



Information and Privacy
Commissioner/Ontario

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

ORDER P-850

Appeal P-9400201

Ministry of Natural Resources



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Natural Resources (the Ministry) received a request for records relating to lands covered by three specific timber licences, including records for allocation, revocation, reallocation, transfer, encumbrance or sale from 1980 to the date of the request.

The Ministry identified numerous records as being responsive to the request. The Ministry notified the holders of the timber licences and certain other parties whose interests may be affected by the disclosure of the information in some of the records (the affected parties). Upon receiving the submissions of the affected parties, the Ministry decided to grant partial access to the majority of the 648 records. The requester appealed the Ministry's decision to deny access to the severed portions of the remaining records.

The records that remain at issue in this appeal are listed in Appendix "A" to this order.

The Ministry relies on the following exemptions in denying access to the records:

- advice or recommendations - section 13(1)
- third party information - section 17(1)
- solicitor-client privilege - section 19

Notices of Inquiry were provided to the appellant, the Ministry and the affected parties. Representations were received from the appellant, the Ministry and two of the affected parties.

PRELIMINARY MATTER:

RESPONSIVE RECORDS

The request is part of the same seven-part request also submitted to the Ministry of Economic Development and Trade (the MEDT). The appellant agreed that the first two parts of the request would be addressed by the Ministry. The remaining portions of the request were addressed by the MEDT and resulted in an appeal which was resolved by Order P-839.

The Ministry claims that the severed portions of Records 83 and 141 fall outside the scope of the first two parts of the request and are, therefore, not responsive.

In the Notice of Inquiry, the Ministry was asked to show why the records were not responsive to the request. The affected parties identified in the records were also asked to comment on this issue.

The Ministry submits that the information at issue relates to the security held by the Ontario Development Corporation and certain lending institutions and, therefore, properly falls within that part of the request that the appellant agreed would be addressed by the MEDT. In the alternative, the Ministry submits that if the

information at issue is found to be responsive, then section 17(1) of the Act applies to the severed portions of the records.

I have carefully reviewed the severed portions of Records 83 and 141 together with the request. Firstly, the request is for **all** records relating to the timber licences including security agreements. Record 83 is a letter from the solicitor for an affected party and relates to the timber licences and the security held by various affected parties. Record 141 is a letter from the solicitor for a secured creditor, and contains a discussion about the timber licences and position of his client as a secured creditor.

Secondly, I note that it was agreed, for administrative purposes, that the Ministry would respond to parts 1 and 2 of the request and MEDT would respond to the remainder. However, the parts of the records that the Ministry claims are not responsive to the request are contained in records which the Ministry has in its possession and has made decisions on, in part. Records 83 and 141 are not in the possession of the MEDT.

In my view, the severed portions of Records 83 and 141 contain information that is responsive to the request. As the Ministry has claimed that section 17(1) applies to these records, I will include them in my discussion of third party information below.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Ministry has claimed that section 13(1) applies to exempt Records 6, 18, 52, 70, 73, 123, 130, 191, 192, 223, 245, 254, 257, 454, 479, 480, 485, 489, 494, 501, 503, 513, 516, 522, 529, 537, 543, 553 and 625 from disclosure.

Section 13(1) of the Act states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118 and P-278). Previous orders have also determined that where disclosure of the information would reveal the substance of the deliberations, that information also qualifies for exemption under section 13(1) of the Act (Order P-529). I adopt both these interpretations for the purposes of this appeal.

The records for which section 13(1) has been claimed consist of Minister's briefing notes, internal memoranda, Minister's issues notes, printed electronic mail, draft action plans and proposals, all relating to the status and disposition of the specific timber licences. The Ministry points out and I note that the bulk of each record has already been disclosed to the appellant.

The Ministry submits that the records relate to an ongoing sensitive issue, the outcome of which will have a significant impact on the affected parties and the community where the timber licences are located. The Ministry states that the advice and recommendations contained in the records were given by public servants on the basis of the circumstances and the information available at that time. The position of the Ministry with respect to the issue has evolved over the period of time and the final decision has yet to be made. The Ministry submits that the premature release of this information may jeopardize the integrity of the deliberative process which was intended to be protected by section 13(1). Finally, that the information that has been withheld in the records relates, directly or indirectly, to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I have carefully reviewed the information in the records and I find as follows:

- (1) Records 6, 18, 73, 191, 223, 254, 257, 454, 479, 480, 485, 489, 494, 501, 513, 522, 529, 537 and 625 contain advice and recommendations and qualify for exemption under section 13(1) of the Act.
- (2) Some parts of Records 52, 70, 123, 130, 192, 245, 503, 516, 543 and 553 qualify for exemption under section 13(1) of the Act. I have highlighted those portions of the records that do **not** meet the requirements of section 13 on the copy of the records which will be sent to the Ministry's Freedom of Information and Privacy Co-ordinator (the Co-ordinator) with a copy of this order. No mandatory exemption applies to the highlighted information and since no other discretionary exemptions have been claimed by the Ministry for these records, other than Record 123, they should be disclosed to the appellant. The Ministry has claimed that section 17(1) applies to the same information in Record 123 and to other information in Record 516. I will, therefore, include Records 123 and 516 in my discussion of third party information below.
- (3) In my view, the mandatory exceptions in section 13(2) do not apply to the information in the records that I have found to be exempt under section 13(1) of the Act.

THIRD PARTY INFORMATION

The Ministry and the affected parties claim that sections 17(1)(a), (b) and/or (c) of the Act apply to Records 15, 23, 83, 123, 141, 247, 510, 516 and 520.

In its representations, the Ministry identified an administrative error in those parts of Record 516 for which section 17(1) has been claimed. The portions of Record 516 which have been withheld by the Ministry under section 17(1) and which will be addressed in this order are:

- page 3 - parts of three sentences
- page 6 - paragraph 5 (all), paragraph 7 (one sentence)

- pages 13, 14 and 15 - all

As noted above, representations were received from two of the affected parties. In its representations, one of the affected parties withdrew its claim to section 17(1) of the Act and consented to the disclosure of its information contained in Records 83 and 141. The second affected party, whose information is contained in Record 83, indicated that it was no longer pursuing this appeal. No other mandatory exemptions apply to this information and no discretionary exemptions have been claimed by the Ministry. On that basis, I am ordering Record 141 in its entirety and the relevant portions of Record 83 be disclosed to the appellant. I have highlighted the relevant parts of Record 83 which should be disclosed, on the copy of the records sent to the Co-ordinator with a copy of this order.

In addition, in reviewing the records for which section 17(1) has been claimed by the Ministry and the affected parties, I note that Record 516 contains information about the appellant, withheld under section 17(1), which should be disclosed to the appellant. This is contained in paragraph 3 on page 3, paragraphs 4 and 6 on page 6 and all of pages 13 and 14 of Record 516. I have highlighted these portions of the record on the copy of the record which will be sent to the Co-ordinator with a copy of this order.

In its representations, the Ministry has included the submissions of one of the affected parties (the affected party) and indicates that it is relying on these submissions to meet the harms element of the section 17(1) test.

The records which I will consider in my discussion below are Records 15, 23, 83, 123, 247, 510, 520 and the remaining portions of Record 516, as clarified above.

For a document to qualify for exemption under this provision, the Ministry and/or the 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 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 (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy all parts of the test renders the section 17(1) claim invalid.

Part One of the Test

The Ministry submits that the information in the records relates to timber licenses issued to mills for the purpose of operating commercial lumber enterprises and, therefore, qualifies as commercial information for the purposes of section 17 of the Act. The affected party states that some of the information in the records is also financial information relating to its business operations. I have reviewed the information in the records and I am satisfied that the information in the records qualifies as commercial and/or financial information. Part one of the test has been satisfied.

Part Two of the Test

To satisfy part two of the test, the Ministry and/or the affected party must show that the information was supplied to the Ministry, and that it was supplied in confidence, either implicitly or explicitly.

Both the Ministry and the affected party submit that the information relates to the timber licences and was supplied by the affected party to the Ministry. I accept that all of the information, with the exception of that found in Records 23 and 247, was supplied by the affected party to the Ministry.

Record 23 is an internal memorandum providing a status report. Record 247 is a handwritten note regarding a conference call that took place among Ministry employees and summarizes the Ministry's position with respect to a certain proposal. Thus, I find that the information in Records 23 and 247, for which section 17(1) has been claimed, was not supplied by the affected party to the Ministry. I will, therefore, not consider Records 23 and 247 any further.

I will now consider whether the information supplied in Records 15, 83, 123, 510, 516 and 520 was done so implicitly or explicitly, in confidence.

The affected party submits that it considers the information in the records as confidential and that it expected the Ministry to treat it in the same manner. The Ministry confirms that in light of the history surrounding the timber licenses, this was a reasonable expectation. With respect to page 15 of Record 516, the Ministry states that the information relates to the operations of each individual mill and is supplied explicitly in confidence.

The appellant disagrees and states that the information in all the records relates to the manner in which the Ministry makes decisions about the timber licences and should not be regarded as confidential.

I have carefully reviewed the information in the records and I am satisfied that page 15 of Record 516 was supplied by the affected party to the Ministry, explicitly in confidence. In my view, the information in

Records 15, 83, 123, 510, 520 and the balance of the information in Record 516 was supplied by the affected party to the Ministry implicitly in confidence.

I find that part two of the test has been satisfied with respect to Records 15, 83, 123, 510, 516 and 520.

Part Three of the Test

I will now consider the application of part three (the "harms" element) to the records.

The Ministry states that it relies on and supports the submissions made by the affected party with respect to part three of the section 17(1) test.

The affected party submits that it is a small company, operating in a competitive market and disclosure of the information in the records could enable a competitor to create severe financial problems for the affected party (section 17(1)(a)). The affected party states that the type of information at issue in the records consists of detailed information about its financial situation. Under section 17(1)(b), the affected party states that disclosure of the information in the records could result in this type of detailed information no longer being available to the Ministry and finally, under section 17(1)(c), it submits that if disclosed, a competitor could use the information for its own gain.

