

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2013-37

October 8, 2013

**ALBERTA ENVIRONMENT AND SUSTAINABLE RESOURCE
DEVELOPMENT**

Case File Number F5941

Office URL: www.oipc.ab.ca

Summary: The City of Edmonton (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Environment and Sustainable Resource Development (the Public Body). The Applicant's access request included records related to "complaints", "offences", "orders" and "prosecutions" against 110 Centre Ltd.

The Public Body located responsive records and provided notice to 110 Centre Ltd. that it was considering disclosing some of the information in the records. 110 Centre Ltd. objected to disclosure of some of the information in the records. Ultimately, the Public Body decided to withhold some of the information under sections 16 (disclosure harmful to business interests) and 27 (privileged information). However, it also decided to disclose some of the information despite 110 Centre Ltd.'s objection.

110 Centre Ltd. requested review. It argued that the records were subject to section 16 and 27. It also argued that disclosing the information in the records would disclose the identity of a confidential source of law enforcement information within the terms of section 20(1)(d) of the FOIP Act.

The Adjudicator found that sections 16, 20, and 27 did not apply. She confirmed the decision of the Public Body to disclose the information it had decided to disclose.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 12, 16, 20, 27, 65, 72; *Water Act* R.S.A. 2000, c. W-3

Authorities Cited: AB: Orders 2000-017, F2005-011, F2008-018, F2009-028, F2010-036, F2011-001, F2011-002, F2011-003, F2011-018, F2012-02, F2012-06, F2013-017

I. BACKGROUND

[para 1] The City of Edmonton made an access request to the Public Body for records containing information about a property with the legal description NE-25-52-24-W4th. Specifically, the City of Edmonton sought information relating to complaints, offences, orders, or prosecutions against General Recycling Ltd., 110 Centre Ltd., 628892 Alberta Ltd., General Metals Ltd., General Recycling Industries Ltd., or The Steel Company of Canada Ltd. The City of Edmonton also confirmed that it was seeking information about licenses, permits, approvals and applications under statutes enforced by the Public Body. The City of Edmonton stated that it had a particular interest in information regarding planned, proposed, or actual drainage, filling and contamination of the wetlands at the property.

[para 2] The Public Body identified records responsive to the access request. The Public Body provided notice to 110 Centre Ltd. that it was considering disclosing some of the information relating to it in the records. The Public Body ultimately decided to grant access to some of the information that 110 Centre Ltd. argued was subject to section 16. 110 Centre Ltd. requested that the Commissioner review the Public Body's decision to disclose this information.

[para 3] Once the matter was scheduled for an inquiry, it became apparent that the Public Body had made decisions to withhold information under the exceptions to disclosure in the FOIP Act, including section 16. However, the Public Body had not responded to the City of Edmonton under section 12(1) of the FOIP Act, or provided the information to which it had not applied an exception and which was not in dispute. I drew the Public Body's to Order F2011-003, which holds that a public body must respond to an access request, even though a third party has made a request for review under section 65(2) of the FOIP Act. I requested that the Public Body respond to the City of Edmonton so that if the City of Edmonton were dissatisfied with the Public Body's decisions to apply exceptions, it could request review of them and the issues could be added to the inquiry.

[para 4] The Public Body responded to the City of Edmonton. The City of Edmonton did not request review of the Public Body's response to its access request. The inquiry continued on the sole issue of whether section 16 applies to the information 110 Centre Ltd. seeks to have withheld under this provision.

[para 5] When I reviewed the arguments of the parties, I noted that there was ambiguity in the records as to what had been withheld, what the Public Body intended to

disclose, and what provisions had been reviewed when it made its decisions regarding disclosure. I obtained further clarification from the Public Body. I determined that the issue of whether section 27(2) required the Public Body to withhold the information it intended to disclose to the City of Edmonton should be added to the inquiry. I added this issue to the inquiry and invited the parties to make submissions regarding it.

[para 6] In its submissions, regarding the application of section 27(2), 110 Centre Ltd. argued that records 85 – 87, 99, 100, and 106 should be withheld under section 20(1)(d) of the FOIP Act. I will address this argument under the issue: Does section 20(1)(d) apply to the information 110 Centre Ltd. seeks to have withheld from the Applicant?

