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

ORDER PO-2174

Appeal PA-010298-1

Ministry of the Environment

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NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of the Environment (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 information relating to underwater logging.

I recently dealt with an appeal involving underwater logging in Order PO-2158. In that order I provided the following background to the underwater logging industry:

> 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 […] 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 [of Natural Resources] with information concerning their proposed operations and to obtain necessary approvals and permits.

The Ministry acknowledged receipt of the request, and then requested an extension of time to search records/databases and to calculate fee estimates due to the wide scope of the request and the number of offices conducting the search for records. The Ministry, subsequently, issued a fee estimate and indicated that full access would be granted to the records. The appellant paid the fee. The Ministry then issued a further decision letter in which it stated that, after receiving and reviewing the records located in Kingston, Cornwall and Thunder Bay, it was revising its original decision to provide full access. In its revised decision letter, the Ministry indicated that it would provide partial access to the records. The Ministry stated that it was withholding access to certain information pursuant to sections 13(1) (advice or recommendations), 17(1) (third party information), 18(1) (economic and other interests) and 21(1) (invasion of privacy). The Ministry indicated that it might grant access to additional records after its "third party review" was completed.

Shortly thereafter, the Ministry disclosed additional records to the requester.

The appellant appealed the Ministry's decision to grant partial access to the records.

During the mediation stage, the mediator contacted both the appellant and the Ministry. The Ministry clarified that since the majority of the records originated with the Ministry of Natural Resources (MNR), it had consulted with MNR with respect to the third party information. The Ministry and the appellant confirmed that the appellant had filed a request for similar information with MNR.

During mediation, the Ministry prepared an Index of records listing 69 records totaling 480 pages, a copy of which was provided to the appellant and the mediator. The Ministry stated that it was no longer relying on section 18(1) of the *Act* and, therefore, the application of that section is no longer at issue in this appeal.

Also during mediation, the Ministry issued a second decision letter granting the appellant partial access to records 16 and 27, access to record 25 in its entirety, and providing the appellant with a refund for the amount charged for copies of pages that the Ministry continued to withhold. The Ministry, subsequently, issued a third decision letter in which it granted the appellant partial access to record 42 and full access to records 1 and 2. Accordingly, records 1, 2 and 25 are no longer at issue.

Also during mediation, the appellant stated that he was not interested in pursuing access to the personal information or personal identifiers of other individuals referred to in the records. Therefore, the application of section 21(1) is no longer at issue in this appeal.

The Ministry then issued a fourth decision letter in which it confirmed that it was continuing to withhold access to records 9, 11 and 15 on the basis that they are not responsive to the request. The responsiveness of these records remains at issue under section 24(2).

I initially sought representations from the Ministry on the application of sections 13(1), 17(1) and 24(2). The Ministry submitted representations and agreed to share the non-confidential portions with the appellant. The Ministry also indicated that it was no longer relying upon section 13(1) to deny access to record 3. Accordingly, record 3 is no longer at issue.

I then sought representations from the appellant who submitted representations on the above issues. The appellant raised the application of the section 23 public interest override in support of his request for disclosure.

I then sought representations, on the application of section 17(1) only, from five affected parties that may have an interest in some of the records at issue in this appeal. I heard from one of the affected parties; however, this affected party did not provide representations on the application of section 17(1).

RECORDS:

52 records remain at issue. Records 4, 5, 8, 12 and 49 have been withheld either in whole or in part pursuant to section 13(1). Records 6, 7, 10, 13, 14, 16-20, 22-24, 27-29, 31-47, 52, 54, 56-59, 61-63 and 65 have been withheld either in whole or in part pursuant to section 17(1). Portions of record 60 have been withheld pursuant to sections 13(1) and 17(1). Records 9, 11 and 15 have been withheld under section 24(2) as being non-responsive to the appellant's request.