Based on an independent review of the information in the records and the representations of the Ministry and the affected party, I find as follows:

- (1) I am not convinced that disclosure of the information in Record 83 could lead to any one of the harms detailed in section 17(1) and Record 83 does not meet the third part of the section 17(1) test.
- (2) I am satisfied that disclosure of the type of detailed information in Records 15, 123, 510, 516 and 520 could reasonably lead to the harms set out in sections 17(1)(a) and/or (c). The third part of the section 17(1) test has been met with respect to Records 15, 510, 516 and 520.
- (3) Records 15, 123, 510, 516 and 520 qualify for exemption under section 17(1) of the Act.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that section 19 of the Act applies to Records 124, 259, 573, 582, 586 and 587.

This section consists of two branches, which provide the Ministry with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1);
and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
 - (b) the communication must be of a confidential nature, **and**
 - (c) the communication must be between a client (or his agent) and a legal advisor, **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

A record can be exempt under Branch 2 of section 19, regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

The Ministry submits that the records requested relate to complex issues surrounding the timber licences and the receivership of a named company in which there was a significant risk of litigation.

The Ministry explains that Records 124, 259, 573 and 586 are memoranda to file or reporting electronic mail transmissions which outline advice obtained from counsel. Record 587 is advice from legal counsel and Record 582 seeks advice or direction from legal counsel. The Ministry points out that even though the legal advice is communicated by non-legal staff, the author of the legal advice is identified and the legal advice is accurately communicated in each record. The Ministry submits that the information in all the records is directly related to seeking, formulating or giving legal advice.

I have carefully reviewed the information in the records and I find as follows:

[IPC Order P-850/January 31, 1995]

- (1) All of the records qualify as written communications of a confidential nature and relate directly to the seeking, formulating or giving of legal advice.
- (2) Records 259, 582 and 587 qualify as direct communication between client and legal advisor while Records 124, 573 and 586 contain the legal advice of counsel for the Ministry.
- (3) Therefore, Records 124, 259, 573, 582, 586 and 587 qualify for exemption under Branch 1 of section 19.

ORDER:

1. I uphold the Ministry's decision to deny access to those portions of Records 6, 15, 18, 73, 124, 191, 223, 254, 257, 259, 454, 479, 480, 485, 489, 494, 501, 510, 513, 520, 522, 529, 537, 573, 582, 586, 587, 625, and parts of Records 52, 70, 123, 130, 192, 245, 503, 516, 543 and 553 which I have highlighted in **pink** on the copy of the records provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose to the appellant Record 141 in its entirety and those portions of Records 23, 52, 70, 83, 123, 130, 192, 245, 247, 503, 516, 543 and 553 which I have highlighted in **yellow** on the copy of the records being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
3. I order the Ministry to disclose to the appellant those records highlighted in **yellow** and listed under Provision 2 within thirty-five (35) days of the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which is provided to the appellant in accordance with Provision 2.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ January 31, 1995

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
6	Minister's briefing note	13(1)
15	Briefing note to Deputy Minister	17(1)(a)
18	Memorandum re Field Lumber wood supply	13(1)
23	Memorandum re Field Lumber - update	17(1)(a)
52	Minister's briefing note	13(1)
70	Letter from Ministry to RoyNat Inc.	13(1)
73	E-mail re teleconference	13(1)
83	Letter from solicitors to Ministry	not responsive, 17(1)(a)
123	Letter from solicitors to Ministry	13(1), 17(1)(a)
124	E-mail re issuance of licences	19
130	Draft action proposal	13(1)
141	Letter from solicitors to Ministry	not responsive, 17(1)(a)
191	Proposed action plan	13(1)
192	Draft action proposal	13(1)
223	E-mail re teleconference	13(1)
245	Draft briefing note	13(1)
247	Handwritten meeting notes	17(1)(a)
254	Draft briefing note	13(1)
257	E-mail	13(1)
259	Handwritten conference call notes	19
454	E-mail re draft briefing note	13(1)
479	Draft briefing note	13(1)
480	Handwritten meeting notes	13(1)
485	Memorandum to file re telephone call	13(1)

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
489	Handwritten meeting notes	13(1)
494	Handwritten meeting notes	13(1)
501	E-mail	13(1)
503	Minister's issues note	13(1)
510	E-mail re teleconference	17(1)(a)
513	Handwritten conference call notes	13(1)
516	Memorandum re Field Lumber licence/supply	13(1), 17(1)(a)
520	E-mail re telephone conversation	17(1)
522	E-mail	13(1)
529	E-mail re Minister's briefing note	13(1)
537	Memorandum re conference call	13(1)
543	Letter re action proposal	13(1)
553	E-mail re draft briefing note	13(1)
573	E-mail re receiver	19
582	E-mail	19
586	E-mail	19
587	E-mail	19
625	Comments on draft briefing note	13(1)