II. RECORDS AT ISSUE

[para 7] The Public Body provided records to the third party with different numbering than the records it provided for the inquiry. At my request, the Public Body provided an index containing both sets of numbers so that I could identify the records at issue and determine which ones were the subjects of the parties' arguments.

[para 8] The information at issue is the information the Public Body proposes to disclose that is found in records 7, 32A – 34, 47a – 48, 50 – 52, 85 – 87, 94, 99 – 100, and 103 - 106.

III. ISSUES

Issue A: Does section 16 of the Act (disclosure harmful to the business interests of a third party) apply to the information in the records?

Issue B: Would disclosure of the information the Public Body proposes to disclose from records 7, 32a – 34, 47a – 48, 50 – 52, 85 – 87, 94, 99 – 100, and 103 – 106 disclose privileged information within the terms of section 27(2) of the FOIP Act?

Issue C: Does section 20(1)(d) apply to the information 110 Centre Ltd. seeks to have withheld from the Applicant?

IV. DISCUSSION OF ISSUES

Issue A: Does section 16 of the Act (disclosure harmful to the business interests of a third party) apply to the information in the records?

[para 9] Section 16(1) is a mandatory exception to disclosure. It states:

16(1) The head of a public body must refuse to disclose to an applicant information

- (a) *that would reveal*
 - (i) *trade secrets of a third party, or*
 - (ii) *commercial, financial, labour relations, scientific or technical information of a third party,*
- (b) *that is supplied, explicitly or implicitly, in confidence, and*
- (c) *the disclosure of which could reasonably be expected to*
 - (i) *harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
 - (ii) *result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
 - (iii) *result in undue financial loss or gain to any person or organization, or*
 - (iv) *reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para 10] The purpose of mandatory exceptions to disclosure for the proprietary information of third parties in access to information legislation is set out in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* at page 313:

The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

[para 11] This statement of the purpose of section 16 has been adopted in Orders F2009-028, F2010-036, F2011-001, F2011-002, and F2012-06, and found to inform the rationale behind the mandatory exception to disclosure created by section 16 of the FOIP Act. In these orders, it was determined that section 16 is intended to protect specific types of proprietary information or “informational assets” of third parties from disclosure, so that businesses may be confident that they can continue to invest in this kind of information, and to encourage businesses to provide this kind of information to government when required.

[para 12] In Order F2005-011, former Commissioner Work adopted the following approach to section 16 analysis:

Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:

Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

I will now follow the approach adopted by former Commissioner Work in Order F2005-011 to determine if the records 110 Centre Ltd. seeks to have withheld under section 16 can be withheld under this provision.

Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

[para 13] The records created by 110 Centre Ltd. were submitted to the Public Body as part of an investigation under the *Water Act R.S.A 2000, c. W-3*. These records contain submissions and concessions regarding the issues under investigation. Other records at issue were created by the Public Body as part of its investigation. Records 85 – 87 contain the Public Body’s disposition of the investigation.

[para 14] In its submissions 110 Centre Ltd. states:

The Disputed Records [contain] trade secrets, or commercial, financial, labour relations, scientific or technical information of a third party, 110 Centre, that is not in the public domain. Disclosure of the Disputed Records would reveal the trade secrets, or commercial, financial labour relations, scientific or technical information.

Other than to make this bare statement, 110 Centre Ltd. did not explain its position that the information it seeks to have withheld falls within the terms of section 16(1)(a).

[para 15] Previous orders of this office have considered the meaning of the terms “trade secrets”, “commercial information”, “financial information”, “labour relations information”, “scientific information” and “technical information”. I will follow these orders when considering whether information of this kind is present in the information 110 Centre Ltd. seeks to withhold.

Commercial, Financial, and Labour Relations Information

[para 16] In Order F2009-028, I reviewed the definitions of “financial” and “commercial” information and said:

In Order 96-018, the former Commissioner adopted the following definition of “financial information” and determined that information is not the financial information of a third party for the purposes of section 16(1)(a) if the information does not allow an applicant to draw an accurate inference about a third party’s assets or liabilities, past or present:

In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word “financial”. I also reiterate that careful consideration must be given to the content of the

document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of the third party and is not limited to information relating to financial transactions in which the third party is involved.

