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

ORDER PO-2763

Appeal PA07-220

Ministry of the Environment

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BACKGROUND:

This appeal arises in the context of the leak of trichloroethylene (called "TCE") from a facility into neighbouring properties. The TCE had contaminated the local groundwater and a potential health hazard may exist due to the movement of contaminant vapours from the groundwater into the basements of nearby homes.

In an effort to implement a remediation plan, the appellant (the affected party and owner of the facility) retained an environmental consultant to assist with the testing of indoor air quality of homes in the area. Various reports have been submitted by both the appellant and its consultants to the Ministry of the Environment (the Ministry) staff to consider and deal with the contamination.

The records which are the subject matter of this appeal contain information which is the result of technical studies by the appellant's chief consulting firm. The records include the results of a number of tests which were required to ascertain the amount of contamination that exists in the groundwater, soil and air as well as the remediation strategies undertaken.

NATURE OF THE APPEAL:

The Ministry initially received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> …for all communications pertaining to [a specified location] and TCE contamination emanating from that location, including:
>
> a. All correspondence and attachments, regardless of whether in electronic paper or other form, to and from [first named company] and [second named company] including its agents, engineers, consultants with respect to the TCE contamination (or other compounds) of [above-stated location] and the related contamination of adjacent properties and/or groundwater, including:
>
> a) all test results; and
> b) all reports regarding possible site remediation and specific remediation to specific properties.
>
> b. All Ministry of Environment (MOE) reports, correspondence and documents relating to the contamination of [above-stated location] regardless of whether in electronic, paper or other form.

The Ministry subsequently received two similar requests from the requester and chose to process the three requests as one. As a result, the scope of request was expanded to include records up to July 2006.

After having notified the company (the affected party) and considering its submission, the Ministry issued a final decision granting partial access to the records, to the requester. In its letter to the affected party, the Ministry advised that access had been denied to portions of the

records pursuant to sections 13(1) (advice to government), 17(1)(a) and (c) (third party information), 19(a) and (b) (solicitor client privilege), 21(1)(f) (personal privacy) and 22 (publicly available) of the *Act*.

The Ministry further advised that it elected not to apply section 17(1)(b) to the records, and that some portions of the records such as officer notebooks have been removed as being non-responsive to the request.

The affected party (now the appellant) appealed the Ministry's decision to grant access to the responsive records.

During mediation, the mediator contacted the original requester who confirmed that she is not, at this time, appealing the Ministry's decision to deny access to parts of the responsive records. The original requester took the position that she can only make a decision as to whether or not to appeal the Ministry's decision upon receipt of the severed records.

The appellant clarified that he is appealing the Ministry's decision to disclose information pertaining to the homeowners and some proprietary information, relying on sections 17(1)(b) and (c) and 21(1) of the *Act*. The appellant also pointed out that some records contain homeowners' names which should not be disclosed to the requester.

After discussions with the mediator, the Ministry explained that the homeowners' names contained in the documents outlined on page 6 of the appeal letter had been overlooked in the processing of the request and would not be disclosed to the requester. In response, the appellant confirmed that the disclosure of the homeowner's names is no longer at issue in this appeal.

In response to the Mediator's Report, the original requester advised the mediator that she had provided the Ministry with consents from a number of individuals who consented to the disclosure of information relating to their property. The Ministry responded that it was not in a position to disclose the information while the matter was under appeal by the affected party.

Further mediation was not possible and the appeal was moved to the adjudication stage of the process for me to conduct an inquiry.

I initially sent a Notice of Inquiry to the appellant. The appellant provided representations in response. I then sent a Notice of Inquiry to the Ministry along with a complete copy of the appellant's representations. The Ministry also provided representations.

RECORDS:

The records at issue consist of 18,000 pages and are identified in the appellant's Schedule "A" document, excluding the homeowner's names contained in the records as outlined in the appeal letter. The appellant did not set out which exemption it submits applies to each record. Instead, the records were essentially divided into three categories:

(1) Records with address information and test results

(2) Records that contain location information (GPS coordinates, maps) and test results

(3) Records that are the appellant's proprietary information

My findings on the records are set out in the attached appendix.

DISCUSSION:

The appellant notes in its representations that issues relating to its chief consultant's proprietary interests and the inclusion of homeowners' names have been addressed in the appellant's Notice of Appeal. The remaining information, not addressed in the Notice of Appeal, namely records containing the location and test results of TCE tests is addressed in its representations in response to the Notice of Inquiry.

