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

ORDER PO-2020

Appeal PA-000413-1

Ministry of Consumer and Business Services

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BACKGROUND:

The appellant and the primary affected party in this appeal are manufacturers of boilers and major competitors in the Ontario market.

Until June 2001, the *Operating Engineers Act* (the *OEA*), administered by the (then) Ministry of Consumer and Commercial Relations (MCCR), governed the operation of boilers in Ontario, and required that those with a water content over a specified amount be supervised by an operating engineer. The administration of the *OEA* was transferred in May 1997 from MCCR to the Technical Standards and Safety Authority (the TSSA), which was set up as an entity independent of MCCR (now the Ministry of Consumer and Business Services) (the Ministry). In June 2001, the *OEA* was superseded by the *Technical Standards and Safety Act, 2000* (*TSS Act*).

The appellant and the primary affected party submitted competing bids in 1997 for a contract to install boilers in a named hospital. A condition of the tender was that the boilers have a water content below the threshold requiring engineering supervision. The hospital awarded the contract to the primary affected party. After the boilers were installed, the hospital alleged that the water content of the boilers exceeded the threshold limits and commenced an action (the litigation) in that regard against a number of parties including the primary affected party. The primary affected party then brought third party claims against the TSSA and the Ministry. The appellant was not involved in the litigation. In March 2000 the primary affected party and the TSSA entered into a settlement agreement with respect to the litigation.

NATURE OF THE APPEAL:

This appeal arises from a request made by the appellant to the Ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the regulation of boilers under the authority of the TSSA and MCCR, including records relating to the granting of exemptions from the *OEA*, and records relating specifically to the primary affected party.

The Ministry identified 197 responsive records (consisting of 2,553 pages) and granted access to one record (Record 87), a two-page letter written by the appellant. The Ministry advised that it was withholding the balance of the records on the basis of the exemptions at sections 22 (information available to the public), 17 (third party commercial information), 13 (advice to government) and 19 (solicitor-client privilege) of the *Act*. The appellant appealed the Ministry's decision.

During mediation, the Ministry disclosed to the appellant a number of records (Records 1-8, 51, 66-68, 70, 71, 106, 160, 180 and 182) for which it had claimed the exemption at section 22 for "publicly available" information. Also during mediation, the appellant further narrowed the scope of the appeal to include only four records, numbered 75, 80, 91 and 92. In addition, the Ministry advised that it was relying only on the exemption at section 17 to withhold the four records. The appellant later claimed that there is a compelling public interest in disclosure of the records, pursuant to section 23 of the *Act*.

Also during mediation, the primary affected party became aware that the Ministry had disclosed to the appellant a number of records relating to the litigation. The primary affected party then wrote to the Ministry expressing its concern about the disclosure of these records, and asked the

Ministry to provide it with an index of these records and to direct the appellant to return them to the Ministry. The primary affected party subsequently filed an appeal (Appeal Number PA-000370-1) with this office regarding the Ministry's disclosure of records to the appellant.

This office sent a Notice of Inquiry setting out the issues in this appeal initially to the Ministry, the primary affected party, a second affected party, and the TSSA. The Ministry, the primary affected party and the TSSA provided representations. This office then sent to the appellant a Notice of Inquiry together with the non-confidential portions of the representations of the Ministry, the primary affected party and the TSSA. The appellant provided representations that were then shared with the Ministry, the primary affected party and the TSSA, all of which sent in reply representations.

In its representations, the appellant indicated that it is seeking access only to Records 75, 80, and 92.

RECORDS:

The three records remaining at issue are described below.

Record 75 consists of the minutes of a meeting held in May 1992 between representatives of MCCR and the primary affected party.

Record 80 is a report, dated June 20, 1986, compiling the results of tests conducted on the primary affected party's boilers.

Record 92 is an agreement, dated March 1, 2000, between the primary affected party and the TSSA to settle a third party claim arising from the litigation.