I have broadly categorized the records as follows:

- applications and supporting material from underwater logging companies (the affected parties) to the Ministry and the federal government for permission to conduct underwater logging
- internal e-mails between Ministry employees
- correspondence and e-mails between Ministry and MNR employees
- correspondence between the Ministry and/or MNR and public interest groups
- correspondence between Ministry employees and affected parties regarding their proposals to conduct underwater logging
- e-mails between federal government employees and MNR
- correspondence between the federal government and affected parties
- correspondence between affected parties and those parties who may be impacted by underwater logging activities
- land use permits and applications
- work permit applications
- records relating to workshops on sunken log retrieval procedure
- records relating to the review of MNR's application procedure for conducting underwater logging
- maps designating bodies of water and locations within them where underwater logging is proposed

DISCUSSION:

RESPONSIVENESS OF RECORDS/SCOPE OF THE REQUEST

The request is dated March 7, 2001, and reads:

> All information pertaining to underwater logging otherwise known as retrieval of sunken crown timber. Copies of all reports, memos, e-mail, internal correspondence, guidelines, procedures, water monitoring, sediment monitoring, studies and other relevant documents received by or produced by the Ministry of Environment relating to the practice of underwater logging.

The Ministry takes the position that records 9, 11 and 15 are not responsive to the appellant's request, and explains its position as follows:

> Record 9 is strictly an internal administrative electronic mail message identifying a new file code. It is the Ministry's practice to keep internal file identifiers confidential, for security reasons. Record 11 is a transitory internal administrative routing slip used for correspondence control management. Record 15 is an internal electronic mail message regarding a workshop strategy. None of the information in any of these documents contribute to the responsiveness of the request.

The appellant makes no specific submissions on this issue.

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. Institutions should adopt a liberal interpretation of a request in order to best serve the purpose or spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

With regard to record 9, I agree with the Ministry that it is an "internal administrative electronic mail message identifying a new file code". However, I note that the Ministry appears to have initially identified this record as being responsive, claiming the application of section 13(1), but later changed its position. In addition, the contents of the record relates to underwater logging. In light of the wide scope of the appellant's request and the Ministry's ambiguous position in regard to the record, I conclude that record 9 is responsive to the request. Since the Ministry has claimed no exemption for this record, I will order the Ministry to disclose it to the appellant.

Record 11 does appear to be an "internal administrative routing slip", as described by the Ministry. However, the record discloses information regarding a suggested course of action for the Ministry to take in respect of underwater logging activity. In the circumstances, I find that this record is responsive to the appellant's request. Since the Ministry has claimed no exemptions for this record, I will order the Ministry to disclose it to the appellant.

The Ministry describes record 15 as an "internal electronic mail message regarding a workshop strategy". I agree. However, while the message does not refer to underwater logging directly, the subject matter of the workshop is underwater logging. The message refers to issues for discussion relating to possible changes to underwater logging policy and practice. Therefore, I find that record 15 is responsive to the request. Since the Ministry has claimed no exemption for this record, I will order the Ministry to disclose it to the appellant.

ADVICE OR RECOMMENDATIONS

Introduction

As stated above, the Ministry claims the application of section 13(1) as the basis for denying access either in whole or in part to records 4, 5, 8, 12, 49 and 60.

Section 13(1) reads:

> 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.

Section 13(1) is subject to the exceptions listed in section 13(2).

In Order 94, former Commissioner Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information in the records must contain or reveal a suggested course of action that will ultimately be accepted or rejected by its recipient, who is senior in status to the person delivering the information, during the deliberative process. [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

Representations

The Ministry states:

> The records at issue are electronic mail or correspondence intended for internal government communications purposes relating to site specific sunken logging operations and a policy review process. In the first instance, the Ministry's role is to review and provide recommendations to MNR for activities relating to

> retrieval of sunken logs and its effects on the environment. The Ministry's recommendations ultimately factor into MNR's, decision of granting work permits for under water to operations. Any environmental information which is to be made public or shared with work permit applicants, is formally documented and issued by MNR. The Ministry submits that disclosure of the information that has been withheld will inhibit the free flow of advice/recommendations between the Ministry and MNR.
>
> Underlying the issue of protecting the advice and recommendations is the principle that employees must be able to provide frank advice to decision makers during a deliberative process. With respect to the records at issue, it is submitted that MNR engaged the Ministry to provide advice and recommendations as part of policy review process and on site specific applications. It is reasonable to conclude that disclosure of deliberations between civil servants working in such contexts may result in less candid exploration of options to the long term detriment of both processes.
>
> In making its access decision and on receipt of the Notice of Inquiry, the Ministry considered the exceptions delineated by [sections] 13(2)(3) of [the *Act*]. It determined that the records at issue in the appeal are not subject to any of the exceptions delineated by these subsections, but constitute only advice or recommendations provided by the Ministry to MNR.

The appellant did not submit representations that are relevant to a determination of this issue.

Findings

Records 4 and 60 comprise e-mail and letter correspondence, respectively, between staff employed by the Ministry and staff employed by MNR, pertaining to MNR's sunken log retrieval application procedure. In my view, portions of these records contain information that would reveal the substance of a suggested course of action within the meaning of section 13(1).

Records 5, 8 and 12 are internal e-mail communications between Ministry staff also pertaining to MNR's sunken log retrieval application procedure. The portion of record 49 at issue in this appeal is an internal handwritten memorandum that deals with underwater logging activities. In my view, portions of records 8 and 12 contain information that would reveal the substance of a suggested course of action within the meaning of section 13(1). However, I find that records 5 and 49 do not fit within the section 13(1) exemption.

In my review of the records and the application of section 13(1) I discovered portions of record 65 that are either identical or similar to other records at issue under section 13(1).

In particular, one page of record 65 is a reproduction of record 12. The Ministry did not claim the application of section 13(1) to this document. Clearly, in light of the Ministry's position on

record 12, this was an inadvertent omission. Accordingly, my analysis and findings regarding record 12 apply to this one page of record 65.

I provide a more detailed analysis of my findings below.

Record 4

This record is an e-mail from a Ministry employee to an MNR employee. Paragraphs 1 and 2 provide a context for the communication but do not contain information that would reveal a suggested course of action. Accordingly, I find that section 13(1) does not apply to paragraphs 1 and 2 of record 4. However, the remainder of this record does contain detailed and specific recommendations from the Ministry employee to the MNR employee regarding proposed changes to particular sections of the underwater logging application document. In my view, this information does reveal a suggested course of action that could ultimately be accepted or rejected by MNR in a deliberative process. The phrase "any other person employed in the service of an institution" contained in section 13(1) should be interpreted broadly to include intergovernmental advice or recommendations that flows from one institution to another. This approach is consistent with the notion that all government institutions fall under the umbrella of "the Crown" for the purposes of the *Act*. Accordingly, the fact that in this case the recommendations are flowing from public servants employed by the Ministry to public servants employed by MNR does not preclude the application of section 13(1). Therefore, I find that section 13(1) applies to this portion of record 4.

Record 5

This record appears to be an internal e-mail communication between Ministry employees regarding the Ministry's current and future role in a policy review process. The communication contains the "musings" of the author. However, in my view, while the communication is strategic in nature, it does not reveal a suggested course of action that could ultimately be accepted or rejected by a Ministry employee in a deliberative process. Accordingly, I find that section 13(1) does not apply to record 5.

Record 8

This record also appears to be an internal Ministry e-mail communication regarding MNR's application process and environmental concerns regarding underwater logging.

I find that the first part of the record provides a context for the communication. It does not contain information that would reveal the substance of a suggested course of action within the meaning of section 13(1). The remainder of the communication contains the concerns and expectations of a Ministry employee regarding underwater logging and the application process and sets out recommendations regarding revisions to MNR's application process to ensure that the Ministry's concerns are met. In my view, this portion of the record does reveal a suggested

course of action that could ultimately be accepted or rejected by a Ministry employee in a deliberative process. Therefore, I find that section 13(1) applies to this portion of record 8.

Record 12

This record appears to be an internal Ministry e-mail communication that contains proposed recommendations for minor changes to MNR's application process.

As in record 4, paragraph 1 of this record merely sets out the context for the recommendations to follow. Accordingly, I find that this portion of the record does not contain information that would reveal the substance of a suggested course of action within the meaning of section 13(1). However, the balance of the record sets out recommendations for changes to a particular section of the MNR application for underwater logging permits. In my view, this information reveals a suggested course of action that could ultimately be accepted or rejected by a Ministry employee in a deliberative process. Therefore, I find that section 13(1) applies to this portion of record 12.

Record 49

The portion of this record at issue in this appeal is a one-page handwritten internal Ministry memorandum seeking input on proposals to conduct underwater logging activities in a specified area. This document does not contain any information that could be construed as advice or recommendations. Accordingly, I find that this record does not contain information that would reveal the substance of a suggested course of action within the meaning of section 13(1).

I also note that in two locations in this document the Ministry appears to have raised the application of section 17(1). While the Ministry has not formally raised section 17(1) as an exemption at either the request or appeal stages, I will consider its application since section 17(1) is a mandatory exemption.

