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

ORDER PO-1988

Appeal PA-010166-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Natural Resources (the Ministry) made under the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to all records related to the development of a hydroelectric facility and dam on the north shore of the Kagiano River at the crest of the Twin Falls near Manitouwadge, Ontario, since June 1998 following the Department of Fisheries and Oceans (DFO) authorizations under the *Canadian Environmental Assessment Act*, including records on project implementation, mitigation of project effects, or adherence to conditions of authorizations.

Through subsequent communications between the appellant and the Ministry, the request was narrowed to encompass all "Twin Falls Project weekly progress reports and MNR Inspection reports since June, 1998" and "mitigation/compensation performance monitoring program reports submitted to the Ministry of Natural Resources, Manitouwadge area and the Department of Fisheries and Oceans, Fisheries and Habitat management – Ontario". In its decision, the Ministry denied access to the weekly progress reports and Ministry inspection reports, in reliance on the mandatory exemption in section 17(1) of the *Act* (third party information) and the discretionary exemption in section 14(2)(a) (report prepared in the course of law enforcement).

The Ministry also indicated in its decision letter that no records exist in relation to the "mitigation/compensation performance monitoring program reports" specified in the request.

The appellant has appealed the Ministry's decision to refuse access to the records it located. In his letter of appeal, the appellant has referred to the provisions of section 23 (public interest override) of the *Act* in support of his position that the records should be disclosed.

I sent a Notice of Inquiry to the Ministry and to certain affected parties, initially, inviting their representations on the facts and issues in dispute. I received representations from the Ministry, but none from any of the affected parties. The Notice of Inquiry and complete representations of the Ministry were sent to the appellant, who has made representations in response.

RECORDS:

The records have been numbered by the Ministry as A0009653 to A0009781, and total 156 pages.

Records A0009653 through A0009694 consist of the following:

- weekly progress reports covering the period from March 15 to April 19, 1999 and December 3, 1998 to January 20, 1999, printed on plain paper, prepared by a named engineer with a named consulting firm.
- weekly progress reports covering the period from January 30 to March 10, 1999, printed on the letterhead of a second consulting firm.
- weekly progress reports covering the period from the beginning of August 1998 to December 2, 1998, submitted by a third consulting firm.
- six pages of handwritten notes apparently authored by representatives of construction contractors, reporting on production progress and schedules during July and August of 1998.

The Ministry has relied on the provisions of section 17(1) of the *Act* with respect to the above.

Records A0009695 through A0009781 consist of the following:

- area inspection reports, handwritten on pre-printed Ministry forms, signed by various employees of the Ministry, submitted on average weekly (occasionally more frequently) and covering the period between July 21, 1998 and November 24, 2000.
- a printout of email correspondence from an employee of the Ministry to another employee of the Ministry, providing comments about a site visit on June 19, 2000.
- cover letters to Ministry area inspection reports sent to consultants on the project and to the DFO.
- two photographs
- a map bearing three signatures

The Ministry has relied on the provisions of sections 17(1) and 14(2)(a) with respect to the above.

DISCUSSION:

THIRD PARTY INFORMATION

Introduction

Section 53 of the *Act* states that where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this *Act* lies upon the head. Affected parties who rely on the exemption provided by section 17 of the *Act* to resist disclosure of certain parts of a record share with the institution the onus of proving that this exemption applies (Order P-228).

Section 17(1) of the *Act* states:

> 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

> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. In Order PO-1805 Senior Adjudicator David Goodis, discussing the purposes section 17(1), stated that this provision was designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions".

Although, as stated in other orders, 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 information that, while in the possession of government, constitutes confidential information of a third party which could be exploited by a competitor in the marketplace.

In applying section 17(1), previous orders have held that in order to support an exemption from disclosure under this section, institutions or affected parties must establish 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 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Since my finding on the third part of the above test (reasonable expectation of harm) is determinative, it is not necessary to consider the first two parts.

Part Three: Harms

Past decisions have stated that in order to discharge the burden of proof under the third part of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed: see, for example, Order P-373. Recently, the Court of Appeal for Ontario accepted the requirement for "detailed and convincing" evidence, stating, among other things that:

> [s]imilar 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.
>
> [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

In this case, among the third parties notified of the appeal were contractors who prepared the weekly progress reports or who were involved in the construction work on the site. Despite having the opportunity to submit representations, none of these parties has done so. In Order PO-1791, I stated:

> As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it.

The case before me raises similar considerations. The Ministry acknowledges in its representations that the affected parties and not the Ministry are in the best position to present evidence on the issues of harm. Although the Ministry believes that disclosure of the information in the records would result in prejudice to the competitive position of the affected parties, it does not offer any specific evidence to support this contention, simply drawing to my attention "the fact that the electricity market has been deregulated and is now a competitive market".

In the end result, neither the representations of the Ministry nor the records themselves provide the "detailed and convincing evidence" of a reasonable expectation of harm required to support the application of section 17(1) to this case.

LAW ENFORCEMENT REPORT

The Ministry claims that section 14(2)(a) of the *Act* applies to give it the discretion to refuse access to the second group of records at issue, primarily consisting of area inspection reports. Other than the area inspection reports, the group includes cover letters attached to copies of these reports sent to others, one email message summarizing the author's observations and conversations during a joint site visit with the DFO, two photographs and a map. The photographs and map appear to accompany specific area inspection reports.

The area inspection reports consist of pre-printed Ministry forms, completed in handwriting by Ministry inspectors. The forms have areas for the inspector to provide information on such matters as: location (licensee, township, license number, contractor etc.), inspection (date, name of inspector, type of activity inspected, whether the inspection is "routine", "follow-up" or "other", etc.), results of inspection (checklist of logging activities inspected), details of non-compliance, other observations, comments, and action required by the Ministry.

On a review of the forms, their purpose appears to be to record the observations and actions of Ministry inspectors on site visits. They provide information as to the state and progress of the

project. On some of the documents, the inspector records making suggestions or reminders to the contractor. One document, for example, contains a suggestion about the timing of removal of blasting signs and rope barricades. Almost all of the documents characterize the visit as "routine" in purpose. Almost all state that the only action required is to continue with the ongoing inspections, with some also noting specific areas of follow-up for the Ministry on matters noted during the visit.

Section 14(2)(a) reads:

> A head may refuse to disclose a record,
>
> > that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the Ministry must satisfy each part of the following three part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law [see Order 200 and Order P-324].

With respect to the first part of the above three-part test, the word "report" is not defined in the *Act*. However, previous orders have found that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

With respect to the second part of the test, in order for a record to qualify for exemption under this section, the matter to which the record relates must satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. This section states:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
> >
> > (c) the conduct of proceedings referred to in clause (b);

Section 14(4) of the *Act* provides a mandatory exception to the exemption in section 14(2)(a). This section states:

> Despite clause 2(a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

The Ministry submits that the second group of records meets the requirements for exemption under section 14(2)(a), and is not covered by section 14(4). It is submitted by the Ministry that the records are reports which were generated by staff visiting the site. Most are entitled "Area Inspection Report", and contain analysis and conclusions of the person conducting the inspection under the headings "Details of Non-Compliance" and "Comments". These sections not only identify non-compliance where it occurs but set out the rationale for such a conclusion. The documents and supporting material move beyond mere recitations of facts or observations, but are collations and considerations of facts and observations.

The Ministry submits that the records were prepared in the course of inspections whose purpose is to ensure that the proponent is complying with the terms and conditions of his work permit approvals and those laws which are applicable. Where there has been non-compliance, the inspections and related reports will form part of the decision making process within the Ministry on whether there is sufficient evidence to lay charges or take other compliance action.

Further, the Ministry submits that it is a law enforcement agency as contemplated by section 14(2)(a) of the *Act* in that it is charged with the management of the *Public Lands Act*, and is responsible for issuing stop work orders and laying charges under that *Act*.

With respect to section 14(4), the Ministry states that the reports are not routine. Relying on Order P-1120, the Ministry submits that discretion to report is an element in determining whether a report is routine. In Order P-1120, it was found that the discretion of the Ministry of Finance to decide whether an inspection would be conducted against individual companies justified a finding that the report was not "routine" as contemplated by section 14(4). The Ministry states that in this case, there are no standards within the Ministry governing how and when these inspections are conducted. They are not mandatory. The decision to conduct the inspections and generate the reports was a matter of discretion. The size of the project and the environmental sensitivities associated with it are elements which were considered in the exercise of that discretion. Further, there has been some concern among local citizens around elements of the project, and these concerns were also an element in the exercise of the Ministry discretion. The expression of such concerns or complaints and the response to them by conducting inspections supports the view that these inspections and related reports are not "routine" as contemplated by subsection 14(4). The Ministry relies on prior orders which have found that complaint-driven inspections cannot be said to be "routine".