As such, the information in the record is not of a “financial” nature because it reveals nothing of the third party’s financial capabilities beyond its commitment to raise the dollar amount specified. Similarly, I find that the record reveals nothing of the third party’s assets or liabilities, either past or present.

In Order MO-2496, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of “commercial” and “financial” information as they appear in Ontario’s equivalent of the FOIP Act’s section 16. The Adjudicator stated:

These terms have been defined in previous orders of this office as follows:

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

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

In my view, Orders 96-013 and 96-018 of this office, and Order MO-2496 of the Office of the Information and Privacy Commissioner of Ontario, are essentially stating the same thing. “Commercial information” is information belonging to a third party about its buying, selling or exchange of merchandise or services. “Financial information” is information belonging to a third party about its monetary resources and use and distribution of its monetary resources.

[para 17] In Order F2011-018, the Adjudicator reviewed previous decisions which considered “commercial” and “labour relations” information within the terms of section 16(1)(a). He said:

Definitions for "commercial information" and "labour relations information" were noted in Order F2010-013 (at paras. 19 and 24), being the Order that dealt with the Applicant's right of access to the AHW Notices. I refer to those same definitions for the purpose of reviewing the content of the Objection Letter. I find that the Objection Letter does not contain or reveal information about the "buying, selling or exchange of merchandise or services" (commercial information), and that it does not contain or reveal information about "employer/employee relations including especially matters connected with collective bargaining and associated activities" or "relationships within and between workers, working groups and their organizations and managers, employers and their organization" (labour relations information).

[para 18] In addition, to fall within the terms of section 16(1)(a), financial, commercial, or labour relations information must be “of a third party” in the sense that the information must belong to a third party and be about the third party’s monetary resources and its use and distribution of them, its exchange of merchandise or services, or its own employer / employee relations.

[para 19] 110 Centre Ltd. has not pointed to any information in the records that it considers to be its financial, commercial, or labour relations information. I am unable to identify any information in the records it seeks to have withheld that refers to its monetary resources, its buying, selling or exchange of merchandise or services, or information about its labour relations. I therefore find that the information does not contain financial, commercial, or labour relations information within the terms of section 16(1)(a).

Scientific or Technical Information

[para 20] In Order 2000-017, the former Commissioner defined “scientific information” as “information exhibiting the principles or methods of science”. Scientific information for the purposes of section 16(1)(a), then, is information belonging to a third party that exhibits the principles or methods of science. In the context of section 16, which protects business interests in information, scientific information of a third party is proprietary information exhibiting principles or methods of science.

[para 21] The *Canadian Oxford Dictionary* 2nd Edition (Don Mills; Oxford University Press Canada, 2004) offers the following definitions of the word “technical”: “1. of or involving the mechanical arts and applied sciences 2. of or relating to a particular subject or craft”. Previous decisions of this office differ from one another to a certain extent, given that Order F2008-018 considers technical information to refer to information relating to fields of applied sciences or mechanical arts, while Order F2002-002 holds information to be technical for the purposes of section 16(1)(a) provided it relates to particular subjects or crafts. Reconciling these two orders, technical information is the proprietary information of a third party regarding its designs, methods, and technology.

[para 22] In Order F2012-06, I found that references to scientific or technical information in records will not bring information within the terms of section 16(1)(a); rather, the information must belong to the third party and reveal something about how a third party applies science or technology in its business. I said:

With regard to those records containing references to scientific or technical principles, I find that those references are not to “the scientific or technical information of GChem”, within the terms of section 16(1)(a). These records contain a discussion of well data and opinions by a consultant of GChem as to the causes of the presence of methane in a water well. The consultant apparently provided opinions as a service to MGV Energy in some cases, and to well owners in others. However, there is nothing in the records to suggest that the scientific principles referred to in the discussions belong to GChem or are associated with GChem as an organization in any way. The references to scientific or technical principles in these discussions do not refer to the ways GChem applies science or technology in its business, but were incorporated in the discussions as a service to clients.

I found that scientific or technical information of a third party within the terms of section 16(1)(a) is information about the way in which a third party applies scientific or technical principles in its business. This approach to the application of section 16(1)(a) was also followed in Order F2010-036 and in Order F2013-017.