The appellant further notes in its Notice of Appeal that following notice by the Ministry and review of its response to the notice, the Ministry applied section 17(1) to withhold some of the information of its chief consultant. The appellant states that its chief consultant is satisfied with the information withheld by the Ministry and has no further objection to these records being disclosed in their redacted form. However, the chief consultant also objects to the address and test result information being disclosed.

As stated above, the disclosure of the homeowners' names is no longer an issue and I will not be considering whether the personal privacy exemption in section 21(1) applies to the homeowners' names. In the rest of this order I will be considering whether section 21(1) applies to the category 1 and 2 records, as well as whether section 17(1) applies to those records which the appellant claims are proprietary (category 3 records). I will not be considering the application of section 17(1) to the records the Ministry has claimed are exempt. I have noted these records on the attached index.

PERSONAL INFORMATION

As both section 17(1) and 21(1) of the *Act* are mandatory exemptions I will first consider whether the category 1 and 2 records contain personal information and thus are subject to section 21(1). If I find that section 21(1) does not apply to these records, I will then consider whether the category 1 and 2 records are exempt from disclosure under section 17(1).

The first issue to be determined is whether the addresses with the test results (category 1 records) and location information with test results (category 2 records) is personal information for the purposes of section 21(1) of the *Act*. In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of "about" the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official

or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The meaning of "identifiable"

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

The appellant submits that section 2(1)(d) of the definition of "personal information" is applicable as the records contain the location and results of TCE tests that if disclosed would constitute the personal information of each of the individual homeowners. In particular, the appellant states:

> ..if the location of a person's home is considered private and therefore personal information under the *Act*, it follows that the location and results of tests taken within the privacy of a person's home should be considered private and personal information under the *Act*.
>
> …
>
> [The appellant] submit that where the disclosure of information could result in negative financial consequences to an identifiable individual, that information should be considered information about the individual and not about the property. The Records contain information that if disclosed may result in financial consequences to individual home owners and thus, should be considered information about an individual and not property.
>
> Orders that have found that test results relate to properties and not individuals, such as IPC Orders PO-2322 and MO-2053 are distinguishable as they did not involve information gathered in the privacy of an individual's home with the understanding that the information would remain confidential and there was no risk that disclosure of such information would result in financial consequences to the individual property owners and therefore are not relevant to the present appeal.

The appellant further argues that the individual homeowner's would be identifiable as the addresses can be inputted in publicly available references and their identities and phone numbers could be located.

The Ministry submits that the records do not contain "personal information" as defined in section 2(1) of the *Act*. The Ministry states that the names of the property owners and/or tenants are personal information and should be removed. On the other hand, the Ministry submits that the addresses and the results of the environmental testing are not "about" the individual. Instead, the Ministry states, "Even the indoor air quality is not about the individuals who reside at the location, but about the air within structures on the property." The Ministry states that there is a policy reason why environmental test results should not be considered personal information, namely:

> If environmental test results were considered to be personal information, it would seriously hamper the due diligence requirements prospective purchasers must undertake in terms of environmental issues.

The Ministry further argues that while release of the environmental information may affect property values, the appellant has agreed to pay for all the clean up of the properties that are contaminated in excess of the environmental standards.

Finding

The appellant's argument is two-part. The appellant's first argument is that disclosure of the records would reveal recorded information about an "individual" because the information was obtained inside the homeowners' property. Further, the appellant argues that disclosure of this information would result in negative financial consequences to the homeowners. The appellant's second argument is that these individuals are "identifiable".

I disagree with the appellant's first argument. The recorded information is not about an "individual" for the purposes of section 2(1) of the *Act*. The appellant seeks to distinguish Orders MO-2053 and PO-2322 on the basis that in those cases the information at issue was not gathered in the privacy of the homeowner's home. I find that the location where the information was obtained is not relevant to the issue of whether the information relates to the property or to the individual. What is relevant is the distinction addressed by former Commissioner Sidney B. Linden in Order 23 which has been applied in a number of subsequent orders of this office including Orders MO-2053 and PO-2322. The Commissioner, in Order 23, made the following findings regarding the distinction to be made between "personal information" and residential properties:

> In considering whether or not particular information qualifies as "personal information" I must also consider the introductory wording of subsection 2(1) of the *Act*, which defines "personal information" as "...any recorded information about an identifiable individual...". In my view, the operative word in this

> definition is "about". The Concise Oxford Dictionary defines "about" as "in connection with or on the subject of". Is the information in question, i.e. the municipal location of a property and its estimated market value, about an identifiable individual? In my view, the answer is "no"; the information is about a property and not about an identifiable individual.
>
> The institution's argument that the requested information becomes personal information about an identifiable individual with the addition of the names of the owners of the property would appear to raise the potential application of subparagraph (h) of the definition of "personal information".
>
> Subparagraph (h) provides that an individual's name becomes "personal information" where it "...appears with other personal information relating to the individual or where the disclosure of the name would reveal other information about the individual" (emphasis added). In the circumstances of these appeals, it should be emphasized that the appellants did not ask for the names of property owners, and the release of these names was never at issue. However, even if the names were otherwise determined and added to the requested information, in my view, the individual's name could not be said to "appear with other personal information relating to the individual" or "reveal other personal information about the individual", and therefore subparagraph (h) would not apply in the circumstances of these appeals. [emphasis in original]

Senior Adjudicator John Higgins, in Order MO-2053, reviewed the jurisprudence following Order 23 which clearly sets out this distinction between information about property and "personal information". He states:

> Subsequent orders have further examined the distinction between information about residential properties and "personal information". Several orders have found that the name and address of an individual property owner together with either the appraised value or the purchase price paid for the property are personal information (Orders MO-1392 and PO-1786-I). Similarly, the names and addresses of individuals whose property taxes are in arrears were found to be personal information in Order M-800. The names and home addresses of individual property owners applying for building permits were also found to be personal information in Order M-138. In addition, Order M-176 and Investigation Report I94-079-M found that information about individuals alleged to have committed infractions against property standards by-laws was personal information. *In my view, the common thread in all these orders is that the information reveals something of a personal nature about an individual or individuals.*
>
> The information at issue in this case bears a much closer resemblance to information which past orders have found to be about a property and not about an

> identifiable individual. For example, in Order M-138, the names and home addresses of individual property owners who had applied for building permits were found to be personal information, but the institution in that case did not claim that the property addresses themselves were personal information, and the addresses were disclosed. In Order M-188, the fact that certain properties owned by individuals were under consideration as possible landfill sites was found not to be personal information. Similarly, in Order PO-2322, former Assistant Commissioner Tom Mitchinson found that water analysis and test results concerning an identified property were information about the property, not personal information.
>
> [emphasis in original]

In Order MO-2053, Senior Adjudicator Higgins went on to find that two fields of information titled "street no" and "street name" for locations of septic systems were information about the property and not "about" an identifiable individual.

I agree with the rationale in Order 23, and subsequent orders and will apply that rationale here. I find that the test results combined with the addresses are "about" the property in question and not about the individual homeowners. As such, the records relating to the various addresses fall outside the scope of the definition of "personal information" in section 2(1) of the *Act*. Similarly, I include in my finding those records which do not include an address but instead identify GPS coordinates, maps, bore hole locations, well locations and test results. These types of records that contain "location" information combined with test results also fall outside the scope of the definition of "personal information" in section 2(1) and as such constitute information about the property.

The appellant asks that I also consider the fact that the homeowners will experience financial loss should the information be disclosed. The consequences of disclosure are more properly considered under the application of the exemptions of the *Act*. Whether information is personal information for the purposes of the *Act* is not dependent on the consequences of its disclosure.

I also wanted to address the appellant's argument that the individual homeowners would be identifiable from a disclosure of their addresses or other location information using publicly available references. The fact that the names of individual owners could be determined by a search in the registry office or elsewhere does not convert the municipal address from information about a property to personal information. In Order PO-1847, former Adjudicator Katherine Laird noted that, in the context of a discussion about correspondence concerning possible land use, "…where records are **about a property**, and not **about an identifiable individual**, the records may be disclosed, with appropriate severances, notwithstanding the possibility that the owners of the property may be identifiable through searches in land registration records and/or municipal assessment rolls." (emphasis in original)

Accordingly, I find that the address information combined with the test results does not qualify as "personal information" within the scope of the definition of that term in section 2(1) of the *Act*. As only "personal information" can qualify for exemption under section 21(1). I find that section 21(1) has no application in the circumstances of this appeal.

As stated above, the original requester provided a number of consents for individuals who consented to the disclosure of information relating to their property. The Ministry will be asked to leave the names of these individuals in the records but to remove the names of the other homeowners.

THIRD PARTY INFORMATION

As I have found that section 21(1) does not apply to exempt the category 1 and 2 records from disclosure, I must now consider whether section 17(1) applies to all the records.

The appellant submits that sections 17(1)(b) and (c) apply to exempt the "technical information" in the records from disclosure. The Ministry submits that section 17(1) does not apply to exempt the records from disclosure. Sections 17(1)(b) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (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

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; 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 appellant submits that the records for which it claimed section 17(1) applied contains technical information. From my review, I also find that the records may contain scientific information. Technical and scientific information have been discussed in prior orders as:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

I adopt the definitions of these terms as set out in the prior orders.

The appellant submits that the records contain technical information as they relate to an organized field of knowledge, namely environmental science. The records were prepared by a firm of consulting engineers and environmental professionals. The test results are a result of analytical tests of the homeowner's indoor air quality for the sole purpose of the development of a remediation plan.

The Ministry submits that the appellant has not clearly identified the type of information that should be withheld from disclosure. However, the Ministry acknowledges that the records contain monitoring information and environmental testing which fits within the definitions of technical and scientific information for the purposes of section 17(1).

Based on my review of the records, I accept that the majority of the records contain both technical and scientific information. The records contain the results of TCE testing, study methodologies and test processes for remediation work done by the consultant for the appellant. I find that the information relates to the field of environmental engineering and testing carried

out by experts in the field to determine the presence of TCE contamination. As such, the information contain in the records meets part one of the test under section 17(1).

Two of the records, noted in the attached index, do not contain either technical or scientific information. The first record is an email exchange where the majority of the information has been withheld by the Ministry under section 21(1). The remaining information in the email is contact information. The second record is a blank indoor air quality survey. The survey contains general questions about a dwelling and its contents which I find does not fit within the definition of scientific or technical information. As these two records do not meet the three part test for section 17(1), they are not exempt and I will order that they be disclosed to the requester.

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].

In confidence

In order to satisfy the "in confidence" component of part two, the appellant who is 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 [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

The appellant submits that the records were supplied by it or its consultant to the Ministry as required. On the issue of its expectation of confidentiality, the appellant states:

> The Records were provided to the Ministry on the basis that they would be kept confidential and were at all times prior to that treated consistently in a manner that showed concern for their protection. They were initially compiled for the sole purpose of providing expert advice on remediation of an on-going, sensitive situation related to individual property owners and were not otherwise available to the public. The Records were prepared for a purpose that does not entail disclosure, given the nature and the content of the information involved, which relates to the private property of individuals.

The Ministry acknowledges that the environmental testing was supplied to the Ministry "explicitly" in confidence as it was marked "confidential". The Ministry also states:

> Where it is not clearly marked as confidential, the ministry would typically treat as confidential given that the appellant notified the ministry's field staff that it had make a promise to the homeowners/tenants that the data would remain confidential except for information related to the property of the individual homeowner/tenant.

Finding

"supplied"

I have reviewed the records at issue. Some of these records were provided directly to the Ministry from the appellant, while others were sent to the Ministry by the consultant hired by the appellant. Other records are emailed discussions between the appellant, its consultants and the Ministry and relate to the information contained in the reports which were provided directly to the Ministry by the appellant or its consultant. Based on my review, I find that the records contain information that was "supplied" by the appellant as required by the first component of part two of the section 17(1) test.

"in confidence"

I must now consider whether the "supplied" information was provided "in confidence" to the Ministry, that is, whether the supplier (the appellant) held a reasonable and objectively–based expectation of confidentiality.

Based on my review of the records and the representations of the parties, I find that in regard to the categories 1 and 2 records which contain the test result information combined with address or location information, the appellant had an implicit expectation of confidentiality. I accept that it was communicated to the Ministry on the basis that it was confidential and it was to be kept confidential. Further I find that this information was treated in a manner that indicates a concern for its protection from disclosure and it was not otherwise disclosed or available from sources to which the public has access. Regarding the category 3 records, or the records for which the appellant claims a proprietary interest, I find that a number of these records are explicitly marked "confidential" and that the appellant had both an explicit and implicit expectation of confidentiality when it supplied these records to the Ministry.

Accordingly, I find that all of the records, remaining at issue, fulfill the part two test for section 17(1) and I will now consider the harms.

Part 3: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The appellant alleges that the harms in section 17(1)(b) and (c) would result should the records be disclosed.