Record 60

This record is a letter from a Ministry employee to an MNR employee regarding an underwater permit application submitted by a named underwater logging entity reviewed by a Ministry employee. The relevant portion sets out this Ministry employee's concerns and recommendations for MNR to consider regarding the issuance of a permit to this named entity. The circumstances here are identical to those pertaining to record 4. This letter reveals a suggested course of action by a Ministry employee that could ultimately be accepted or rejected by an MNR employee in a deliberative process. Therefore, I find that section 13(1) does apply to the relevant portion of record 60.

I also note that in three locations in this record the Ministry has raised the application of section 17(1). I will consider its application to these portions of the record.

Record 65

As indicated above, one page of record 65 is a reproduction of the internal e-mail that is record 12. Therefore, in keeping with my reasoning regarding record 12, I find the same portions of this one page document exempt under section 13(1).

THIRD PARTY INFORMATION

Introduction

The Ministry claims in its representations that records 6, 7, 10, 13, 14, 16-20, 22-24, 27-29, 31-47, 52, 54, 56-63, and 65 are exempt under section 17(1)(a), (b) and/or (c) of the *Act*. As stated above, I will also consider the application of section 17(1) to records 49 and 60.

Section 17(1) 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,
>
> (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;

Section 17(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. Section 17(1) is designed to protect the "informational assets" of businesses or other organizations that provide information to the government [Order PO-1805].

Although 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 which, while held by government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

For a 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 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

The Ministry submits that the records at issue contain both commercial and financial information. In my view, the records may also contain technical information [see Orders PO-2009, PO-2158 and PO-2172]. This office has defined the terms technical, commercial or financial information as follows:

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].

Financial information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include 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]

I adopt these definitions for the purpose of this appeal.

The Ministry states:

> [T]he information which reveals the business strategies or methodologies of the retrieval of sunken logs reveals the commercial information of these water logging businesses.
>
> . . . . .
>
> Financial information has been defined as information "pertaining to finance or money matters" (Orders 47 and P-607) and as "information which refers to specific data on the use and distribution of money, such as information on pricing practices, profit and loss data, overhead and operating costs." (Order P-80)
>
> [T]he information contained in the records would also reveal financial information of the water logging businesses in the number of and types of logs retrieved. [T]hese water logging businesses submitted this financial information to MNR with the expectation that it would be kept confidential.

The appellant does not make any specific submissions on this issue.

In my view the withheld portions of the records at issue contain technical, commercial and financial information, including

- information about the log retrieval procedures and methodologies of affected parties
- descriptions of log and logging locations (including, in some cases, maps, side-scan sonar readings and D-GPS readings)
- registrations (including Workplace Safety and Insurance Board clearance certificates, Notices for Diving Operations under the *Occupational Health and Safety Act*, articles of incorporation, and Revenue Canada business numbers)
- descriptions of fish and habitat conditions
- equipment to be used for underwater logging activities
- estimated volume and species of logs to be retrieved

This finding is consistent with earlier orders regarding underwater logging involving similar records [see Orders PO-2009, PO-2158 and PO-2172].

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.

"Supplied"

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 the "supplied" aspect of 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].

Neither the Ministry nor the appellant made any submissions on part 2 of the test under section 17(1).

Therefore, my analysis of the supplied aspect of part 2 of the test is based on a review of the records themselves and how this issue has been handled in similar circumstances.

In a recent order (Order PO-2172) involving MNR, Senior Adjudicator David Goodis dealt with a similar request for underwater logging records by the same appellant. The following passage from Senior Adjudicator Goodis' decision addresses the supplied aspect of part 2 of the test:

The Ministry submits:

> The information contained in the records exempted under s. 17 was supplied by persons who applied to the Ministry for permits to retrieve sunken logs from lakes throughout the province. A number of documents are required to be supplied to the Ministry as part of the application package. These applications have been used since the early 1990s to obtain information necessary to the Ministry and a number of government agencies before a Land Use Permit and Sale and Purchase Agreement is approved by the local Ministry district office. Applications for the retrieval of sunken logs were received by a number of Ministry district offices.
>
> Once an application is made, the review and approval requirements for applications for sunken logs can be time consuming and complicated. Applicants need to provide numerous pieces of information and documentation including from third parties like government agencies.

The Ministry also submits that although it obtained some information from other sources, such as the Ombudsman, where the affected parties originally supplied confidential information to these other parties who in turn provided it to the Ministry, it should be considered "supplied" under section 17.

