



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

ORDER PO-2390

Appeals PA-030406-1 and PA-030409-1

Ministry of the Environment



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NATURE OF THE APPEALS:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for all records in the Ministry's files relating to an identified property located in Kitchener.

After notifying an affected party under section 28 of the Act, and considering its submission, the Ministry issued a decision granting full access to some records, partial access to some records and denying access to the remainder of the records pursuant to the exemptions found in sections 17(1)(a) and (b) (third party information), 19 (solicitor-client privilege), 21(1) (invasion of privacy) and 22(a) (information published or available) of the Act. The Ministry also provided a copy of an index of records to the requester and the affected party.

Appeal Number PA-030406-1

The requester (now the appellant) appealed the Ministry's decision to deny access to the records and this office opened Appeal Number PA-030406-1.

In the appeal letter, the appellant identified that he was appealing the Ministry's decision to deny access to the records that were withheld pursuant to sections 17(1)(a) and (b), 19 and 21(1). He also advised that he was not pursuing access to Records 13 and 31 (denied under section 22(a)) nor to Record 46 (denied under section 21(1)).

During the mediation stage of this appeal, the appellant agreed to withdraw his appeal with respect to Records 4, 5, 6, 8, 10, 11, 12, 14, 16, 17, 30, 34 and 45, denied pursuant to section 19; as well as Records 3 and 15, denied pursuant to section 21(1). Also during mediation, the affected party consented to disclosure of the Statement of Claim portion of Record 41.

Mediation did not resolve the remaining issues in this appeal and the matter was moved into the adjudication stage of the process.

The records remaining at issue in this appeal are those records or portions of records indexed as Records 1, 32, 40, 41, 42, 43 and 44. Access to Records 1, 32, 41 (minus the Statement of Claim portion), 42, 43 and 44 was denied on the basis that they qualify for exemption under the mandatory exemption in sections 17(1)(a) and (b). Access to Record 40 was denied on the basis that it is exempt under section 21(1).

Appeal Number PA-030409-1

In its original decision, the Ministry decided to grant access to portions of Record 41. Those portions of Record 41 are not at issue in Appeal Number PA-030406-1, but the affected party to whom those portions relate has appealed the Ministry's decision to disclose those portions of Record 41 on the basis that this information is also exempt under section 17(1). The Commissioner's office opened Appeal Number PA-030409-1 to address the appeal of this decision to disclose these portions of Record 41. Because the subject matter of the two appeals is similar and the parties are the same, this order addresses the issues present in both appeals.

Exchange of representations

This office initially sought representations from the parties resisting disclosure in Appeals PA-030406-1 and PA-030409-1, the Ministry and the affected party/appellant. Both parties provided representations. The Ministry's representations in both appeals were shared, in their entirety, with the appellant. A severed version of the affected party/appellant's representations in both Appeals PA-030406-1 and PA-030409-1 were initially shared with the appellant/original requester as well.

Upon the transfer of the file to me, I decided to share additional portions of the affected party/appellant's representations with the appellant/original requester. I also received representations from the appellant/original requester, which were shared in their entirety with the affected party/appellant and the Ministry. The appellant/original requester indicated that he was no longer seeking access to the personal information contained in Record 40. As a result, this record is no longer at issue in this appeal. I invited the Ministry and affected party/appellant to submit additional reply representations and received further submissions only from the affected party/appellant.

RECORDS:

Appeal Number PA-030406-1

The records remaining at issue in this appeal are the undisclosed portions of Records 1, 32, 41, 42, 43 and 44 as cited in the Index provided to the parties by the Ministry. Access was denied on the basis that the information qualified under the mandatory exemption in sections 17(1)(a) and (b) of the *Act*.

Appeal Number PA-030409-1

The Ministry decided to grant access to certain portions of Record 41. Those portions are the subject of the third party appeal in Appeal Number PA-030409-1. The affected party/appellant objects to the disclosure of those portions of Record 41 on the basis that this information is exempt under section 17(1).

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry takes the position that portions of Records 41 and 42, as well as Records 1, 32, 43 and 44 in their entirety, are exempt from disclosure under the mandatory exemption in section 17(1). The affected party/appellant concurs with this position and, in addition, takes the position that the remainder of Record 41 is also exempt under that section.