[para 23] 110 Centre Ltd. has not pointed to any information in the records that it considers to be its scientific or technical information, and I am unable to identify any information in the records that would reveal how 110 Centre Ltd. applies scientific or technical principles or methodology in its business. I therefore find that scientific or technical information within the terms of section 16(1)(a) is not present in the records.

Trade Secrets

[para 24] Section 1(s) of the FOIP Act defines “trade secret” for the purposes of the FOIP Act. This provision states:

I In this Act,

(s) “trade secret” means information, including a formula, pattern, compilation, program, device, product, method, technique or process

(i) that is used, or may be used, in business or for any commercial purpose,

(ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,

(iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and

(iv) the disclosure of which would result in significant harm or undue financial loss or gain.

[para 25] “Trade secret” is not defined exhaustively in the FOIP Act. Rather, section 1(s) illustrates the kinds of information that may be considered trade secrets. If information meets the criteria set out in section 1(s), it is a trade secret within the terms of the FOIP Act. Meeting the criteria set out in section 1(s) requires evidence of the purposes to which a third party uses information, the economic value the third party derives from the fact that the information is not generally known, the steps it takes to prevent the information from being generally known, and the harm or loss the third party would suffer should the information be disclosed.

[para 26] 110 Centre Ltd. has not led or adduced any evidence regarding the factors set out in section 1(s) of the FOIP Act. Having reviewed the information 110 Centre Ltd. seeks to withhold, I am unable to identify any information falling within the terms of section 1(s). I therefore find that trade secrets within the terms of section 16(1)(a) are not present in the records.

Conclusion

[para 27] As I am unable to identify information meeting the requirements of section 16(1)(a) in the records, the information cannot be withheld under section 16(1).

As discussed above, information must meet the requirements of section 16(1)(a), (b), and (c) before it can be withheld under section 16(1).

[para 28] As I find that the information 110 Centre Ltd. seeks to have withheld cannot meet the requirements of section 16(1), I need not address whether the information meets the terms of section 16(1)(b) and (c).

Issue B: Would disclosure of the information the Public Body proposes to disclose from records 7, 32a – 34, 47a – 48, 50 – 52, 85 – 87, 94, 99 – 100, and 103 – 106 disclose privileged information within the terms of section 27(2) of the FOIP Act?

[para 29] Section 27(1) authorizes the head of a public body to withhold privileged information and other kinds of information. If the circumstances in section 27(2) are met, the head of a public body is required to withhold privileged information. These provisions state, in part:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor -client privilege or parliamentary privilege[...]

(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

[para 30] 110 Centre Ltd. argues that records 7, 32a – 34, 47a – 48, 50 – 52, 85 – 87, 94, 99 – 100, and 103 – 106 are subject to settlement negotiation privilege. If this is so, then section 27(2) requires the Public Body to withhold this information.

110 Centre Ltd. states:

J. Sopinka, S.N. Lederman and A.W. Bryant in *The Law of Evidence in Canada* set out the following three conditions that must be present to establish settlement privilege:

- a) A litigious dispute must be in existence or in contemplation:
- b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
- c) The purpose of the communication must be to effect a settlement.

These are the same conditions set out by the Alberta Court of Queen’s Bench in *Hansraj v. Ao*, 2002 ABQB 385.

Regarding the first condition, from a review of records 7, 32a – 34, 47a – 48, 50 – 52, 85 – 87, 99 – 100, and 103 – 106, it is clear that the parties were dealing with an existing or contemplated dispute. In fact, much of the information in these documents relates to attempts to avoid further dispute.

The communications were made with the express or implied intention that it would not be disclosed in the event negotiations failed. Although not all the documents are marked “without

prejudice”, that is not determinative. In *Hansraj v. Ao*, the Court noted that marking documents “Without Prejudice” is “good practice”, but not a necessary practice.

Finally, the purpose of the communication was to effect a settlement. Correspondences does not need to contain an offer of settlement to meet this test. Correspondence “that invites compromise, or outlines approaches that might be taken to settlement” will also be covered by settlement privilege.”

110 Centre submits that all records 7, 32a – 34, 47a – 48, 50 – 52, 85 – 87, 99 – 100, and 103 – 106 are all subject to settlement privilege and that all of these records must not be released, pursuant to section 27(2) of the Act.

