



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2158

Appeal PA-020201-1

Ministry of Natural Resources



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BACKGROUND:

In recent years, underwater log retrieval has become perceived as a lucrative business. Submerged logs (also referred to as “sunken” or “underwater” logs) left behind from the days when Ontario’s lakes and rivers were the haul roads to move harvested timber for companies and contractors are in hot demand. If retrieved and processed properly these logs can be very valuable for making high-end furniture and other products. In 1998, the Ministry of Natural Resources (the “Ministry”) developed a procedure regarding the practice of underwater logging entitled “Application for Retrieval of Sunken Logs - Review and Approval Requirements”. This procedure established an application process for underwater logging that brings together a complicated series of steps required by a variety of provincial and federal government agencies. Under the procedure, applicants are required to provide the Ministry with information concerning their proposed operations and to obtain necessary approvals and permits. The information at issue in this appeal was submitted to the Ministry as part of the application process for a named company [the affected party].

NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to:

All information supplied to the Ministry [...] by a company identified to me as [a named company], any owners or partners thereof, specifically [a named individual], in regard to the removal of submerged logs from the Kingston area.

The appellant’s request arises out of her desire to address a discrepancy regarding the alleged removal of sunken logs in the Kingston area.

Upon receipt of the request, the Ministry notified the affected party and sought its views regarding disclosure of the requested information. After considering the affected party’s views, the Ministry decided to grant partial access to the records responsive to the appellant’s request.

The Ministry issued a decision to the appellant granting full access to some records and partial access to others. The Ministry’s denial of access was made on the basis of sections 14 (law enforcement), 17 (third party information) and 21 (invasion of privacy) of the *Act*.

The appellant appealed the Ministry’s decision to this office.

During the mediation stage of the appeal process, the appellant confirmed that she was only seeking access to three particular maps that reveal the locations of sunken log retrieval operations in a particular region. Accordingly, approximately 93 pages of responsive records were removed from the scope of the request and are no longer at issue in this appeal. The only records remaining at issue are the three identified maps. The section 14 and 21 exemption claims do not apply to the maps, so these sections have been removed from the scope of the appeal.

As the three maps remaining at issue were withheld under section 17 of the *Act*, the mediator contacted the affected party. The affected party advised the mediator that it objected to the release of the three maps.

The file was then transferred to me for inquiry. I first sought representations from the Ministry and the affected party. Both the Ministry and the affected party submitted representations that I shared in their entirety with the appellant. I then sought representations from the appellant. The appellant did submit representations; however, they are not relevant to the issues before me.

RECORDS:

The records remaining at issue consist of three maps (pages 13, 14 and 15), indexed by the Ministry as records 17289, 17290 and 17291.

DISCUSSION:

THIRD PARTY INFORMATION

Introduction

The Ministry claims in its representations that the records are exempt under section 17(1)(a) of the *Act*, which 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, if the disclosure could reasonably be expected to,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

For a record to qualify for exemption under sections 17(1)(a) 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 section 17(1) will occur [Orders 36, P-373, M-29 and M-37].

Part one: type of information

This office has defined the terms trade secret or technical or commercial information as follows:

Trade secret

“Trade secret” means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order M-29].

Technical information

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act* [Order P-454].

Commercial information

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term “commercial” information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order P-493].

I adopt these definitions for the purpose of this appeal.

The Ministry states "...that the information would be technical and/or commercial information of the affected party..." and offers the following additional comments regarding this view:

In this case, the documents are technical documents, in the form of maps relating to the location of sunken logs. Accordingly, they appear to fall within the [...] definition [of] "technical" information.

.

In this case, the enterprise is underwater logging. The operators retrieve logs on the bottom of water bodies (sic) and these logs are then sold to the appropriate mill. The maps show where the product, sunken logs are located. Therefore, it is the position of the Ministry that they reveal commercial information.

The affected party indicates that the records reveal technical and commercial information and its "trade secret" and must remain confidential. Disclosure of the records would reveal the specific locations of its logs. The affected party sees the records as three "treasure maps".

In Order PO-2009, a third party appeal, Senior Adjudicator David Goodis briefly addressed the issue of "locations" of underwater logging activity in relation to section 17. In that case, an affected party unsuccessfully appealed the Ministry's decision to grant partial access to records relating to underwater logging. Senior Adjudicator Goodis concluded that disclosure of the records would, at best, reveal only generalized geographical areas and, therefore, part one of the test could not be met. However, significantly, he did "...accept that information revealing precise locations of the proposed underwater logging could constitute commercial or technical information."

I accept Senior Adjudicator Goodis' analysis and apply it to the circumstances of this appeal. Based on my review of the parties' representations and the records, I find that they contain technical and commercial information.

The records comprise three maps that designate the locations of underwater logs at various points within a named body of water. The locations are marked on the maps and identified by differential global positioning system (D-GPS) coordinates. In my view, the presence of the D-GPS coordinates is significant. They provide the holder of these maps with the precise locations of underwater logs and/or proposed underwater logging, information that is technically and commercially valuable.

Accordingly, I find that part one of the test has been met.

Part 2: "supplied in confidence"

Introduction

In order to satisfy part 2 of the test, an affected party and/or the Ministry must show that the information was "supplied" to the Ministry "in confidence", either implicitly or explicitly.