The appellant states that it agrees that the majority of the records are "reports." However, he submits that some of the records may simply be recordings of observations and fact and thus outside section 14(2)(a). Further, the appellant submits that section 14(4) applies to mandate the disclosure of these records. He asserts that the Ministry has provided no evidence on the practice of its agency, nor any evidence of specific complaints that lead directly to the undertaking of

these inspections. The appellant understands that the records include a number of similar reports, and that they were carried out pursuant to approval requirements, not complaints. He submits that section 14(4) is directly applicable.

Analysis

Section 14(2)(a)

I am satisfied that the records at issue were prepared in the course of "law enforcement, inspections or investigations" by an agency having the function of enforcing and regulating compliance with a law. However, I find that most of the records do not meet the definition of a "report" for the purpose of section 14(2)(a).

The term "report" as used in section 14(2)(a) (or its municipal equivalent) has been considered in a number of prior orders. As I have set out above, these orders have found that "mere observations or recordings of fact" are insufficient to qualify as a report. In Order M-1109, for example, Assistant Commissioner Tom Mitchinson found that police occurrence reports did not qualify as "reports" for the purpose of the municipal equivalent to section 14(2)(a), as they consisted primarily and essentially of descriptive material, and notwithstanding that they contained a few comments which might be considered evaluative in nature.

In Order M-364, Inquiry Officer Mumtaz Jiwan considered whether inspection reports and deficiency notices created by the building department of a municipality having the function of enforcing and regulating compliance with the *Building Code Act, 1992* and the Building Code qualified for exemption under the municipal equivalent to section 14(2)(a). The inspection reports consisted of a series of entries on pre-printed forms, individually dated and containing observations on the work completed and the remedial work required to be done. The deficiency notices were also on pre-printed forms and listed the deficiencies observed and the remedial work required. Inquiry Officer Jiwan rejected the argument that these inspection reports and deficiency notices met the definition of a "report".

In Order MO-1238, Senior Adjudicator David Goodis applied the reasoning in Order M-364, also finding that inspection reports of a municipal building inspector did not qualify as "reports.

In sum, although it is generally accepted that occurrence reports or inspection reports are generated out of law enforcement activities, it has been found that they do not have the quality of formality of analysis required to qualify as "reports" for the purpose of section 14(2)(a) or its municipal equivalent. I find that the area inspection reports before me are similar in nature to the records under consideration in the above orders. Their purpose is to describe, rather than to evaluate and their contents consist essentially of observations and facts rather than evaluations of those observations and facts. The fact that there are some comments in some of the reports which might be considered evaluative does not detract from their essential nature.

I therefore conclude that the area inspection reports (include the accompanying photographs and map) do not qualify as "reports" for the purpose of the section 14(2)(a) exemption, and the exemption accordingly does not apply to them.

My conclusions apply with even more force to the cover letters, which clearly do not meet the definition of a "report" under section 14(2)(a).

I find that the email message of June 26, 2000 (Record A0009701), recording a site visit with representatives of DFO and the Ministry, qualifies as a "report". Although it also contains observations and factual information, much of it is concerned with evaluating and deciding on future actions. I also find no reason to disturb the Ministry's exercise of discretion in deciding to withhold access to this record.

Section 14(4)

In the alternative, if the area inspection reports qualify as "reports" for the purpose of section 14(2)(a), I find that they were "prepared in the course of routine inspections" within the meaning of section 14(4) and must therefore be disclosed.

The inclusion of section 14(4) in the *Act* followed from a recommendation in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*,vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report). The drafters of that Report recommended that information gathered for regulatory enforcement purposes be treated the same as information gathered for criminal law enforcement, for the purposes of the law enforcement exemption. However, they were concerned that such an exemption not be too broadly construed:

> …if the notion of material relating to civil and regulatory enforcement is too broadly construed, much that should be made accessible under a freedom of information law would be brought within the exemption. In particular, it would be inappropriate to withhold routinely from public scrutiny all material relating to routine inspections and other similar enforcement mechanisms in such areas as health and safety legislation, fair trade practices laws, environmental protection schemes, and many of the other regulatory schemes administered by the government.
>
> Under the U.S. act, is has been accepted that routine material of this kind not gathered for the purpose of investigating a particular offence is not exempt from the general rule of access merely because it relates to the enforcement of law.

Consistent with the above discussion, orders interpreting section 14(4) of the *Act* have found that "complaint driven" inspections are not "routine inspections" (see, for instance, Order 136). Other orders have concluded that the existence of a discretion to inspect or not to inspect is an important factor in deciding whether an inspection is "routine" (see, for instance, Order P-480 and P-1120).

I agree that the existence of a discretion to inspect is a factor to be considered in deciding whether an inspection is "routine" for the purpose of section 14(4) of the *Act*. Since discretion, however, takes many forms and can be of varying levels of significance in the whole scheme of regulatory enforcement, I find that it is not always a determining factor. As was noted in Order 136 by former Commissioner Sidney B. Linden, "it is the nature of the inspection itself" which is

important. I turn therefore to consider the nature of the inspections which are recorded in the area inspection reports.

In this case, it appears that there was an exercise of discretion initially in deciding to monitor the construction project in question. It is reasonable to assume that the Ministry does not have its inspectors conduct weekly site visits of every project for which it issues a work permit approval. In this case, the Ministry states, the size of the project and the environmental sensitivities led it to conduct inspections of the ongoing work. Another factor in its decision to conduct inspections was the existence of some concerns amongst local citizens around elements of the project at the time that the Ministry was deciding on its approvals.

I therefore accept, as urged by the Ministry, that the decision to monitor this project through ongoing site inspections was a discretionary one, based on the particular circumstances of the project. However, in this case, I find that the existence of this discretion does not lead to a conclusion that the area inspection reports which were generated as a result were not "prepared in the course of routine inspections". On the facts before me, the decision to monitor the project was made without any specific investigatory purpose, but as part of the Ministry's general mandate to ensure compliance with its work permit approvals. The ensuing site visits were also without a view to investigating any particular infraction or instance of non-compliance with the work permit approvals or governing legislation, but were intended to ensure the orderly progress of the project. Further, the site visits were not the result of a new exercise of discretion each time, but became the ongoing means of monitoring the project.

Through these visits, Ministry officials could ensure that the terms and conditions of the applicable work permit were being followed. As part of these visits, the Ministry's inspectors completed standard form documents recording their observations from their site visits. These kinds of activities are similar to the type of enforcement or compliance activities engaged in by any number of government agencies in fulfilment of a regulatory mandate. I find that these reports arise out of precisely the kind of routine inspections and enforcement activities discussed in the Williams Commission Report in the above excerpt, and which the drafters of that Report were concerned ought not be shielded from public scrutiny.

Although the Ministry mentions the existence of "concerns" by local citizens, it is clear that its inspectors were not reacting to specific complaints about the project in conducting their ongoing site visits. The monitoring activity by the Ministry started at the very outset of the project, and was not in response to a complaint arising out of the construction itself.

I find the circumstances of this case distinguishable from other cases in which the application of section 14(4) has been considered and rejected, or partly rejected (see, for instance, Orders 136, P-1120, P-480 and P-323). None of those other cases dealt with the kind of regular, ongoing monitoring activity engaged in by the Ministry inspectors here.

In conclusion, even if the area inspection reports meet the definition of "reports" for the purpose of section 14(2)(a) of the Act, I find that they fall within the mandatory exception in section 14(4), and must be disclosed.

However, I find that the email message of June 26, 2000 (Record A0009701) does not fall into the section 14(4) exception as it is not clear that it arises out of the same kind of routine site visit as the other documents.

PUBLIC INTEREST OVERRIDE

The appellant has raised the applicability of the "public interest override" in section 23 of the *Act*, which states:

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

Since the only exemption I have upheld is section 14(2)(a) to Record A0009701, and section 23 cannot override the section 14 exemption, section 23 does not apply to the circumstances of this appeal.

ORDER:

1. I order the Ministry to disclose all the records at issue, with the exception of Record A0009701.

2. I order disclosure to be made by sending a copy of the records to the appellant by **February 21, 2002**, but no sooner than **February 14, 2002**.

3. 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 are disclosed to the appellant pursuant to Provisions 1 and 2.

Original signed by: January 24, 2002
Sherry Liang
Adjudicator