[para 31] I agree with 110 Centre Ltd. that the established test for determining whether settlement negotiation privilege applies is the following:

- 1) A litigious dispute must be in existence or in contemplation:
- 2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
- 3) The purpose of the communication must be to effect a settlement.

[para 32] However, I disagree with 110 Centre Ltd. that all three requirements of the test are met in this case.

[para 33] While I accept that the dispute that was the subject of these records is litigious, given that it relates to an investigation in relation to a contravention of the *Water Act*, I find that the second and third requirements of the test are not met in this case. I say this because 110 Centre Ltd.’s communications were addressed and submitted to the Public Body for its use in assessing an administrative penalty under the *Water Act*. The Public Body was not a party in this case, but was the decision maker empowered to decide the outcome of the litigation. Moreover, the purpose of the communications was not to effect a settlement, so as to avoid the need to undergo proceedings, but to answer questions and to make arguments to persuade the decision maker regarding the merits of 110 Centre Ltd.’s case in order to achieve the best possible outcome in the proceedings. Where employees of the Public Body refer to the answers and submissions provided by 110 Centre Ltd., in the records, it is to explain how the answers and submissions support arriving at the decision the employees were responsible for making.

[para 34] In *The Law of Evidence*, 6th Edition (Toronto: Irwin Law, Inc, 2011) Paciocco and Stuesser state at page 248:

The privilege is in place primarily as a matter of public policy to encourage litigants to settle their disputes without the need to go to trial. Communications made for the purpose of settlement are protected from disclosure; otherwise few parties would engage in such settlement discussions for fear that any concessions or statements could be used if no settlement is reached. A second rationale for the rule – occasionally cited – is the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence.

[para 35] Neither rationale for settlement negotiation privilege can be said to apply to statements made to a decision maker that are intended to persuade the decision maker with regard to the merits of a case and to form the evidence considered by the decision maker. In saying this, I do not mean that there is anything improper in the submissions 110 Centre Ltd. made to the Public Body, only that they are submissions, and settlement negotiation privilege does not attach to submissions or arguments made to a decision maker. Settlement negotiation privilege may attach to communications made by one party to another for the purpose of settling a dispute without a trial or hearing; it does not attach to arguments or statements made to the Court, or to another entity responsible for deciding the outcome of the litigation.

[para 36] I find that the communications that are the subject of this inquiry are arguments and admissions made to the individuals responsible for conducting the investigation and deciding its outcome, with the intent of persuading those individuals of the merits of 110 Centre Ltd.'s case.

[para 37] To put it another way, I find that the communications in question do not meet the second and third requirements of the test cited by 110 Centre Ltd. The second requirement of the test is not met because 110 Centre Ltd.'s communications were clearly intended to be put before, and used by, the decision maker, and were provided to the Public Body for that reason.

[para 38] The third requirement of the test is not met because the communications were not intended to settle the matter, but to persuade the decision maker of the merits of 110 Centre's Ltd.'s case.

[para 39] I find that section 27(2) does not require the Public Body to withhold records 7, 32a – 34, 47a – 48, 50 – 52, 85 – 87, 94, 99 – 100, and 103 – 106, as the records are not privileged.

Issue C: Does section 20(1)(d) apply to the information 110 Centre Ltd. seeks to have withheld from the Applicant?

[para 40] 110 Centre Ltd. argues that the Public Body should have applied its discretion to withhold records 85 – 87, 99, 100 and 106 under section 20(1)(d).

[para 41] Section 20(1)(d) states:

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(d) reveal the identity of a confidential source of law enforcement information,

[para 42] 110 Centre Ltd. argues that the identity of a confidential source of law enforcement information would be revealed by disclosing records 85 – 87, 99, 100 and 106. However, 110 Centre Ltd. states:

A confidential source is a source that supplied law enforcement information on the assurance that his or her identity will remain secret or with the reasonable expectation of confidence. [my emphasis]

[...]

In Order 99-026, the Commissioner stated that under this part of the test, the public body may refuse to disclose information that could reasonably be expected to reveal the identity of a confidential source, even if the information is not itself the law enforcement information.