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

Representations

The appellant submits that disclosure of the records would result in similar information no longer being supplied by affected homeowners and businesses like itself, and thus section 17(1)(b) applies. In support of its position, the appellant states that it provided assurances to homeowners who participated in the remediation that any data obtained would only be provided to regulatory authorities "as required" and would otherwise be kept confidential. The appellant submits that the residents who participated in the remediation would have likely been reluctant to cooperate with the appellant and its consultant if they knew that the test results together with their home addresses would become public. The appellant acknowledges that while it was under a statutory obligation to notify the Ministry of the discharge, it was not acting pursuant to any statutory obligation when it provided the Ministry with the records. Instead, the appellant voluntarily

provided the records to the Ministry in order that the appellant and the Ministry could cooperatively develop and implement an effective and efficient testing and remediation plan. Finally, the appellant submits that it is clearly in the public interest that homeowners are encouraged to cooperate with the remediation process and that the Ministry cultivate an environment where information is voluntarily provided to the Ministry. The appellant also provided a number of affidavits in support of its representations.

In response, the Ministry submits that section 17(1)(b) does not apply as it could have compelled production of the environmental testing information so that staff could confirm the extent of the contamination and that the clean up was satisfactory. The Ministry goes on to state:

> The ministry has elected not to invoke section 17(1)(b), although it acknowledges that co-operative relations with industry is preferred.
>
> To foster a climate of cooperation, the ministry has agreed to keep the environmental testing confidential; however, that promise was always tempered with the exception that it would be released if required by law.
>
> The *Act* is one route where disclosure is required by law.

The Ministry goes on to cite order PO-2170 where the disclosure of similar type information was found not to result in the harm in section 17(1)(b).

Finding

I have reviewed the appellant's representations including the affidavits and exhibits provided with its representations. I have also reviewed the records and the Ministry's representations and Order PO-2170. Based on my review of the records and representations, I find that section 17(1)(b) does not apply. The appellant has not provided me with detailed and convincing evidence to establish that disclosure of the records could reasonably be expected to result in similar information no longer being supplied to the Ministry.

I accept the appellant's representations and the information affirmed in the affidavits that the homeowners who participated in the testing and remediation were extremely concerned that the testing results remaining private. I also accept that the testing and remediation that went on would have been more difficult without the cooperation of both the homeowners and the consultant. That being said, due to the regulatory nature of the Ministry and the *Environmental Protection Act*, I find disclosure of the records would not reasonably be expected to result in similar information no longer being supplied to the Ministry where it is in the public interest that similar information continue to be so supplied. I am supported in my finding by a number of past orders in this office (Orders P-1595, M-1143, PO-1707, PO-1732-F, PO-1666 and PO-1803). Adjudicator Laurel Cropley summarized the rationale for these decisions in Order PO-1666:

> With respect to section 17(1)(b) …, the Ministry acknowledges that it would prefer to work co-operatively with the industry, however, it submits that the *EPA* provides the authority for it to obtain this type of record in any event.
>
> …Although the Company has strenuously objected to the disclosure of the records, I am not persuaded that the harms which it believes will come to pass should they be disclosed could reasonably be expected to occur. In particular, I am not convinced that the Company, or any other similar company in the industry would no longer supply this type of information to the Ministry. The *EPA* clearly requires specific types of information and establishes the legal authority to obtain it. Although, as the Ministry indicates, it would prefer to have this information provided voluntarily, it indicates that it is prepared to compel its production under the authority of the *EPA* if necessary. Consequently, I find that section 17(1)(b) does not apply.

Adjudicator Cropley then sets out, in Order PO-2629, the approach taken by former Assistant Commissioner Tom Mitchinson in Order PO-1803 which applied her approach in Order PO-1666. In the following comments Adjudicator Cropley fully describes the current reasoning of this office in regard to section 17(1)(b):

> Expanding on this rationale, former Assistant Commissioner Tom Mitchinson noted in Order PO-1803 that there is a public interest in making the maximum amount of information in the area of environmental contamination and clean-up efforts available. He noted further that this view is reflected in the provisions of the *EPA*, which provide the necessary authority to the Ministry to ensure that the public is fully informed of issues impacting the environment.
>
> Assistant Commissioner Mitchinson found that the public interest signified by the wording of section 17(1)(b) must have some connection to the policy mandate of the institution with custody or control of the record at issue. In the case of the Ministry of the Environment, its policy mandate relates to the protection of the environment.
>
> Assistant Commissioner Mitchinson observed that it is significant that the Ministry, which has the mandate to protect the public interest in matters relating to the environment, does not express any concern that similar information will not be supplied in future, nor that the continued supply of similar information is in the public interest. He concluded:
>
> > Because section 17(1) is a mandatory exemption, in my view, it is fair to infer from the Ministry's position that it has determined that disclosure of the record would not interfere with the kinds of public interests that the Ministry's mandate seeks to protect. Given the Ministry's experience with issues of this nature, in

> particular the types of information it requires to protect the natural environment on an ongoing basis, the Ministry's position that section 17(1)(b) does not apply is a significant consideration.
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> The record at issue in the current appeal relates to "contaminants released to the environment", and according to the Ministry, falls under the *EPA*.

I apply the reasoning set out in prior orders to the present appeal. In its decision to the requester, the Ministry did not claim section 17(1)(b) or express a concern that similar information would not be supplied in the future. Similarly, in its representations, the Ministry makes no comments on the supply of these records. The appellant's arguments while focusing on the public interest in the nature of the relationship between the Ministry and companies remaining open and voluntary does not address the public interest in protecting the environment and the Ministry's policy mandate to do such. Accordingly, I find that the appellant has failed to establish that disclosure of the category 1 and 2 records could reasonably be expected to result in similar information no longer being supplied, where it is in the public interest that similar information continues to be supplied.

I also find that section 17(1)(b) also does not apply to the category 3 records or those records claimed to be proprietary by the appellant. The majority of the records consist of the appellant's chief consultant's letters to the Ministry which discuss testing, sampling or remediation methodology. A number of records consist of the appellant's chief consultant's letters, investigation results, and remediation plans or reports to the appellant's lawyer. A number of records consist of information provided by the appellant to the Ministry in regard to the procedures for handling homeowner inquiries. Some of the records consist of testing results for business and homes in the community. Other records are emails between the appellant or its chief consultant and the Ministry exchanging information about test results. All of these records, however, provide information to the Ministry which the Ministry requested. For the same reasons set out in Order PO-2629, I find that the Ministry would be able to require the appellant to provide the information in these records and the appellant has not provided me with detailed and convincing evidence that the information in these records could reasonably be expected to not be supplied if disclosure occurred.

Accordingly, I find that the category 1, 2 and 3 records do not qualify for exempt under section 17(1)(b) of the *Act*.

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

Representations

In its Notice of Appeal letter, the appellant submits that disclosure of the records could reasonably be expected to result in undue loss to itself and undue gain to third parties so that the harm in section 17(1)(c) applies. The appellant states:

> Litigation has already been commenced against [the appellant] with respect to the contamination of residential properties adjacent to the [named] site. To the extent that this litigation is without merit, it would impose undue losses on [the appellant], in terms of the costs of mounting a defence.
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> In addition, the disclosure of the remediation plan with respect to individual properties before remediation efforts have been completed may have the effect of unfairly diminishing the value of those properties and the ability of their owners to find a purchaser in the open market, which in turn could have an impact on the litigation, to the detriment of [the appellant].

In its representations, the appellant focuses on the harm to the homeowners and the undue loss they would experience. The appellant submits:

> Disclosure of the locations and TCE test results can reasonably be expected to result in undue loss to the homeowners by unfairly diminishing the value of those properties and the ability of their owners to find a purchaser in the open market as a result of the stigma that has been found to be associated with contaminated properties.
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> Environmental contamination has resulted in unfairly diminishing property values in various areas across the United States…and there is no reason to believe that the situation is different in Canada.
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> In fact, in February 2002, TCE migrated from [a named] facility, a manufacturer of air conditioners, heat pumps and gas furnaces, into the neighbouring groundwater in [a named city] and the location of the TCE contamination became public harming residential property values in the area…

The appellant goes on to describe the "stigma" attached to properties associated with or in the vicinity of environmental contamination and the adverse effects that "stigma" had on the value of these properties. The appellant also states that certain Canadian courts and administrative bodies have recognized the existence of stigma attached to contaminated properties and have awarded damages on the basis of a diminution in the value of the property as a result of that stigma. The appellant provides examples of these cases and submits that as a result of this evidence it has provided sufficiently detailed and convincing evidence that disclosure of the Records can reasonably be expected to result in undue loss to the homeowners by unfairly diminishing the value of their properties and their ability to find purchasers in an open market.

In response, the Ministry states that disclosure of the records has already occurred to the individual homeowners' and tenants. Further, the Ministry states:

> The ministry's release of environmental testing information may affect property values; however, the media has already publicized the fact that properties in the

> vicinity of [the appellant] are affected by TCE contamination. Disclosure of the information will clearly outline which ones are affected and which ones are not. The records will also reveal which properties have been cleaned up to Ministry requirements.

Analysis and Finding

I do not find the appellant's argument that disclosure would result in undue loss to itself as it would be forced to mount a defence against litigation that has already been commenced against it to be persuasive. I find the appellant's submission on this point to be unhelpful. I have no evidence before me or in the records to suggest that the litigation being brought against the appellant is without merit. Furthermore, the appellant has not provided detailed and convincing evidence that disclosure could reasonably be expected to result in undue loss to itself in the litigation. Prior orders of this office have determined that a finding by a court of law cannot be considered an "undue loss" for the purposes of section 17(1)(c) (see Order PO-2490).

I accept that the stigma of environmental contamination can result in the lowering of property values and may affect the ability of property owners to sell their properties in the free market. However, in this particular case, I find that the appellant has not provided me with detailed and convincing evidence that the disclosure of these records could reasonably result in undue loss to the homeowners. Firstly, as the Ministry notes, the media has already reported of the contamination in the community. The records contain these newspaper reports. Secondly, from my review of the records, I find that there has already been some public disclosure of the test results to the homeowners and businesses in the community. And finally, I agree with the Ministry's representations that the information in the records including test results and remediation reports provide a clearer picture of those properties that have been properly remediated to Ministry standards. I am not persuaded that disclosure of these records would result in undue loss to the homeowners in the community. In Order PO-1732-F, former Assistant Commissioner Tom Mitchinson dealt with a similar argument in relation to the harm in section 17(1)(a) of the *Act*. The Assistant Commissioner stated the following:

> On a larger scale, the appellant submits that disclosure may interfere with further negotiations for the sale of the appellant's site due to the stigma of environmental contamination. The appellant goes on to argue that disclosure could result in competitors and customers perceiving that, due to the appellant's significant remediation costs, it is striving to keep its costs down and is, therefore, vulnerable to negotiations on price and volume for its products and other such perceptions.
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> There has already been a significant degree of disclosure to the requester both before and during the processing of these appeals. Some of these documents, such as Certificates of Approval for the remediation activities undertaken by the appellant, are, according to the Ministry, publicly available records, which would presumably come to the attention of any potential purchaser as part of a basic due diligence exercise. With the exception of certain identified records that otherwise

> qualify for exemption, I am not persuaded that the disclosure of the additional records that remain at issue could reasonably be expected to interfere significantly with any potential negotiations for the sale of the appellant's property.

I agree with Assistant Commissioner's findings and apply them here. Accordingly, I find that disclosure of the records could not reasonably result in undue loss to the homeowners and as such I find that section 17(1)(c) does not apply to the category 1 and 2 records.

Similarly, I find that the appellant has not provided detailed and convincing evidence that disclosure of the information in the records it describes as proprietary would result in undue loss to the property owners; its chief consultant or itself. For the reasons above, regarding the category 1 and 2 records, I find the disclosure of these "proprietary" records could not reasonably be expected to result in undue loss to the homeowners. The appellant has not explained the link between disclosure of these specific records and the anticipated harm.

I want to reiterate for the purposes of the discussion in section 17(1)(c), that I am not dealing with the records for which the Ministry has claimed the application of section 17(1). The appellant's representations focus on the possible harm to homeowners and do not provide detail about the loss to itself in regard to the proprietary information. Further, the appellant notes in its Notice of Appeal letter that the concerns of its chief consultant relate only to the disclosure of the homeowners' names and addresses.

As stated above, I find that disclosure of the address information combined with the test results in all three categories of records could not reasonably be expected to result in undue loss to the appellant or property owners. As such, I find that the section 17(1)(c) does not apply and the records should be disclosed.

ORDER:

1. I order the Ministry to disclose the records to the requester as set out in the attached appendix by **April 2, 2009** but not before **March 27, 2009**. The Ministry is ordered to disclose the information of those homeowners whose consent it has received from the requester.

2. In order to verify compliance with provision 1, I reserve the right to require the Ministry to provide me with a copy of the record that was disclosed to the requester.

Original signed by: February 26, 2009
Stephanie Haly
Adjudicator