DISCUSSION:

CUSTODY OR CONTROL

Section 10(1) of the *Act* provides a right of access to a record "in the custody or under the control" of an institution. The TSSA submits that the records are not "in the custody or under the control" of the Ministry and that, therefore, the appellant does not have a right of access to them. This office asked the TSSA and the Ministry to provide representations in response to a series of questions regarding the "custody or control" issue under section 10(1). The TSSA was also referred to pertinent authorities under each question, where appropriate. These questions reflect a purposive approach to the "custody or control" question under section 10(1) (see Orders MO-1237 and MO-1251 under the *Act*'s municipal counterpart).

Specifically, the TSSA submits:

> These Records belong to and are in the custody and control of the [TSSA]. While copies of these Records are in the possession of [the Ministry], these Records are not in the custody or control of the Ministry.
>
> TSSA acquired custody and control of [Records 75 and 80] on May 5, 1997 when the administration of the [*OEA*] and the *Energy Act* [the *EA*] were transferred from [MCCR] to TSSA pursuant to the *Safety and Consumer Statutes Administration Act, 1996* and subject to the Administrative Agreement, dated January 13, 1997, between Her Majesty the Queen in Right of Ontario as represented by the Minister of Consumer and Commercial Relations and TSSA (the "Administrative Agreement").
>
> Under Section 11(2) of the Administrative Agreement . . ., when TSSA took custody of the records and information provided to it by the Minister of Consumer and Commercial Relations on May 5, 1997, TSSA became the sole owner and custodian of all such records and information and could use them for its legitimate purposes in the administration of the [*OEA*] and the *EA*. [Records 75 and 80] were part of the records and information that TSSA took custody of from the Minister on May 5, 1997.
>
> Record No. 92 was created in 2000. Under section 11(1) of the Administrative Agreement . . . Record No. 92 is the property of TSSA.
>
> TSSA is not an "institution" as such term is defined in the [*Act*]. It is not a ministry of the Government of Ontario and it is not an "agency, board, commission, corporation or other body designated as an institution in the regulations" to the [*Act*]. Therefore TSSA is not bound by the [*Act*]. TSSA has its own Access and Privacy Code . . . under which TSSA regards these Records as confidential and not able to be disclosed to a member of the public.

The TSSA also submits:

- the records were created by the TSSA, not the Ministry;
- the TSSA intended to use the records "for the purposes of the TSSA and [the primary affected party]", and they were not created with the intention of giving them to the Ministry;
- the records were voluntarily provided to the Ministry, and were not provided pursuant to a statutory or employment requirement;
- no Ministry officer or employee is holding the records for the purposes of his or her duties as an officer or employee;

- the Ministry has no right to possess the records;

- the content of the records does not relate to the Ministry's mandate and functions, except to the extent that the Ministry's mandate and functions have been delegated to the TSSA;

- the Ministry has no right to regulate the use of the records;

- the records have not been relied upon by the Ministry, except perhaps for background and technical information to enable the Ministry to prepare a defence in litigation; and

- the Ministry has the authority to dispose of its copy of the records, but only the TSSA has the authority to dispose of the original records.

Finally, the TSSA submits:

> These Records were provided in confidence to the Ministry that they would be used for the purpose of enabling the Ministry to prepare its defence or participate in litigation as provided in Section 12(2) of the Administrative Agreement . . . TSSA would not disclose these Records under its own Access and Privacy Code. TSSA only released them to the Ministry with the expectation and the implicit understanding that they would be used for the specific purposes spelled out in the Administrative Agreement. Although TSSA gave possession of copies of the Records to the Ministry to be used for a specific purpose, TSSA did not give up custody and control of the Records to the Ministry, because they belong to TSSA. The mere granting of possession of copies of the Records to the Ministry should not be construed as the abrogation of TSSA's ownership rights and custody and control rights over the Records.

The primary affected party also takes the position that the records are not in the custody or under the control of the Ministry, for reasons similar to those advanced by the TSSA.