The requirement that it be shown that the information was supplied to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties. The following passage, from *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), addresses this purpose:

. . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. (pp. 312-315) [emphasis added]

To meet part 2 of the test, it must first be established that the information in the record was actually supplied to the Ministry, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry [Orders P-203, P-388 and P-393].

With respect to whether the information was supplied "in confidence", part 2 of the test for exemption under section 17(1) also requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly [Order M-169].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

1. Communicated to the institution 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 person prior to being communicated to the government organization.

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]

Representations

The Ministry states:

When documents are supplied, as they were in [this] case, determination of whether they were supplied in confidence rests on the reasonable expectation of the affected parties. The affected parties are in the best position to provide such evidence. Accordingly, the Ministry relies upon the representations and evidence of the affected parties. However, ...[b]ased on previous requests, the Ministry has consistently treated information relating to the specific location of sunken logs as sensitive and informed industry that it is aware of those concerns. The procedure relating to the retrieval of sunken logs requires the applicant to identify information, which it considers confidential. The affected party has indicated that the maps are confidential. In the circumstances, it is implicit that when the maps were supplied to the Ministry by the affected party, it did so on the basis that they would be held in confidence by the Ministry.

The affected party states:

We supplied the information in strict implicit and explicit confidence to several ministries.

.

Their locations are absolutely confidential, since they reveal technical and commercial information.

Findings

I find that the records were *supplied* by the affected party to the Ministry in respect of its application to obtain necessary approvals and permits to conduct underwater logging operations in specified bodies of water.

With respect to the *in confidence* portion of the part 2 test, while the affected party suggests that there was an explicit expectation of confidentiality, there is no evidence before me to support this position. However, based upon the submissions of both the affected party and the Ministry, I find an implicit expectation of confidentiality due to the highly competitive nature of the underwater logging business and the value of these locations to those in the business.

Accordingly, I find that the records meet part 2 of the test under section 17(1) of the *Act*.

Part 3: Harms

Introduction

To discharge the burden of proof under part 3 of the test, the parties opposing 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 [Order P-373].

The words “could reasonably be expected to” appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated “harms”. In the case of most of these exemptions, in order to establish that the particular harm in question “could reasonably be expected” to result from disclosure of a record, the party with the burden of proof must provide “detailed and convincing” evidence to establish a “reasonable expectation of probable harm” [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Representations

The Ministry states:

[T]here has been a growing interest in underwater logging with a large number of new entrants to the field. Given that there are only a fixed number of sunken logs, there has been increasing competition in the area. The Ministry has been made aware of cases where sunken logs were stolen or where rival operations were set up adjacent or nearby to the areas identified in applications for sunken log retrieval. Given the environmental and other sensitivities associated with the process, applicants are required to go through a number of steps to ensure that the logs may be retrieved in a safe and environmental friendly way. To meet those requirements, applicants are required to make a not insignificant financial outlay. It is the position of the Ministry that if the maps were released, it would identify the specific location of sunken logs. This would allow the unscrupulous to remove the logs without authorization. This would result in a loss of revenue to the Crown and potentially result in harm to the environment. It would result in loss to the affected party who has complied with the requirements at some cost, but who would be deprived of the ability to sell logs which may be stolen as a result of disclosure. It is the position of the Ministry that in these circumstances that loss or harm would be undue. Therefore, it is

the position of the Ministry that the records fall within the scope of section 17 of the Act and are exempt from disclosure.

The affected party states:

The information provided was gathered at considerable amount of time, energy and money.

.
The disclosure of the specific locations of our logs (our 3 treasure maps) would significantly prejudice our competitive position and would cause us significant losses.

.
[T]he release of the three maps is like making your very own treasure map public. The maps are our “trade secret” and must remain confidential at all cost.

Findings

In considering part 3 of the test under section 17(1), I have carefully weighed the representations submitted by the Ministry and the affected party, the nature of the underwater logging industry and the records.

I am satisfied that disclosure of the three maps to the appellant could reasonably be expected to prejudice significantly the affected party’s competitive position in the underwater logging industry. I have reached this conclusion for the following reasons.

Underwater logging is a highly competitive regulated industry. Those in the business must go to considerable expense and effort to gain licences and approvals to engage in underwater logging. Success for an underwater logger is measured by their ability to locate logs. Maps that reveal detailed information about the location of underwater logs are critical to achieving commercial success. In the words of the affected party, the records in this case represent three “treasure maps”. In my view, a sophisticated user of the maps would be led to valuable underwater logs. In the hands of the affected party the maps provide an exclusive opportunity to reap the rewards of its considerable investment of time and money in this business. In the hands of a competitor, such as the appellant, the affected party’s ability to realize on its investment is significantly prejudiced.

This finding can be contrasted with the conclusion in Order PO-2009, since here the maps contain information far more specific than “generalized geographical areas”.

In conclusion, I am satisfied that the harm described in section 17(1)(a) could reasonably be expected to occur if the records are disclosed to the appellant.

ORDER:

I uphold the Ministry's decision to deny access to the three records at issue under section 17(1)(a) of the *Act*.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ June 30, 2003