Record 32 is a report that was prepared by a company that is no longer carrying on business. Neither this office nor the Ministry was able to locate the successor or current proprietor of this company. Because this document contains third party information that may qualify for exemption under the mandatory exemption in section 17(1), I will independently examine Record 32 in order to determine whether the information that it contains meets the tests established under that section.

Section 17(1): the exemption

Section 17(1) 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,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. 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 Ministry and/or the affected party/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 Ministry and the affected party/appellant submit that the records, and parts of records, at issue contain information that qualifies as both “commercial” and “financial” information for the purposes of section 17(1). The terms “commercial” and “financial” information have been discussed in previous orders in the following manner:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Representations of the parties

The affected party in Appeal Number PA-030406-1 indicates that the information in Records 1 and 41 to 44 relates to the corporate structure of the affected party including its assets, liabilities, shareholdings and dealings with its lender. It argues that this information was provided to the Ministry following a meeting held on a specified date in 2003 and relates directly to the issues discussed at that meeting. In addition, the affected party states that the information contained in these records also pertains to the reorganization and refinancing of another corporation. Further, it submits that the information does not relate to “environmental issues or the condition of the Kitchener property and was restricted to commercial and financial matters”. Accordingly, the affected party argues that this information qualifies as both commercial and financial information for the purposes of section 17(1).

In addition, the affected party, who is the appellant in Appeal Number PA-030409-1, submits that the information contained in Record 41 that the Ministry is prepared to disclose “also contain[s] financial information due to the numerous references to the involvement of [the affected party/appellant] and its lender, in the remediation of the Kitchener property.”

The Ministry provides support for the argument that portions of Records 41 and 42, as well as Records 1, 43 and 44 in their entirety, contain information that qualifies as commercial and financial information. It submits that Record 1 “outlines the financial restructuring, transfer of assets, transfer of shares, capital interests of the corporation, the assumptions of debts and the interrelationships between the various parties involved in the management of [the affected party/appellant]”. It further indicates that Records 41, 42 and 44 “describe the information contained in Record 1, albeit in less detail and provides interpretations of the various parts of agreements between the parties including responsibility for environmental contamination.” With respect to Record 43, an Agreement between the affected party/appellant and another corporation, the Ministry submits that it also contains financial and commercial information relating to the affected party/appellant’s “financial restructuring, contractual arrangements and on-going business interests.”

With respect to the information that it proposed to disclose in Record 41, which is the subject matter of Appeal Number PA-030409-1, the Ministry indicates that these portions of that record “relate to environmental responsibilities; however, the financial restructuring information similar to Record 1 has been severed.”

The appellant/original requester does not address this part of the test under section 17(1) in his representations.

Findings with respect to part one of the test under section 17(1)

I have reviewed the contents of the records, and parts of records, remaining at issue and make the following findings:

- Record 1 contains information that meets the criteria for both “commercial” and “financial” information. The record relates to the restructuring and refinancing of the affected party/appellant and describes in great detail how this is to be effected.
- Those portions of Record 41 that the Ministry proposes to disclose also contain financial and commercial information about the restructuring and refinancing of the affected party. This information qualifies as commercial and financial information for the purposes of section 17(1). The remaining portions of Record 41 that are the subject of Appeal Number PA-030409-1 address the remediation of the Kitchener property undertaken by the affected party, including its cost and a description of the work still to be undertaken. I find that this information satisfies the definition of the term “commercial” information as it deals directly with the buying and selling of services for the remediation of the property by the affected party. As a result, I find that the first part of the test has been met with respect to all of Record 41.
- The undisclosed portions of Record 42 also contain information about the refinancing and restructuring of the affected party, along with information about its relationship with its

lender. I find that all of this information qualifies as either commercial or financial information for the purposes of section 17(1).

- Record 43 is an Agreement of Partnership Interest dated March 26, 1997. I find that it contains financial and commercial information relating to the affected party/appellant, thereby satisfying the first part of the test under section 17(1).
- Record 44 consists of a summary of the 2003 meeting involving representatives of the affected party, the lender and the Ministry, as well as a series of questions along with handwritten answers and handwritten notes of the meeting. Again, I find that these records contain information that falls within the ambit of the terms commercial and financial information within the meaning of section 17(1).
- Record 32 consists of an Application made to the Ministry in 1994 for a Certificate of Approval for a “proposed pilot test project” by a now-defunct engineering firm to assist in the remediation of the Kitchener property. I find that this record contains information that falls within the ambit of the term “technical” or “scientific” as it relates directly to the techniques employed by this firm in remediating contaminated soil.

To conclude this portion of my analysis, I find that all of the records, or parts of records, remaining at issue in both appeals contain information that qualifies as either commercial, financial, scientific or technical information for the purposes of section 17(1). Accordingly, the first part of the test has been met for the records and parts of records.

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 [Orders PO-2018, MO-1706].

In confidence

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure, in this case the Ministry and the affected party, 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 of the parties

The affected party/appellant indicates that Record 1 was given to the Ministry following the 2003 meeting and was, accordingly, “supplied” within the meaning of section 17(1). It further indicates that Records 41 to 44 contain information that was provided to the Ministry by the affected party at that meeting.

With respect to the issue of confidentiality, the affected party/appellant states that:

Throughout the [2003] meeting and during the subsequent forwarding of information to the MOE, [the affected party/appellant] maintained an implicit and reasonable expectation of confidentiality. [The affected party/appellant] attended the [2003] meeting and shared information with the MOE in order to further the MOE’s investigation of the contamination of the Kitchener property and, in particular, to provide information that the MOE required concerning the solvency of [the affected party/appellant] and its dealings with its lender [a named financial institution]. While co-operating with the MOE for these purposes, [the affected party/appellant] provided information that would normally not be available to the general public. The sharing of this commercial and financial information with the MOE at the [2003] meeting occurred in order to co-operate with the MOE’s

enquiries. In addition, the records included in Document No. 1 were submitted only for the purpose of responding to the MOE's questions raised in the [2003] meeting. The submission of this information was never intended to waive the inherent confidential nature of the information and the documents that were provided to the MOE.

The Ministry submits that the information contained in Records 1 and 41 to 44 were provided to it voluntarily by the affected party/appellant in response to a request by the Ministry for such information. It also indicates that it has not disclosed any of the financial and commercial information in the records to anyone. It states that the information was provided implicitly in confidence and confirms that this was the view of the affected party and the financial institution at the time the information was provided.

With respect to the information contained in Record 32, the Ministry indicates that it consistently treats information relating to decontamination processes or contaminant cleanup techniques confidentially. For this reason, the Ministry argues that the proponent of the processes described in Record 32 would have had a reasonable expectation that the information contained therein would be treated confidentially by the Ministry.

The appellant counters this evidence by pointing out that the affected party and financial institution have not expressly stated that the information was being provided to the Ministry in confidence. In addition, he suggests that the affected party/appellant cannot have a reasonably-held expectation that this information would be kept confidential from the appellant/original requester, who is the former owner of the Kitchener property, as it is directly involved in the remediation discussions with the Ministry and may have been adversely affected by an order from the Ministry with respect to the clean-up of the property.

Based upon my review of the contents of Records 1 and 41 to 44, I am satisfied that the information was provided to the Ministry by the affected party/appellant. I am further persuaded that the information was provided with a reasonably-held expectation that it would be treated in a confidential fashion by the Ministry. I find that this information was supplied to the Ministry by the affected party/appellant with an implicit expectation that it would not be made public. The information deals with the financing and restructuring of the affected party/appellant's organization and is extremely detailed. I find that it is reasonable to expect that information of this sort supplied to an institution would be treated confidentially in its hands.

I am prepared to accept the Ministry's position with respect to the information in Record 32 that relates specifically to the actual remediation process to be employed by the now-defunct company. I agree that it is reasonable to assume that this information was provided to the Ministry by this company with an expectation that it would be treated confidentially.

Part 3: harms

General principles

To meet this part of the test, the Ministry and/or the affected party/appellant 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].

Representations of the parties

The affected party/appellant submits that:

The release of the information contained in Doc. No. 1, 41, 42, 43 and 44 would interfere substantially with [the affected party/appellant]’s ‘contractual or other negotiations’ as described in section 17(1)(a). [The affected party/appellant] are currently involved in confidential negotiations with [the appellant/original requester] for the purpose of addressing the liability issues in connection with the Kitchener property. The release of the commercial and financial information contained in the documents noted above would interfere in such negotiations by providing [the appellant/original requester] indirectly, through the means of an FOI Request, access to documents that [the affected party/appellant] are not prepared to provide directly to that party.

...

The release of the information collected by the MOE during the [2003] meeting, and afterwards through follow-up correspondence, will effectively deter others from providing similar information to the MOE. This information provided to the MOE during the [2003] meeting and afterwards was not directly related to the Kitchener property but was relevant to the MOE’s consideration of the proper parties to an order. . . Much of the information that was provided was volunteered in an effort to assist in the MOE’s understanding and to dispel certain assumptions the MOE was making with respect to the [affected party/appellant]. Such efforts of assisting MOE are undoubtedly in the public interest and would result in harm if discontinued. If Docs. No. 1, 41, 42, 43 and 44 are released and the implicit understanding of confidentiality regarding cooperative efforts with

the MOE is disregarded, others will be deterred from co-operating with the MOE in the future. . . as described in section 17(1)(b).

As discussed in the context of section 17(1)(a) above, disclosure of Doc. Nos. 1, 41, 42, 43 and 44 may result in an undue loss to [the affected party/appellant] and subsequent undue gain to [the appellant/original requester] indirectly, through the means of an FOI request, access to documents that [the affected party/appellant] are not prepared to provide to [the appellant/ original requester] directly.

The Ministry submits that it has concerns about the ability of the affected party/appellant to sell the subject property should the information in the records be disclosed. It also suggests that the affected party/appellant may be reluctant or refuse outright to provide information of this type in the future if it is likely to be disclosed. The Ministry is concerned that other parties in similar circumstances may refuse to share sensitive commercial information with it in future if this information is ultimately disclosed as a result of a request and appeal under the *Act*. It adds that as a result of receiving this information voluntarily from the affected party/appellant, it was spared the time and expense of trying to locate it elsewhere.

With respect to Record 32, the Ministry relies on the reasoning in Orders PO-1666, PO-1688 and PO-1732-F which upheld decisions to deny access to similar “technical information”. It argues that the disclosure of Record 32 would enable a remediation firm to create a system to clean up the subject property at the expense of the company who designed it.

The appellant/original requester submits that:

. . . [the affected party/appellant] is using the threat of an MOE order as leverage in its negotiations with [the appellant/original requester], while at the same time (by objecting to the disclosure of information) attempting to prohibit [the appellant/original requester] from seeing information it has provided to the MOE in respect of its ability to remediate the Property. As such, [the appellant/original requester] remains unaware of the financial viability of [the affected party/appellant], other information provided by [the affected party/appellant] to the MOE and [the affected party/appellant’s] general representations to the MOE in respect of its ability to remediate the Property.

It concludes its representations as follows:

[The appellant/original requester] is of the view that it has been implicated in the MOE’s investigation in respect of contamination on the Property, at least in part, as a result of [the affected party/appellant’s] representation to the MOE that it has inadequate financial resources to remediate the Property. Specifically, [the appellant/original requester] is concerned that the MOE is being encouraged to issue an order against [it] on the basis that [the affected party/appellant] is not in a financial position to remediate the Property itself. On this basis and for the

reasons set out above, we submit that [the affected party/appellant] cannot purport to maintain confidence over information that, among other things, goes to its financial viability as against a party involved in the MOE investigation such as [the appellant/original requester].

By way of reply, the affected party/appellant submits that:

The appellant's representations suggest that [the appellant/original requester] requires information about [the affected party/appellant]'s financial viability in order to address any MOE orders that might be issued against [the appellant/original requester]. In fact, if an order were issued against [it] with respect to the Property, the only issues that would be relevant to an appeal would be whether [the appellant/original requester] was a proper target (as a former owner or the party causing the contamination) and whether the measures contained in the order are reasonable and necessary. The financial resources of a third party (such as the [affected party/appellant]) would be entirely irrelevant to [the appellant/original requester's] liability under an MOE order. [The appellant/original requester] is not entitled to require such information to be provided directly by [the affected party/appellant], and should not be able to access such information indirectly through the FOI process.