The Ministry disagrees with the TSSA and the primary affected party, and submits:

> The indicia of custody depend upon the facts of the particular case. The [three] records are in the physical possession of the Ministry. The Ministry received these records from a third party during the course of carrying out its mandate and functions. The Ministry is responsible for the care and protection of these records and responded to the request and participated in mediation with a view to carrying out this duty.
>
> In Order P-120 Commissioner Linden set out some criteria for determining control and custody of records. Commissioner Linden concluded that physical

possession of a record is the best evidence of custody, and only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession. He also gave a liberal and broad interpretation of the words "custody" and "control" so as to give effect to the important purposes of the *Act*.

The Ministry submits that the case at hand is not a rare case. It is a situation in which an institution often finds itself in the course of its operations. The Ministry has responsibility for the care and protection of records received from outside entities. As stated above the Ministry has this responsibility for the records in question and has acted accordingly. The possession of these records is therefore not a matter of bare possession.

Institutions receive documents in the course of business from many "non-institutions" for many different reasons. Commissioner Wright stated in Order P-239: "It is my opinion that to remove information originating from non-institutions from the jurisdiction of the *Act* would be to remove a significant amount of information from the public right of access, and would be contrary to the stated purposes and intent of the *Act*."

In Order P-1105, the Inquiry Officer explains why the exclusion of such records from the operation of the *Act* would be contrary to its purpose:

> To state this proposition a bit differently, the *Act* will apply to information in the custody or control of an institution notwithstanding that it was created by a third party. I accept this approach and adopt it for the purposes of these appeals.
>
> There are innumerable individuals, organizations, agencies and businesses that interact with government institutions on a daily basis. During the course of these interactions, information about these entities often comes into the possession of these institutions. In drafting its freedom of information legislation, the government determined that such information should be subject to the provisions of the *Act*, unless the exemptions contained in the statute applied. These exemptions are designed to not only protect the interests of government institutions, but also those of third parties (such as individuals, agencies and organizations) whose information may come into the custody or control of an institution as well. Based upon the scheme of the *Act*, therefore, a third party, such as the Corporation, will have the opportunity to fully argue that its interests will be harmed by the release of such information.

In conclusion, these records were in the custody of the Ministry and responsive to the request. The Ministry denied access to the requester pursuant to section 17 of the *Act*. The Ministry acted according to the scheme contemplated by the *Act*.

In this case, it is clear that the Ministry has physical possession of the records. I agree with the Ministry's submission, based on Order P-120, that where the records are in the physical possession of the institution, this is the "best evidence" of custody, and "only in rare cases could it successfully be argued that an institution did not have custody of a record in its actual possession." I agree with the Ministry that this is not one of those rare cases.

I do not accept the TSSA's submissions for a number of reasons. First, the TSSA relies on the fact that it has possession of the "original" records, while the Ministry only has "copies". Section 10(1) of the *Act* provides a right of access to a "record", and that term is defined, in part, to mean "any record of information however recorded". Thus, the *Act* does not distinguish between "originals" and "copies". Moreover, any such distinction would be highly impractical, and contrary to the purpose and spirit of the *Act*, which suggests a broad and liberal approach to the interpretation and application of "custody and control" [see Order MO-1251; *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 (C.A.); and *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.)].

In addition, the TSSA submits that it created the records and that it "owns" them. While this may be the case, these factors are not determinative of the "custody or control" issue. The *Act* may apply to records in the custody or control of an institution, despite the fact that they were created by or are "owned" by an outside party. This is a scenario the legislature envisioned when it included the section 17 exemption in the statute, which may apply to information such as a trade secret that was formulated by and belongs to a third party.

In my view, the Ministry acquired all of the records at issue in the normal course of discharging its functions, in particular for the lawful and necessary purpose of preparing its defence and participating in the litigation. On this basis, this is not one of the rare cases former Commissioner Linden spoke of in Order P-120, and I conclude that the records are in the custody of the Ministry within the meaning of section 10(1) of the *Act*.

THIRD PARTY INFORMATION

Introduction

Section 17(1) of the *Act* reads, in part:

> 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;

For a record to qualify for exemption under any of these sections, the parties resisting disclosure (in this case, the Ministry, the TSSA and the primary affected party) must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
>
> 2. the information must have been supplied to the Ministry 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) or (c) will occur [Orders 36, P-373].

Part one: type of information

The Ministry, the primary affected party and the TSSA (I will sometimes refer to the primary affected party and the TSSA collectively as "the affected parties") submit that the records contain technical information. Previous orders of this office have defined "technical information" in section 17(1) as follows:

> . . . *The Concise Oxford Dictionary* (8th ed.) defines "technical", in part, as follows:
>
> > of or involving or concerned with the mechanical arts and applied sciences.
>
> In my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, 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. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act* (see, for example, Order P-454).

I adopt this definition for the purpose of this appeal. Record 75 centres on the technical classification of the primary affected party's boilers, including their operation and design. Record 80 is a compilation of the results of tests conducted on these boilers. Record 92 is an agreement to settle aspects of the litigation and includes information about boiler design and classification. I am satisfied that all the information contained in Record 80 and portions of the information in Records 75 and 92 meet the definition of technical information. The remaining information, however, does not qualify as technical information.

The affected parties also submit that Records 75 and 92 contain commercial information, a term which was defined in Order P-493 as "information that relates solely to the buying, selling or exchange of merchandise or services".

Record 75 contains information related to the primary affected party's sales and its marketing strategy, and Record 92 includes references to and information about its customers. I find that portions of both records contain commercial information within the meaning of section 17(1). However, I do not accept that Records 75 and 92, in their entirety, constitute commercial information. While the records as a whole have some connection to the primary affected party's commercial activity, not all of the information is sufficiently related to "the buying, selling or exchange of merchandise or services" to qualify as commercial information (see Order PO-2010). In addition, I am not satisfied that the remaining information in these records contains or reveals trade secrets or financial or labour relations information.

Therefore, the first part of the section 17(1) test has been met for all of Record 80, and for portions of Records 75 and 92. The remaining portions do not qualify for exemption under section 17(1) since they do not satisfy the first part of the three-part test.

Part two: supplied in confidence

Supplied

To meet the second part of the test, it must be established that the information in the records was actually supplied to the Ministry, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-203, P-388, P-393).

Record 75 consists of minutes of a meeting held between representatives of MCCR and the primary affected party. Although the record was not created by the primary affected party, I find that some of the portions of the record that constitute technical or commercial information reveal information that clearly on the face of the record was supplied by the primary affected party during the course of the meeting.

Record 80 is a report prepared by the primary affected party for MCCR and provided to the MCCR. Therefore, I am satisfied that all of the information in Record 80 was "supplied" to MCCR by the primary affected party.

Record 92 is an agreement between the primary affected party and the TSSA to settle a third party claim. Because the information in a contract is typically the product of a negotiation process between two parties, the content of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 17(1) of the *Act* (see, for example, Orders P-36, P-204, P-251 and P-1105). However, in this case, the agreement is between the primary affected party and a non-institution, the TSSA, and did not directly involve the Ministry. In these circumstances, the orders of this office involving contracts referred to above are not applicable, and I find that the technical and commercial information in this record was supplied to the Ministry for the purpose of part two of the section 17(1) test (see Order MO-1450).

Therefore, all of Record 80, and the portions of Records 75 and 92 that met the first part of the test, meet the "supplied" element of part two of the three-part test under section 17.

In confidence

Previous orders of this office have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis (Orders M-169 and P-1605).

The Ministry submits:

> . . . the information [in Record 75] is technical in nature and supplied implicitly in confidence. A review of the record reveals that the focus of the meeting was a technical analysis of a significant component of the [primary affected] party's product. It is unlikely on the face of the document that the [primary affected] party would have participated in the discussion if it knew that its comments would be documented and disclosed to competitors. A reasonable person participating in the discussion would have expected the minutes of the meeting to remain confidential.
>
> [Record 80] consists of a technical and scientific report commissioned by the [primary affected] party to review its product for MCCR. Based on the contents of the report there is a strong inference of a reasonable expectation of confidentiality. The [Ministry] therefore submits that the information was supplied implicitly in confidence.

The TSSA submits:

> The information [in Records 75, 80 and 92] was supplied to the Ministry by the TSSA on a confidential basis during the course of litigation as part of settlement negotiations and process in a third party action [that the primary affected party] brought against the Ministry and TSSA.

> . . . The TSSA supplied the Ministry with the Records implicitly in confidence so that the Ministry could obtain the necessary background and technical information to prepare its legal defence . . .
>
> . . . This type of information is not normally available to members of the public through TSSA either through its registration process or as a result of settlement of lawsuits. Please see the attached excerpt from TSSA's Access and Privacy Code under which TSSA would treat this Record as confidential and not able to be disclosed to members of the public.
>
> . . . Section 12 from the Administrative Agreement dated January 13, 1997 between Her Majesty the Queen in Right of Ontario as represented by the Ministry of Consumer and Commercial Relations and TSSA, provides that TSSA will cooperate with the Ministry for the purpose of the Minister's or the Crown's defence or other participation in litigation including providing documentation or information or witnesses. Although this section does not specifically contain a confidentiality obligation on the provision of information, it is submitted that one is implied with respect to the supply of necessary information between the Ministry and TSSA when litigation is involved.

The primary affected party submits:

> . . . [Record 92] was entered into between the TSSA and [the primary affected party] with a tacit understanding that both parties would treat the final terms of the agreement as confidential . . . As in any negotiation, drafts of the agreement would be exchanged with an implicit understanding of confidentiality. We understand that . . . the TSSA provided a copy of [Record 92] to the Ministry on a confidential basis for their information only. The TSSA has confirmed that it considered [Record 92] to be confidential in nature. [Record 92] was not disclosed to any of the other parties to the . . . litigation. Both [the primary affected party] and the TSSA consider the terms of [Record 92] to contain highly sensitive information, and thus it would not have been disclosed to the Ministry with anything but an implicit or explicit understanding that it was confidential.
>
> Records [75 and 80] were, in our view, provided to the Ministry as part of the . . . litigation. We do not have direct knowledge of how the Ministry obtained the documents, but it is likely the TSSA provided Records 75 and 80 to the Ministry during the litigation . . . [Records 75 and 80] would have been provided with an expectation of confidentiality . . .

Based on the representations of the Ministry, the TSSA and the primary affected party, and on the nature of the records and the surrounding circumstances, I am satisfied that the technical and commercial information in Records 75, 80 and 92 was supplied implicitly in confidence by the primary affected party to the Ministry (Records 75 and 80) and by the primary affected party to the TSSA and, in turn, the Ministry (Record 92).

Part three: reasonable expectation of harm

Introduction

To discharge the burden of proof under the third part of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Order P-373).

In Order PO-1747, I stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In my view, the Ministry, the affected parties must provide detailed and convincing evidence to establish a "reasonable expectation of probable harm" as described in paragraphs (a), (b), and (c) of section 17(1).

Section 17(1)(a): prejudice to competitive position/interference with negotiations

The primary affected party submits:

> . . . [D]isclosure of [Record 92] would operate to prejudice [us] in a number of different ways . . . [T]he disclosure of the customer information set out in [Record 92] would be expected to cause harm to [us] in the hands of a competitor. Moreover, the disclosure of the testing regime agreed to between [ourselves] and the TSSA, as set out in [Record 92], could be used by a competitor to create apprehension among potential . . . customers . . .
>
> . . . [T]he technical information contained in Records [75 and 80] is clearly sensitive information relating to the design and operation of [our] boilers which could be used by a competitor to [our] prejudice . . . Moreover, [MCCR]/TSSA policy and advice set out in Record 75 constitutes information that is

> commercially sensitive in the context of the coiled tube boiler marketplace, and could be used by [our] competitor to [our] prejudice in a number of ways.

The Ministry submits:

> [Record 75] indicates that the technical classification of the product would impact on its competitiveness in the marketplace. The requester/appellant is a competitor of the [primary affected party]. There is a strong inference that the possession of such information by a competitor could be used to the advantage of the competitor and to the prejudice of [the primary affected party]. Since the technical classification would likely have an important effect on its position in the marketplace there is a strong inference that the prejudice would be significant.
>
> . . . . .
>
> [Record 80] contains a detailed technical analysis of [the primary affected party's] product. There is a strong inference on the face of the document that disclosure of this type of information to a competitor would cause significant prejudice to the competitiveness of the [primary affected party's] product . . .
>
> The nature of the information [in Record 92] leads to a strong inference of implied confidentiality . . . [D]isclosure of this type of information could significantly prejudice the competitive position of [the primary affected party].

The TSSA submits:

> The information contained in the Record could be used by a competitor of [the primary affected party] regarding its boiler specifications and installation to obtain a commercial advantage in the marketplace.
>
> A competitor of [the primary affected party] could obtain information about [the primary affected party] that it would not otherwise obtain which it may use to the detriment of [the primary affected party] or any other entity who has installed a [primary affected party] boiler.

The representations of the parties resisting disclosure are vague and well below the "detailed and convincing" threshold. In similar circumstances, in Order PO-1745, I stated:

> Notwithstanding my reluctance to find a reasonable expectation of the harm alleged on the basis of the evidence before me, I am prepared to infer that such harm could reasonably be expected to result based on my independent analysis of the facts and circumstances. In this connection, I refer to the judgment of the Federal Court, Trial Division in *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1993] 1 F.C. 427 at 478-479:
>
> > While no general rules as to the sufficiency of evidence in a s. 14 [harm to federal-provincial affairs] case can be laid down, what the

> Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.

> In short 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, in my view, it would only be in exceptional circumstances that the determination of whether an exemption applies would be made on the basis of anything other than the records at issue and the evidence provided by such party in discharging its onus.

Here, based on the nature of the records at issue and the surrounding circumstances, I am satisfied that disclosure of some of the technical and commercial information in Records 75 and 92, and all of the information in Record 80, could reasonably be expected to prejudice significantly the competitive position of the primary affected person. This information reveals detailed information about the technical aspects of the primary affected parties boilers, as well as specific information concerning sales and marketing of the primary affected party's products. Clearly, this is information that a competitor would find useful in seeking a competitive advantage over the primary affected party. However, the remaining technical and commercial information in Records 75 and 92 does not satisfy the harms test, because the information is generalized and widely known, or simply because it does not reveal any specific information about the primary affected party's products.

In conclusion, I find that all of Record 80, and portions of Records 75 and 92 meet the part three "harms" test and, therefore, qualify for exemption under section 17(1) of the *Act*.

PUBLIC INTEREST IN DISCLOSURE

Background

A newspaper published articles in the 1980s referring to the primary affected party having paid for a trip overseas for a former MCCR director and his wife, and discussing changes made to boiler safety standards by MCCR that appeared to favour the primary affected party.

In 1999, the TSSA granted a variance allowing for reduced supervision requirements for the primary affected party's boilers that were the subject of the litigation. The appellant sought to set aside the variance.

The *OEA* was repealed and replaced by the *Technical Standards and Safety Act, 2000* (the *TSS Act*). According to the primary affected party, the *TSS Act* eliminated the distinction between classifications of boilers, which would mean that the primary affected party's boilers would no longer require the granting of a variance.

Introduction

Section 23 of the *Act* reads:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

If section 23 applies, it would have the effect of overriding the application of section 17, and the appellant would have a right of access to the records at issue.

In order for section 23 to apply, two requirements must be established: there must be a compelling public interest in disclosure, and this compelling public interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1999), 118, O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply, in this case, section 17(1). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested.

Compelling public interest

With respect to Records 75 and 80, the appellant submits that disclosure of these records:

> . . . may provide valuable information as to whether the Ministry knew or should have known that the [primary affected party's] boilers did not comply with the regulations. The public deserves to know if government regulators were deliberately ignoring serious safety concerns respecting the [primary affected party's] boilers.
>
> . . . . .
>
> [Record 92] may constitute another variance decision or multiple variance decisions. The public is entitled to notice of all variance decisions since they are, as described above, subject to appeal.

