to the ministry where it is in the public interest that similar information continue to be so supplied, as contemplated by section 17(1)(b). I have considered the appellant's detailed arguments, but conclude, for the following reasons, that this part of the test has not been met.

[41] I agree with the appellant that it is in the public interest that information similar to that contained in the report continue to be supplied to the ministry. However, I do not accept the appellant's submission that disclosure of the record can reasonably be expected to result in similar information no longer being so supplied.

[42] The appellant states that when it agreed to undertake the assessment, it was unaware of the extent to which others had also deposited fill at the property. The appellant argues that public disclosure of the report has the potential to create an erroneous impression that the appellant deposited contaminated fill at the property, where in fact, the appellant contends that the contaminated fill came from others. The appellant states that it will not undertake to have a similar environmental assessment performed again on a voluntary basis if it will be publicly disclosed.

[43] However, in its representations, the appellant also acknowledges that the ministry relies on the voluntary cooperation of industry to carry out its day-to-day environmental protection mandate, and that it is in the public interest that such voluntary cooperation continue. It states that it agreed to undertake an assessment of the fill at the property on a voluntary basis in order to assist in developing a better understanding of the environmental issues at the property, and because it relies on its reputation as a good corporate environmental citizen to support the growth of its waste management business. I am not convinced that the appellant, as a good corporate environmental citizen, could reasonably be expected to refuse to cooperate with a similar request from the ministry in the future, simply because the report at issue in the current appeal is publicly disclosed. Furthermore, if the appellant is of the view that the resulting report is misleading in some way, it should be a simple matter to convey updated correct information to the requester.

[44] Moreover, the ministry states that it has always considered reports of this nature as public information and that its practice is to disclose such reports. None of the parties has submitted any evidence that voluntary compliance by the industry has diminished as a result of this practice. In fact, the ministry indicates that, as a result of co-operation from the industry, it issues very few orders under section 18(1)(6). The ministry does not express any concern about similar information not being voluntarily supplied to it in the future as a result of disclosure.

[45] Even if it were not the case that similar information would continue to be voluntarily supplied, I find that the ministry could compel it under section 18(1) or 157.1(1) of the *Environmental Protection Act* (EPA).

[46] Section 18 of the EPA provides, in part:

> (1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following:
>
> …
>
> 6. To study and to report to the Director on,
>
> i. the presence or discharge of a contaminant specified in the order,
>
> ii. the effects of the presence or discharge of a contaminant specified in the order,
>
> iii. measures to control the presence or discharge of a contaminant specified in the order…

> (2) The Director may make an order under this section if the Director is of the opinion on reasonable and probable grounds, that the requirements specified in the order are necessary or advisable so as,
>
> (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment for the undertaking or property; or
>
> (b) to prevent, decrease or eliminate an adverse effect that may result from,
>
> (i) the discharge of a contaminant from the undertaking, or
>
> (ii) the presence or discharge of a contaminant in, on or under the property.

[47] Section 157.1 of the EPA provides for the same types of orders as those set out in section 18, except that in the case of section 157.1, the order is issued by a provincial officer of the ministry, rather than the director.

[48] The appellant argues that the ministry could not have made an order under either of these provisions, because there is no evidence of any adverse effect resulting from the deposit of fill on the property. However, sections 18 and 157.1 of the EPA explicitly provide for the issuance of an order where the ministry believes on reasonable grounds that such an order is necessary or advisable so as to *prevent* an adverse effect that *may* result from the circumstances described in those sections. I find, therefore, that the ministry could have issued an order under one of these provisions to either the property owner or the appellant, requiring it to undertake an environmental assessment and provide it with the resulting report.

[49] I conclude, therefore, that disclosure of the report cannot reasonably be expected to result in similar information no longer being supplied to the ministry. For the reasons stated above, I am not convinced that the appellant or other companies in its position would stop providing it voluntarily. Even if they were to do so, the EPA imposes obligations on property owners in addition to companies in the position of the appellant which authorize the ministry to order the production of any such report.

[50] Finally, I wish to acknowledge the parties' submissions with respect to section 157(1)(c) of the EPA, relied on by the requester. The requester submits that the ministry was in a position to issue an order under section 157(1)(c) of the EPA, while the appellant argues that it was not.

[51] I have reviewed the parties' extensive submissions on this issue. However, since I have found that the ministry could have compelled an assessment of the fill by way of an order under section 18(1) or 157.1(1) of the EPA, I do not need to decide whether it was also open to the ministry to issue an order under section 157(1)(c).

Conclusion

[52] I conclude that the record at issue does not qualify for an exemption under section 17(1)(b) of the *Act.* Given my conclusion, I do not need to consider the requester's argument that the public interest override at section 23 of the *Act* applies to the record.

ORDER:

1. I uphold the decision of the ministry to disclose the record to the requester, and order it to do so no later than **March 18, 2015** but not before **March 13, 2015**.

2 In order to verify compliance with provision 1 of this order, I reserve the right to require the ministry to provide me with a copy of the information disclosed to the requester.

Original Signed by: February 10, 2015
Gillian Shaw
Adjudicator