The first affected party states:

> We consider the information contained in the Application Packages and all attendant Schedules that we have submitted to the [Ministry] to be the commercial heart of our business. There is absolutely no question that they were provided by us to the [Ministry] as confidential documents to be shared only on a "need to know" basis, that is, with those having a mandated involvement in the approval process.

. . . . .

In my view, most of the information contained in the records at issue under section 17 was supplied to the Ministry by the various affected parties during the course of the sunken log permit application process. In some cases, the records contain information that was not supplied to the Ministry by a third party; however, all of the information that I have found below meets the "harms" test under part 3 was in fact supplied to the Ministry, either directly from the third parties, or indirectly through other parties such as the Ombudsman. The fact that

> information may have been supplied to the Ministry indirectly does not negate the application of section 17.

I concur with Senior Adjudicator Goodis' analysis and conclusions and find that it applies here. In this case, some of the records contain information that was not supplied to the Ministry by a third party. However, as in Order PO-2172, all of the information that I have found below meets the "harms" test under part 3 was supplied directly or indirectly by a third party.

"In confidence"

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose which would not entail disclosure

[Order P-561]

Again, without any representations on this issue I am left to consider the records along with other decisions involving similar circumstances. Returning to Senior Adjudicator Goodis' decision in PO-2172, I refer to the following passage:

> The Ministry submits that while there were no explicit indications that information was supplied to it in confidence, the affected parties had an implicit expectation that information was supplied in confidence:

> . . . An important reason why applicants supply the information to the Ministry is to further their chances of being issued with a permit to retrieve sunken logs. It is in the best commercial interests of those applicants to be forthcoming and timely with the information required by the Ministry through its sunken log application, given the substantial investments made in preparing the application package.
>
> As part of the application process, the Ministry requires that applicants identify information contained in their applications that is confidential and/or proprietary in nature. Applicants are informed that their application will be shared with other government agencies as part of the approval process. Most ordinary citizens view the government as a monolithic institution, regardless of whether this is a provincial or federal government agency. An ordinary citizen is likely to consider that the nature of the relationship between them and the government is a confidential one, built on trust. As such, it is reasonable for an affected party to implicitly conclude that the information provided in their application was done so on a confidential basis.
>
> . . . . .
>
> I am persuaded that the information that I have found below meets the "harms" test was supplied to the Ministry, either directly or indirectly, with a reasonable expectation on the part of the Ministry and the affected parties that the information would not be disclosed to any parties outside other government agencies involved in the underwater logging approval process. Therefore, the second part of the three-part test is met with respect to this information.

I endorse Senior Adjudicator's reasoning in Order PO-2172. I am persuaded that the information below, which I have found to meet the "harms" test, was supplied to the Ministry, either directly or indirectly, with a reasonable expectation on the part of the Ministry and the affected parties that this information would not be disclosed to any parties outside other government agencies involved in the underwater logging approval process. Therefore, I find that part 2 of the three-part test is met for this information.

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:

> MNR advised the Ministry verbally on April 7, 2001, that the following harms could be expected should the records with third party information be disclosed.
>
> Businesses involved with retrieval of sunken logs are usually small. Sunken logs are in great demand and its retrieval is highly competitive; hence, any release of applicant-related information:
>
> 1) could reasonably cause businesses, economic hardship.
>
> 2) may cause other individuals/parties to unlawfully gain access to sunken logs, disturb fish habitat and the environment. MNR informed the Ministry there have been reports of damage and theft of retrieval equipment belonging to businesses which have been granted MNR permits.
>
> 3) would deter businesses from obtaining work permits and further lead to illegal access of sunken logs, disturbance of fish habitat and further damaging the environment.
>
> 4) work permit applicants could reasonably be expected to take legal action against the Ontario Government.
>
> Based on the above-mentioned harms, the Ministry relies on s[ection] 17(1) against disclosure of records which would reveal the commercial, financial information that was supplied implicitly in confidence. Further, any disclosure of these third party records would significantly prejudice the competitive position of a person, groups of persons or organization.

The appellant makes no specific representations on the harm issue.

Findings

Due to the similarity in the records at issue in this appeal and those in Order PO-2172 I find it instructive to consider the analysis and findings of Senior Adjudicator Goodis in Order PO-2172 in considering part 3 of the test under section 17(1).

Much of the Senior Adjudicator's analysis in that case was devoted to the application of section 17(1)(a). In this case the Ministry has claimed the application of sections 17(1)(a), (b) and (c). However, the Ministry has only offered general submissions in support of its position. The Ministry indicates that disclosure would result in possible economic hardship and alludes to prejudice to its competitive position. This position is unsupported by any evidence of economic hardship or prejudice to affected parties. Nevertheless, in my view, the Ministry's submissions raise the possible application of section 17(1)(a) and so I will consider it in light of the records at issue and Senior Adjudicator Goodis' findings in Order PO-2172.

In Order PO-2172, Senior Adjudicator Goodis started his analysis by considering information in the records that is publicly available, in part through notices that MNR requires underwater logging applicants to publish. The Senior Adjudicator found that, because of its public nature, this information did not meet the "harms" test under section 17(1):

> In order to put the following discussion in context, it is useful to consider the nature of the information the Ministry requires underwater logging applicants to publish. Under the Ministry's approval process, applicants must publish in local newspapers notices of their proposed logging. These notices are intended to allow any interested parties to comment on the proposed work, and typically contain the following categories of information:
>
> - the name of the company seeking approval
> - the duration of the land use permit being sought
> - a statement that the applicant intends to retrieve sunken logs
> - a written description of the specific location of the work [for example, a typical description may include: the name of the lake, the name of the particular bay, the name of the adjacent township, the location in relation to various landmarks such as islands (*e.g.*, off the northeast portion of Green Island), and specified adjacent concession and lot numbers (*e.g.*, offshore of Concession III, Lot 14 and Lots G and H]

- the approximate depth of the water in which the work will take place
- the approximate distance from shore the work will take place
- the fact that the retrieval area has been analysed by Differential-Global Positioning System (D-GPS) side-scan sonar, bottom sampling and other operational data as required by the Ministry
- the duration of the work (*e.g.*, 20 days during the ice-free months commencing this autumn and perhaps extending into the spring)
- the fact that the log retrieval will be carried out by experienced divers and direct hoisting methods acceptable to the Ministry
- the fact that the work will cause only minimal disturbance/impact to the lake bottom, landowners and fish and aquatic habitat
- the fact that the work does not involve any dredging or other disturbance of the lake bottom
- the fact that no work will be done during fish spawning periods
- the name or names of company representatives to contact regarding the proposed work, and the address and telephone number at which they can be reached
- a statement that any written comments should be copied to the Ministry
- a detailed map illustrating the specific location of the intended work, often denotes with arrows or other markings

Much of the information the Ministry withheld is very similar in nature to the information listed above, which is available to the public. In the circumstances, I am not persuaded that this information could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected parties under section 17(1)(a) of the *Act*.

In addition, some of the withheld information is otherwise available to the public, and I find that the "harms" under section 17(1)(a) are not made out in those cases, which include:

- companies' articles of incorporation and other corporate documents as filed with the Ministry of Consumer and Business Services

- historical business/social information about particular areas derived from publicly available sources such as libraries

- company literature and promotional material

- Ministry habitat and fishery studies of particular water bodies containing data such as measurements of water areas and water temperatures, and descriptions of fish species, vegetation and the like [see Order PO-2010].

The Senior Adjudicator went on to explain that certain information that is generally known within the underwater logging industry did not meet part three of the three-part test under section 17(1):

> Further, I am not persuaded that disclosure of other information, which is generally known to those within the underwater logging industry, could reasonably be expected to cause the harm described in section 17(1)(a). This information includes:
>
> - the amount of insurance coverage and performance bond required by the Ministry
>
> - generic workplace safety information
>
> - descriptions of equipment that is used by virtually all underwater logging companies (*e.g.*, side-scan sonar, D-GPS)
>
> - generalized descriptions of underwater logging processes and/or methodologies that are widely used and not linked to any individual company or project
>
> - names of mills that are known in the industry to buy harvested logs, where the information is not linked to a particular logging company

Senior Adjudicator Goodis then addressed some of the specific points raised by the Ministry and the affected parties on the "harms" issue:

> The first affected party submits that disclosure of its applications would reveal a "unique structure, methodology and content" and that this information is

"proprietary in nature". I do not accept this submission. In Order PO-2005, I said the following in response to a similar argument made by an underwater logging applicant:

> . . . I am not persuaded that disclosure of these records, which recite information requested by the Ministry in a very basic and straightforward manner, would reveal information of a proprietary nature concerning the application structure, timing and presentation methods.