> . . . [T]he public interest is compelling in that it relates directly to a threat to public safety and an apparent attempt to "cover up" possible negligent practices by our public authorities.

The appellant also submits that the newspaper articles "disclose that there was considerable controversy at that time about the propriety and the advisability of amendments to regulations under the *OEA* which were allegedly demanded by [the primary affected party]". The appellant also included the last page of an eight-page report prepared by a consultant that "summarizes the public safety concerns surrounding the [primary affected party's] boilers which arose at [the hospital] as a result of the variance granted by TSSA." The report concludes that:

> In my professional opinion, the safety considerations outlined above were not sufficiently addressed in the granting of the variance. A more reasonable and prudent approach would have been to require the continuous attendance of an operating engineer, as set out in the legislation.

The Ministry submits that the appellant's interest in the information is a "private interest", and further states:

> . . . The appellant raises no credible evidence that the granting of the variance was inappropriate.
>
> . . . the appellant does not provide any evidence that the variance was granted to accommodate [the primary affected party]. Aside from two newspaper articles that are nearly two decades old, the truth of which has not been substantiated, there is simply no current evidence that the granting of the variance was inappropriate.
>
> . . . . .
>
> … the appellant has failed to substantiate that the release of the records is in fact compelling. The records do not raise "a strong interest or attention" because there is no general public interest in the matter. As discussed above, the interest is that of a private litigant.

The TSSA submits that:

> . . . there is no public interest in the disclosure of the records and the Appellant is asserting a private commercial interest in the guise of public interest.
>
> As evidenced by the . . . public media reports attached to the Appellant's representations on the issue of public interest in the disclosure of the record, the issue of the regulatory change and [the primary affected party's] plant in [a named city] received a full public airing. It cannot possibly be in the public interest to revisit this issue in 2002, some 13 years later, let along a compelling public interest.
>
> . . . . .

> We readily admit that there is a public interest in the safety of boilers, just as there is public interest in a clean and safe environment. Boiler safety should be the concern of every person. We submit, however, there is no evidence of a compelling public interest in the disclosure of the records in question.
>
> There is no reported history or incidents involving the [primary affected party's] boilers, which are of such a specific concern for the Appellant. The variance that was granted for [the primary affected party] was very site-specific and it was as a result of a particular fact situation . . . We believe that the Appellant is seeking to obtain the requested information to advance and use in an appeal on a very fact specific variance decision.
>
> . . . . .
>
> It is important to note that there is no recorded incident of a safety problem with [the primary affected party's] boilers. No evidence that has been provided of public safety issues other than the bold assertions of the Appellant.

The primary affected party submits that, as a result of the new classification of boilers under the *TSS Act*, its product would no longer require a variance and this renders the appellant's dispute over the TSSA's granting of the variance to the primary affected party no longer relevant. The primary affected party submits:

> . . . there never was any compelling public interest in disclosure of the records in question. The "dispute" highlighted by [the appellant] was never motivated by questions of safety, but rather was a result of efforts to keep a foreign competitor out of the marketplace.

I am not persuaded in the circumstances that there exists a "compelling public interest" in disclosure of the information at issue. First, substantial portions of Records 75 and 92 are not exempt and will be disclosed, going some way towards shedding light on these issues. In addition, in my view, the appellant's interest in these records is essentially a private one. Accordingly, I find that section 23 does not apply.

ORDER:

1. I uphold the Ministry's decision to withhold Record 80 and portions of Records 75 and 92.

2. I order the Ministry to disclose those portions of Records 75 and 92 that are **not** highlighted on the copy of the records provided to the Ministry with this order. Disclosure is to be made by July 10, 2002, but not before July 4, 2002.

3. I reserve the right to require the Ministry to provide me with copies of the material disclosed to the appellant in accordance with provision 2.

Original Signed By: June 5, 2002
David Goodis
Senior Adjudicator