[para 43] As 110 Centre Ltd. notes, section 20(1)(d) authorizes a public body to withhold any information that would serve to reveal the identity of a person who provided law enforcement information on the assurance of anonymity. If a public body provides assurance of anonymity, and an individual provides a statement on condition that his or her identity will not be revealed, i.e. that the statement will not be attributed to him or her, then the maker of the statement can be considered a confidential source of law enforcement information within the terms of section 20(1)(d). However, section 20(1)(d) does not authorize a public body to withhold other kinds of law enforcement information, such as the statements made by a confidential informer, unless the law enforcement information would serve to identify the informer. If a statement made by a confidential source of law enforcement information would serve to identify the maker of the statement, then section 20(1)(d) authorizes a public body to withhold the information.

[para 44] I am unable to identify any point in records 85 – 87, 99, 100, or 106 where either 110 Centre Ltd. or the Public Body discussed anonymity or confidentiality. Records 85 – 87 contain the Public Body’s decision; records 99, 100, and 106 contain notes of conversations between employees of the Public Body and representatives from organizations other than 110 Centre Ltd., according to a letter from the Public Body to the President of 110 Centre Ltd., dated May 26, 2011. (This letter appears at Tab 2 of the Public Body’s initial submissions.)

[para 45] The decision in records 85 – 87 does not refer to the identity of anyone providing information for the Public Body’s investigation, confidential or otherwise. It may be that 110 Centre Ltd. means that its own arguments and submissions are referred to in the decision and that 110 Centre Ltd. itself is a confidential source of law enforcement information, as a result. This argument is possibly based on the fact that it marked its arguments and submissions “without prejudice”. However, marking correspondence “without prejudice” is usually understood to mean that the information contained in the record is not an admission for legal purposes. It does not refer to expectations that the identity of the maker of the admission is to be kept confidential. There is no evidence before me that 110 Centre Ltd. made its arguments and submissions with an expectation that its identity as the maker of the arguments and submissions would be kept confidential, or that the Public Body made any such assurances.

[para 46] The notes appearing in records 99, 100, and 106 document conversations taking place after the Public Body's investigation concluded. (The Public Body's letter of May 26, 2011 indicates that the decision in records 85 – 87 was signed on June 18, 2002. The notes refer to conversations taking place on October 28, 2002 and December 12, 2002.) There is nothing in these conversations to support a finding that the Public Body collected information for the purposes of law enforcement at the time it documented the conversations. From the time frame, it is clear that these conversations could not have formed the basis of the decision in records 85 – 87, which concludes a law enforcement matter.

[para 47] The conversations documented in records 99, 100, and 106 are conversations involving individuals representing companies other than 110 Centre Ltd. If these representatives were assured anonymity, then it is unclear why the statements of these representatives were provided to 110 Centre Ltd. on May 20, 2011. The Public Body's actions in disclosing the identities of these individuals are explicable by the fact that these representatives were *not* assured anonymity. Moreover, the basis of 110 Centre Ltd.'s position that these parties were assured anonymity is unclear, as it does not explain the source of its understanding as to the basis on which employees of organizations other than 110 Centre Ltd. had conversations with the Public Body.

[para 48] In its submissions of July 26, 2013, the Public Body stated:

The Department's starting position is that all of the records in its possession with respect to this site should be publicly available. This is consistent with the Department's approach to the Environmental Site assessment Repository (ESAR) and its Routine Disclosure initiative. The Department is of the view that the public should have full access to the information relating to the conditions of land as well as to information relating to enforcement and compliance activities.

While the Public Body does not discuss in its submissions the conditions under which it held conversations and meetings, given its position that all the records with respect to the site referred to in the records should be made available to the public, it appears unlikely that it made assurances of anonymity or confidentiality to anyone. In any event, there is no evidence before me that the Public Body made assurances of anonymity to anyone who provided submissions and arguments referred to in the records, and I am therefore unable to find that it did.

[para 49] As I am unable to find that a source of confidential law enforcement information would be identified by disclosing the information contained in records 85 – 87, 99, 100 and 106, I find that section 20(1)(d) has no application to these records.

V. ORDER

[para 50] I make this Order under section 72 of the Act.

[para 51] I confirm the decision of the Public Body to disclose the information from records 7, 32a – 34, 47a – 48, 50 – 52, 85 – 87, 94, 99 – 100, and 103 – 106 to the Applicant that it decided to disclose and order it to do so.

[para 52] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator