Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3916

Appeal PA16-574

Ministry of the Environment, Conservation and Parks

December 21, 2018

Summary: The requester sought access to certain environmental reports from Ministry of the Environment, Conservation and Parks (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The ministry located responsive records and notified an affected third party company of the request. The affected party objected to disclosure on the basis of the third party information exemption at section 17 of the *Act*. The ministry decided to disclose the records. The affected party (now the appellant) appealed that decision to this office. At adjudication, the appellant claimed that some records were not responsive. In the alternative, the appellant claimed that the section 17 exemption applies to all the records. This order upholds the ministry's decision.

Statutes Considered: *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended, sections 27(1) and 186(3); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(b), 17(1)(c), 23, and 24(2).

Orders Considered: Orders P-134, P-880, P-1003, PO-2558, PO-3878, and MO-2004.

OVERVIEW:

[1] The Ministry of the Environment, Conservation and Parks (the ministry) received two separate requests under the *Freedom of Information and Protection of Privacy Act* (the *Act)* from the same requester for access to the following:

> 1. Copies of report(s) referred in section 1.31 of Environment Director's Order Main Doc. Ref. [specified number], Incident Report [specified number]

> Section 1.31 states: "The Ministry's Northern Region Technical Support Section reviewed analytical data for the . . . as presented in the [specified years] Water Quality Assessment. This report was prepared for [a specified company] and is dated [a specified date in 2010]", and
>
> 2. Copies of report(s) referred in section 1.27 of Environment Director's Order Main Doc. [specified number], Incident Report [specified number]
>
> Section 1.27 states: "A report [of a specified date] from the Ministry advised the [specified company] that a new shallow ground water monitoring well be installed."

[2] The ministry combined both requests and processed them as one request. It located reports, letters, and memorandum related to the appellant and the mercury disposal site (the site) at issue in response to the request.

[3] Before issuing its access decision, the ministry asked the company specified in the request for its views about disclosure of the records, pursuant to section 28(1) of the *Act*. The company objected to disclosure, claiming the application of section 17(1) (third party information) of the *Act*. The ministry issued a decision to the requester, granting full access to the records.

[4] The company (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC or this office), relying on the mandatory exemption of section 17(1) of the *Act*. Mediation did not resolve the dispute, and the appeal moved to adjudication. During adjudication, in addition to arguing section 17(1), the appellant argued that some records are not responsive to the request.

[5] I sought and received representations from the ministry, the appellant and the original requester. Representations were shared in accordance with the *Practice Direction 7* of the IPC's *Code of Procedure*.

[6] For the reasons that follow, I find that the mandatory third party information exemption at section 17(1) does not apply to the records in this appeal, and I uphold the ministry's decision to disclose them to the requester.

RECORDS:

[7] For ease of reference, I will associate the page numbers identified by the ministry as responsive to the request with the following record numbers:

Record Number(s)	**Page Numbers**	**Description**	**Responsiveness in dispute**
1	000001	Ministry letter of a specified date to the appellant and enclosing Record 2.	yes

2	000002-000005	The attachment to Record 1 – signed ministry memorandum of a specified date.	yes
3	000006-000048	The appellant's report.	no
4	000049	Ministry letter to the appellant of a specified date.	no
5	000050-000051	Unsigned ministry memorandum of a specified date; the attachment to Record 4.	no
6	000052-000094	Duplicate of Record 3.	no
7	000095-000101	Unsigned draft duplicate of Record 2, but with tables.	yes
8	000102-000103	Signed duplicate of Record 5.	no

ISSUES:

A. Are the records responsive to the request?

B. Does the mandatory exemption at section 17(1) apply to the records?

DISCUSSION:

Issue A: Are the records responsive to the request?

[8] If records in dispute are not responsive to the request, it is not necessary to determine whether an exemption under the *Act* applies to them. For the reasons that follow, I find that all records in dispute in this appeal are responsive to the request.

[9] Initially, the appellant submitted that "certain" or "several [c]onfidential [r]ecords" are not responsive, and that "all such" records should not be disclosed, but did not initially identify which ones are not responsive and why that was the case. When asked to be more specific, the appellant identified Records 1, 2, 7, and 8 as not responsive to the request. The appellant later withdrew its position about the responsiveness of Record 8 after the ministry pointed out that Record 8 is a signed duplicate of Record 5 (which the appellant does not dispute is responsive to the request).

[10] To be considered responsive to the request, records must "reasonably relate" to the request,[1] and my review of the records and the parties' submissions leads me to be satisfied that is the case here.

The request and its processing

[11] As mentioned, the request is for specified "reports" regarding environmental assessments at a specified mercury disposal site in relation to the appellant and specified Environment Director's Orders.

[12] In assessing the responsiveness of Records 1, 2, and 7, I have reviewed them myself but I have also given significant weight to the ministry's assessment. The ministry, with industry expertise and legal disclosure obligations, reviewed the request and identified the records at issue in this appeal as responsive to that request. This weighs towards finding that the records are responsive. A requester, on the other hand, may not be in a position to precisely identify every record that could be responsive to their request. This is part of the reason that institutions are to take a liberal approach to identifying responsive records that provide access to information under the *Act*, and the principle that responsive records are defined as "reasonably relating" to a request. In addition, any ambiguity in the request, it should be resolved in the requester's favour.[2]

[13] The ministry describes the request as sufficiently detailed so that no further clarification was needed on the part of a ministry employee experienced in the subject matter of the request in order to search for and identify responsive records. The requested items were identified by the requester as sections of a specified Ministry's Director's Order that is published online.

[14] Asked for submissions about the responsiveness of these records, the ministry explained that its freedom of information (FOI) office received all the records at issue in this appeal from the ministry's Thunder Bay District/Kenora Area and the Northern Regional Technical Support Offices in response to the request. The records at issue in this appeal are described by the ministry as consisting of reports, letters and memoranda relating to the appellant and the specified mercury disposal site. The ministry identifies Record 6 as a duplicate record, and considers all other records as responsive.

The significance of relevance to the request

[15] As discussed, to be considered responsive to the request, records must "reasonably relate" to the request.[3] The ministry relies on Orders P-880 and PO-3878 to argue that point, and to highlight the IPC's long-held principle that "'relevancy' must mean 'responsiveness.'"[4] The appellant's representations do not directly address this longstanding definition.

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[1] Orders P-880 and PO-2661.
[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.
[4] Order P-880.

[16] The ministry submits that in the interest of access to information and in order to best serve the purpose and spirit of the *Act*, it took a liberal interpretation of the request in its review of the responsiveness of records. This approach has long been held by the IPC to be the approach that institutions are to take.

[17] As the ministry argues, the IPC has held that "by asking whether information is 'relevant' to a request, one is really asking whether it is 'responsive' to a request",[5] and that "relevancy" or "responsiveness….describe anything that is reasonably related to the request."[6] Therefore, I reject the appellant's argument in principle that identifying records that were not referenced in the request "effectively re-writes and expands the original request into a much broader, new request that was never put before the [m]inistry." That would be the case if the records did not reasonably relate to the request, but here, I find that they do, as I will explain below. I will begin with Records 2 and 7.

Records 2 and 7

[18] The appellant submits that the ministry acknowledges that these records are copies of a ministry memorandum that are not referred to in section 1.31 of the Director's Order (the first part of the request) as "the report", but that the ministry adopted a liberal approach in concluding that these records are referenced in the Director's Order. I find that this submission does not explain how the contents of Records 2 and 7 do not reasonably relate to the request so as to be found not responsive to the request.

[19] Based on my review of theses records, I accept the ministry's submission that Record 2 is a memorandum of a specified date that is signed without tables, and that Record 7 is a draft unsigned version of Record 2 with tables.

[20] The ministry submits, and I find, that Record 2 contains the ministry's Northern Region Technical Support Section review of the appellant's water quality assessment of a specified date covering certain years that is identified in the first part of the request. As the ministry submits, the appellant does not dispute the relevance of that water quality assessment. The ministry explains that section 1.31 of the Director's Order refers to the ministry's review contained in Record 2, and quotes that reference. The ministry then submits, and I find, that although section 1.31 does not refer to the memorandum as a report, the ministry took a liberal interpretation of the request and concluded that the memorandum (Record 2) is a report referred to in section 1.31 of the Director's Order, which was part of the request. Essentially, the information in Record 2 reasonably relates to information that was part of the request. I find, therefore, that Record 2 is responsive to the request.

[21] Because Records 2 and 7 are duplicates of each other, but for the existence of a signature on one and attached tables with the other, I find that Record 7 is responsive

[5] Ibid.
[6] Ibid

to the request for the same reasons that Record 2 is.

Record 1

[22] The appellant objects to the inclusion of Record 1 for the same reasons it submits Records 2 and 7 are not responsive.

[23] The ministry submits, and I find, that Record 2 was an attachment to Record 1. Record 1 is a letter of a specified date to the appellant's counsel from the ministry. The ministry submits, and I find, that Record 1 sets out two recommendations of the ministry's reviewer from Record 2. The ministry agrees that this letter (Record 1) is not a report referred to in the Director's Order, but Record 2 is responsive to the request and portions of Record 2 are referred to in Record 1. The ministry submits, and I find, that taking a liberal interpretation of the request, Record 1 is reasonably related to the subject matter of the request, and is therefore, responsive to it.

Conclusion re: responsiveness

[24] Taking into account the purpose and spirit of the *Act*, the relationship between the records and the request, and the ministry's assessment of that relationship, I am not persuaded that the appellant's position on the responsiveness of Records 1, 2, and 7 has merit.

[25] Therefore, the remaining issue in this appeal is whether the records at issue are exempt under section 17(1) of the *Act*.

Issue B: Does the mandatory exemption at section 17(1) apply to the records?

[26] The appellant submits that the records are exempt from disclosure in their entirety because they meet the three-part test for section 17(1), but I find there is insufficient evidence to accept that position.

[27] Because the appellant submits that the harms set out at sections 17(1)(b) and 17(1)(c) of the *Act* apply, these are the relevant portions of section 17(1) in this appeal:

> 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, if 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;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[28] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[7] 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.[8]

[29] For section 17(1) to apply, the appellant must prove that each part of the following three-part test applies:

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

[30] The parties agree, and I find based on my own review of the records, that the records contain technical and scientific information, consistent with the IPC definitions of those types of information. Therefore, I find that the first part of the section 17(1) test has been met.

Part 2: Supplied in confidence

[31] Although the ministry agrees with the appellant that part two of the test is met, for the reasons that follow, I find that it is not. Part two of the three-part test itself has two parts: the information at issue must have been "supplied" to the ministry by the appellant, and the appellant must have done so "in confidence", implicitly or explicitly. If the information was supplied but not "in confidence", section 17(1) does not apply. That is the case here.

[32] The parties agree, and I find, that the "supplied" component of part two of the test is met.

[33] What is in dispute, rather, is whether the information at issue was provided to the ministry "in confidence." The ministry's agreement with the appellant on this point certainly weighs in favour of accepting that it is the case. But when I examine the ministry's position on this (and the appellant's), I do not find that it is sufficiently supported by the evidence overall.

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[7] *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.*).
[8] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[34] 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.[9]

[35] 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
- 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.[10]

[36] The appellant submits that the first three factors listed above apply in this case, and I accept that they do, taking into consideration the ministry's shared position with the appellant on this (whether or not records, such as Record 3, were marked "confidential").

[37] However, as noted above, all the circumstances of an appeal must be considered in determining whether there was an objective expectation of confidentiality. In the circumstances of this appeal, markings of confidentiality and the usual practices of parties, or even between parties, are not sufficient evidence supporting an objective expectation of confidentiality.

[38] It is undisputed that the records relate to environmental testing and reporting regarding a mercury disposal at a specified site, and that the appellant has reporting obligations to the ministry in that regard.[11]

[39] In Orders MO-2004 and PO-2558, despite the respective institutions' positions that part two of the test had been met, the IPC held that when dealing with records supplied to the ministry in relation to environmental testing and contamination levels, there can be additional significant factors to consider when assessing an expectation of confidentiality. Amongst those additional factors are the following considerations, which I find relevant to this appeal:

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[9] Order PO-2020.

[10] 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.

[11] The appellant did not provide any reply to the ministry's representations about those obligations, when given a chance to do so. Although the ministry detailed those obligations in its submissions under part three of the test, the fact that these obligations exist is relevant to the question of an expectation of confidentiality under part two of the test.

- the nature of the problem addressed in the record at issue (contamination or potential contamination of soil, groundwater and structures);
- disclosure requirements imposed by authorities;
- the potential impacts on public health and safety and on the environment of such situations.[12]

[40] Here, as mentioned, the nature of the problem addressed in the records is environmental safety, and specifically, the disposal of mercury at a specified site. As noted in both Orders MO-2004 and PO-2558, "records created in the context of an environmental regulatory scheme are reasonably and necessarily subject to a 'diminished expectation of confidentiality.'" I find that it is undisputed that the appellant has legal reporting obligations to the ministry in that regard. The ministry laid out those legal obligations in its representations about the claimed harm of a "chilling effect" on the provision of similar information to the ministry (discussed in more detail later in this order, under part three of the test regarding harms). Given the opportunity to respond to the ministry's representations, the appellant did not deny the existence of its legal obligations. As Orders MO-2004 and PO-2558 also determined, I find that the legal and regulatory requirements for reporting and compliance support mean that the appellant had a diminished expectation of confidentiality when supplying the information at issue to the ministry.

[41] I also reject the appellant's submission that, "[m]ore generally," the records at issue are inherently confidential because they concern environmental protection as well as health and safety issues, and that this subject matter "makes it clear that the information contained there was supplied to the [ministry] with the expectation that it would remain confidential." As the IPC has previously held,[13] there is a diminished objective basis for expecting confidentiality in relation to the records created in an environmental regulatory scheme set up so that the ministry can determine the extent of contamination at a specified site and ensure that remedial activities are undertaken.

[42] Therefore, I find that the information at issue was not supplied in confidence to the ministry, so part two of the test has not been met, and the section 17(1) exemption does not apply to the records.

[43] While the appellant has not met part two of the test for the application of section 17(1), I will proceed to consider part three in any event.

Part 3: Harms

[44] Regarding part three, I find that the appellant has not provided sufficient evidence that disclosure of the records could reasonably be expected to result in the harms claimed, as required of a party resisting disclosure.

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[12] Orders MO-2004 and PO-2558.
[13] Orders MO-2004 and PO-2558.

[45] The appellant had to 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.[14]

[46] The failure of a party resisting disclosure to provide such 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*.[15]

[47] The appellant argues that disclosure could reasonably be expected to result in two types of harm: those set out in section 17(1)(b) (similar information would no longer be supplied to the ministry) and section 17(1)(c) (undue loss or gain).

Section 17(1)(b): similar information no longer supplied

[48] The appellant has not provided sufficient evidence to establish that if the records are disclosed, similar information will no longer be supplied to the ministry.

[49] I do not accept the appellant's representations that the "sensitivity" of the information in such reports would dampen the willingness of the appellant or similar companies to provide the ministry with information necessary for the ministry to make environmental assessments. Nor are delays or increased costs as a result of compelled reporting relevant considerations here, assuming without deciding that these would result.

[50] Rather, section 17(1)(b) does not apply because, as the ministry and the requester submit in different ways, the appellant (and companies like it) are required by law[16] to provide the ministry with information such as that found in the records. The ministry states that failure to comply with the terms and conditions of this requirement is an offence.[17] The ministry also highlights by reference to a previous IPC order[18] that "it is prepared to compel…production under the authority of the [Environmental Protection Act], if necessary".

[51] The ministry submits that the appellant's predecessor, and now the appellant, were required to submit monitoring reports (and did so), in accordance with a condition in certificate of approval/environmental compliance approval (ECA) [specified number]. The original ECA was amended twice, and in compliance with "Condition 1" of that ECA, the holder was compelled to submit reports about the specified site that is the subject of this appeal:

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[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[15] Order PO-2435.
[16] Subsection 27(1) of the *Environmental Protection Act*.
[17] Section 186(3) of the *Environmental Protection Act*.
[18] Order PO-1666.

> That the company's groundwater monitoring program at the site be maintained, and that the test results continue to be submitted to this [m]inistry's District Office in Kenora.

[52] The ministry explains that conditions of an ECA are, in turn, prepared in accordance with the *Environmental Protection Act* and regulations.

[53] In addition, the ministry's representations explain the reason for its imposition of Condition 1 of the relevant ECA: "'to provide surveillance of potential leachate migration and thereby ensure the quality of the groundwater."

[54] The ministry's submissions also highlight section 27(1) of the *Environmental Protection Act*, which concerns approval, waste management systems, or waste disposal sites, and says:

> No person shall use, operate, establish, alter, enlarge or extend a waste management system or a waste disposal site except under and in accordance with an environmental compliance approval [ECA].

[55] Therefore, the ministry submits, an ECA holder is required to comply with the conditions in the ECA, and that it is an offence under section 186(3) of the *Environmental Protection Act* for a person to fail to do so, which says:

> Every person who fails to comply with the terms and conditions of an environmental compliance approval, certificate of property use or renewal energy approval or of a licence or permit under this *Act* or who fails to comply with the terms of a report under section 29 is guilty of an offence.

[56] The ministry submits, and I find, that as an ECA holder, the appellant is required by law to submit information such as the information at issue.

[57] Therefore, I agree with the ministry that the appellant has not demonstrated that disclosure of the information at issue would not reasonably be expected to lead to the harms contemplated by section 17(1)(b). This is because of the type of information at issue, the regulatory nature of the ministry, and the requirements of the *Environmental Protection Act* compelling such disclosure. This is consistent with many IPC orders[19] that have found that section 17(1)(b) does not apply if a ministry has authority to compel the supplying of information, even if the ministry would prefer to have that information supplied voluntarily.

Section 17(1)(c): undue loss or gain

[58] The appellant did not provide sufficient evidence that disclosure of the records could reasonably be expected to result in undue loss or gain, despite the requirement to do so as the party resisting disclosure.

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

[59] All the parties referenced litigation in relation to the appellant and the mercury disposal site in their representations, but I found the representations of the ministry to be most persuasive. The appellant argues that disclosure could result in undue loss to itself and undue gain to "potential litigants" because current or potential litigants might pursue legal actions against the appellant in the future. However, as the ministry argues, the IPC has repeatedly held that the "competitive position" mentioned in section 17(1)(c) does not include a litigant's competitive position in civil litigation.[20] The IPC has also consistently found that if the disclosure of information will cause a third party significant and undue harm in future proceedings, this is not "undue harm" under section 17(1)(c), and that the possibility of damages that result from potential legal proceedings are not "undue" or "unfair".[21]

[60] I find, therefore, that neither of the harms set out in section 17(1)(b) or section 17(1)(c) have been established. Since all three parts of the section 17(1) test must be met I find that the exemption at section 17(1) does not apply to the records and I uphold the ministry's decision to disclose the records.

[61] Since I am ordering the ministry to disclose these records, there is no need to examine the question raised by the requester about whether the public interest override (at section 23 of the *Act*) applies.

ORDER:

1. I order the ministry to disclose the records to the requester by **January 28, 2019** but not before **January 21, 2019**.

2. In order to verify compliance with the order, I reserve the right to require that the ministry provide me with a copy of the records disclosed to the requester.

Original Signed by: December 21, 2018
Marian Sami
Adjudicator

[20] See, for example, Orders PO-2293, PO-1805, PO-2018, PO-2184, MO-1706, and PO-2490.
[21] See, for example, Orders PO-2043M MO-1481, and PO-1912.