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

ORDER PO-1675

Appeal PA-980210-1

Ministry of the Natural Resources

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BACKGROUND

The Ministry of Natural Resources (the Ministry) indicates that the statutory authority for the forest management on Crown lands is the Crown Forest Sustainability Act (the CFSA). Pursuant to section 7 of the CFSA, Crown lands are divided into Crown Management Units (CMUs). Operators that wish to harvest forest resources must have either a forest resource licence issued under section 27, or a Sustainable Forest Licence (SFL) issued under section 26 of the CFSA. SFLs are long term evergreen licences which cover an entire CMU. Overlapping forest resource licences may be issued to smaller operators on areas subject to a SFL, pursuant to section 38. In these instances, an overlapping agreement must be negotiated between the operator and the holder of the SFL. Holders of a SFL are responsible for preparing a forest management plan and for forest renewal on the CMU.

The Ministry states that it has been encouraging smaller and medium sized forest companies and businesses to form corporations for the purpose of obtaining a SFL. In these cases, the corporation assumes responsibility for preparing the forest management plan, and does forest renewal on the CMU. The operation of the corporation is governed by a shareholders' agreement, negotiated by the various participating operators. The Ministry states that it is not a party to any such agreement. Rather, the Ministry's role is to review the shareholder agreement and assess the viability of the corporation before issuing a SFL.

NATURE OF THE APPEAL:

A group of operators formed a forest management company for the purposes of obtaining a SFL. These operators negotiated a shareholders agreement. The Ministry received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to this shareholders' agreement.

Before responding to the request, the Ministry notified the forest management company (the affected party), pursuant to section 28 of the Act, seeking its views on the possible disclosure of the record. After considering the affected party's response, the Ministry issued its decision to the requester denying access to the record pursuant to section 17(1) of the Act (third party information).

The requester, now the appellant, appealed this decision.

I sent a Notice of Inquiry to the Ministry, the appellant and the affected party, as well as the 25 operators who were parties to the Shareholders' Agreement (the other affected parties) and certain individuals identified in the record whose personal interests might be affected by disclosure (the affected persons). I included section 21 of the Act (invasion of privacy) in the Notice as a possible relevant exemption claim.

Representations were received from the appellant, the Ministry and the affected party, but not from any of the other affected parties or any of the affected persons.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 17(1)(a), (b) and (c) of the Act 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,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

For the record to qualify for exemption under sections 17(1)(a), (b) or (c), 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 Ministry in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

Part One

"Commercial information" has been defined in past orders to mean information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply can apply to both profit-making enterprises and non-profit organizations, and has equal application to bothlarge and small enterprises [Order P-493].

"Financial information" has been defined in past orders to mean information relating to money and its use or distribution and must contain or refer to specific data. For example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs [Orders P-47, P-87, P-113, P-228, P-295 and P-394].

The Ministry submits that the record contains commercial information. It states that the affected party is a corporation formed by a number of operators whose businesses involve the harvesting and processing or milling of timber for the purpose of holding a SFL. The Ministry submits that:

> The Agreement contains or outlines financial information and details relating to the business relationship of the shareholders, their employment and assets in the area.

The affected party adds that:

> The agreement reveals commercial information regarding the internal management of the corporation, the transfer of shares, the shareholders of the corporation, and the internal financial management of the corporation. For example, there are provisions regarding the purchase and sale of shares of these corporations.

The appellant argues that the information contained in the record is of a general corporate nature and does not relate to commercial functions such as the buying, selling or exchange of products, property, goods or services.

The Shareholders' Agreement itself sets out very specific provisions regarding the operation of the corporation, including the manner it which it conducts business and how various financial aspects of the licence arrangement will operate. In my view, the information in the record clearly meets the criteria of "commercial" and "financial" information for the purposes of section 17(1).

Part Two

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

Supplied

The Ministry and the affected party both submit that the record was supplied to the Ministry by the affected party, at the Ministry's request, to determine whether the affected party was a suitable candidate for the issuance of the SFL.

The appellant submits:

> As regards the phrase "supplied" in subsection 17(1) of the Act, the Shareholders' Agreement will only have been supplied to the MNR if the MNR had no role in the

> negotiations that led to the Shareholders' Agreement (Order 87). Given that the [named] Company was formed in order to receive a SFL under the provincial government's CFSA, and given that all the rights and duties of the [named] company relate to operations on public lands, it would be surprising if the MNR were not involved in any way in the negotiations and structure of the Shareholders' Agreement (ie. it was only submitted to the MNR after it was finalized).

It is clear from the contents of the record that the Ministry is not a party to the Shareholders' Agreement. It is also clear that the role of the Ministry in the scheme under the CFSA is to review agreements after they have been negotiated, not to participate in the negotiations themselves. Based on the explanations provide by the Ministry and the affected party, I am satisfied that the record was supplied to the Ministry and that the Ministry was not involved in its negotiation.

In Confidence

In order to establish that the record was supplied either explicitly or implicitly in confidence, the Ministry and/or the affected party must demonstrate that an expectation of confidentiality existed at the time the record was submitted (Order M-169), and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

(1) Communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the Ministry.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

The Ministry states that due to the sensitivity of the information contained in the record, there was an implicit understanding that the record was supplied to it by the affected party in confidence.

The affected party submits:

> [The Shareholders' Agreement] was submitted by the corporation along with a business plan, and as indicated earlier, the business plan specifically indicated that it was supplied in confidence. There was never any indication from the Ministry that the expectation of confidentiality would not be honoured. The corporation has consistently treated the shareholders agreement as a private confidential document whenever anyone has requested its production. To the corporation's knowledge, the agreement is not made available to the

> public from any other sources. The agreement was prepared for internal management purposes which would not entail disclosure.

The appellant's argument on the issue of confidentiality centres on his view that similar information was available to the public under the forest management regime that existed prior to the enactment of the CFSA in April 1995. The appellant states:

> ... information that was formerly wholly in the public domain is now contained in agreements (such as the Shareholders' Agreement) among private sector parties ... Prior to the establishment of the [named] Company and the granting of an SFL to the [named] Company, this information for the CMU would have been publicly available. It is our submission that this information should remain available to the public.
>
> ... given the public nature of the rights and responsibilities contained in the Shareholders' Agreement, and given the fact that the Shareholders' Agreement was concluded for the sole purpose of obtaining an SFL, the [named] Company cannot reasonably expect that the information contained in the Shareholders' Agreement would be confidential information.

I find that the affected party, with support from the Ministry, has established a reasonable expectation that the record was supplied to the Ministry implicitly in confidence. Even if I were to accept the appellant's position that comparable information was publicly available under the previous forest management regime, which is not clear, it does not follow that the expectation of confidentiality with respect to the Shareholders' Agreement submitted under the new regime is not reasonable.

Part Three

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

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

> Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was

> it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]
>
> [Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)]

Section 17(1)(a)

The affected party submits that disclosure of the record could interfere with the contractual or other negotiations of the shareholders and the corporation. According to the affected party:

> The agreement contains information regarding management of the corporation that the corporation would not make public in any negotiation which it has with other parties. In addition, disclosure could effect the negotiations of shareholders with other parties in connection with issues such as the sale of their shares.

The Ministry adds that disclosure of the record would benefit the appellant as a party with whom the affected party must negotiate an overlapping agreement for harvesting timber in the area covered by the SFL. The Ministry states:

> The [appellant] will have an overlapping licence on the unit. This means that it will have to negotiate a third party licence with [the affected party] under section 38 of the Crown Forest Sustainability Act. Disclosure would reveal to, or put the [appellant] in a position to deduce the bottom lines for the third party in their negotiation from the sensitive business information contained in the Agreement. This would give the [appellant] an unfair advantage and would interfere significantly with contractual and other negotiations with third parties. Thus, the information falls clearly with section 17 of the Act and the Ministry has no choice but to exempt the information from disclosure.

The appellant argues that disclosure could not prejudice the affected party's competitive position because, in the appellant's view, the affected party has a monopoly over logging in the CMU.

I am satisfied that the record is relevant to negotiations which the appellant and the affected party will be required to undertake pursuant to section 38 of the CFSA in order for the appellant to obtain an overlapping forest resource licence in the area governed by the SFL held by the affected party. Based on my independent review of the contents of the record and the submissions of both the Ministry and the affected party, I find that I have been provided with detailed and convincing evidence describing a set of facts and circumstances that could lead to a reasonable expectation that the harms described in section 17(1)(a) would occur if the record was disclosed to the appellant.

Accordingly, I find that the record qualifies for exemption under section 17(1)(a) of the Act.
Because of my findings here, it is not necessary for me to consider the application of sections 17(1)(b), (c) and 21 of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: May 11, 1999
Tom Mitchinson
Assistant Commissioner