Findings

The representations of the affected party/appellant fail to provide the kind of detailed and convincing evidence required for me to make a finding that the harms contemplated by section 17(1) could reasonably be expected to flow from the disclosure of the information contained in Records 1 and 41 to 44. The affected party has not provided sufficient evidence to substantiate a finding that the disclosure of the records could reasonably be expected to result in significant prejudice to its competitive position or result in any undue loss or gain within the meaning of sections 17(1)(a) or (c).

Specifically, I note that the commercial and financial information contained in Record 1 dates back to July of 1992. Record 41 is a two-page letter accompanied by two versions of notes reporting on certain information provided by the affected party/appellant to the Ministry. Record 41 includes information culled from Record 1 and describes in detail the reorganization and refinancing of the affected party/appellant in the ensuing years up to 1998. Record 42 is a five-page letter with a two-page list of documents requested from the affected party/appellant by the Ministry describing the meeting held in 2003 between the parties. It includes much the same information as that contained in Record 41 relating to the corporate restructuring and refinancing of the affected party/appellant. Record 43 is an Assignment of Partnership Agreement dated March 26, 1997. Record 44 is yet another recitation of the information provided by the affected party/appellant at its meeting with the Ministry on April 7, 2003.

It is not self-evident from an examination of the records that their disclosure could reasonably be expected to result in the harms described in section 17(1). In addition, neither the Ministry nor the affected party/appellant described how disclosure could lead to the harms. Although the affected party/appellant has provided significant representations respecting the nature of the information and its reluctance to share those representations with the appellant/original requester, it has not explained in sufficient detail how or why disclosure could reasonably be expected to result in the harms contemplated by section 17(1)(a) or (c). While the Ministry refers to its concerns about the ability of the affected party/appellant to re-sell the subject property, neither it nor the affected party/appellant have explained how disclosure of the information in these records could reasonably be expected to result in this harm.

While the Ministry surmises that it is less likely to voluntarily receive similar information from other parties in the future, as contemplated by section 17(1)(b), I am not satisfied based on the representations provided that this outcome can reasonably be expected to flow from the disclosure of the information in the records.

Based on my review of Records 1 and 41 to 44 and the representations of the parties, I am satisfied that section 17(1) does not apply to the information contained therein. I will, accordingly, order that all of these records be disclosed to the appellant.

With respect to Record 32, the Notice of Inquiry forwarded to the engineering firm who prepared this report by the Commissioner's office was returned as undeliverable. The Ministry indicated that the firm is no longer carrying on business. Accordingly, I cannot agree that the disclosure of the information contained in Record 32 could reasonably be expected to result in any of the enumerated harms in section 17(1) coming to pass. As the engineering firm is no longer carrying on business, there is no longer any risk of harm to its competitive position or possibility of an undue loss to it. Similarly, I have no evidence to support a finding that the disclosure of the information in Record 32 could reasonably be expected to result in the harm contemplated by section 17(1)(b). As a result, I find that section 17(1) has no application to the information contained in Record 32 and I will order that it be disclosed to the appellant/original requester, in its entirety.

ORDER:

1. I uphold the Ministry's decision to disclose to the original requester those portions of Record 41 at issue in Appeal Number PA-030409-1.
2. I do not uphold the Ministry's decision to deny access to Records 1, 32, the remaining portions of Record 41, 42, 43 and 44 in Appeal Number PA-030406-1.
3. I order the Ministry to disclose to the appellant/original requester Records 1, 32, 41, 42, 43 and 44 in their entirety by providing him with copies by **June 16, 2005** but not before **June 10, 2005**.

4. In order to verify compliance with Order Provision 3, I reserve the right to require the Ministry to provide me with copies of the records that are disclosed to the appellant/original requester.

Original Signed By:

Donald Hale
Adjudicator

May 12, 2005