For similar reasons, I find that disclosure of the applications as a whole would not reveal any proprietary information and thus it is not reasonable to expect that such disclosure would cause competitive or other harms described in section 17(1)(a).

I accept Senior Adjudicator Goodis' analysis and conclusions as described above, and find that they apply in this appeal. I find that disclosure of the types of information listed above would not cause competitive or other harm as described in section 17(1)(a), for similar reasons.

In Order PO-2172, Senior Adjudicator Goodis goes on to list other categories of information that he accepted *could* reasonably be expected to cause competitive harm under section 17(1)(a), including:

- accurate locations of individual logs, usually contained in sonar and/or D-GPS readings, where this information is clearly more precise than the information generally contained in the public notices

- specific logging processes and/or methodologies, where they may be linked to a specific company

- descriptions of specialized equipment that is not necessarily widely used in the industry, where that information is linked to a specific company

- specific numbers and species of logs a specific company intends to retrieve (in contrast to information about estimated numbers of logs in a given area)

- names and locations of mills that purchase logs, where the information is linked to a particular logging company

- detailed information about mill operations

- names and addresses of suppliers and sub-contractors (*e.g.*, commercial diving operators) of specific logging companies

- business plans of specific logging companies

- Workplace Safety and Insurance Board account numbers and firm numbers

In my view, these categories of information could be considered the "informational assets" of the affected parties, and would generally be considered useful to other companies in gaining a competitive advantage in the industry.

In my view, once the above categories of information are withheld, disclosure of the remaining information could not reasonably be expected to cause the harm described in section 17(1)(a).

The first affected party speaks of the "gold rush" mentality, and is concerned disclosure of information at issue could cause a competitor to "stake a claim" beside the "experienced log retriever who has done all the homework". First, that harm could already have taken place by virtue of the public notices that, as I have indicated, reveal relatively specific locations of proposed logging. Second, in my view, these relatively specific locations of proposed logging still lack the degree of specificity that would make them useful to a competitor, whether legal or illegal. For this reason, I accept that disclosure of only exact D-GPS readings of log locations could reasonably be expected to cause competitive harm to the affected parties. However, where the location information is similar in nature and specificity to the public notices, or less specific, I find that the harm is not made out. In addition, with regard to the concern regarding potential "legal" competitors, it stands to reason that the Ministry would not license a subsequent competitor to harvest logs in the exact same location as the original, "experienced" logger, since generally, upon approval of the application, the Ministry transfers ownership of the logs in a particular location from the Crown to the applicant.

The first affected party also expresses concerns regarding the data it has made significant efforts to collect, such as information regarding water conditions, fish and habitat conditions, log densities and conditions, boat traffic, shoreline information and other information of a similar nature. In my view, in the absence of more specific information about the precise locations of logs or of the precise locations of certain conditions, this information would not be useful to a competitor. As I indicated above, potential competitors are already aware that an applicant believes that in a specific area the geographical and biological conditions are ideal for underwater logging, by way of the public notice.

> Revealing data about a given area could not reasonably be expected to be of greater use to a competitor.
>
> The submissions of the second affected party relate mainly to the issue of the Ministry's policy of requiring publication of notices of intended logging, and do not assist me in regard to the application of the harms portions of the section 17(1)(a) test.
>
> To conclude, I have found that some of the information at issue qualifies for exemption under section 17(1)(a), while some does not.

I concur with Senior Adjudicator Goodis' analysis and findings.

After a thorough review of the information at issue under section 17(1) in this appeal, I find that some of it falls within the categories of information that Senior Adjudicator Goodis has coined the "informational assets" of the affected parties. Following his reasoning I agree that this information would generally be considered useful to other companies in gaining a competitive advantage in the underwater logging industry. For that reason, I find that this information should be exempt from disclosure. However, I also find that once the above categories of information are withheld, disclosure of the remaining information could not reasonably be expected to cause the harm described in section 17(1)(a).

To summarize, I find that some of the information at issue is exempt under section 17(1)(a), while some is not.

The Ministry has also claimed the application of sections 17(1)(b) and (c) to some of the information at issue. The Ministry argues that release of this information would deter businesses from obtaining work permits. While the Ministry has not specifically stated that disclosure would result in similar information no longer being supplied to it [section 17(1)(b)], perhaps this conclusion can be inferred from its statement. With respect to section 17(1)(c), the Ministry appears to take the position that disclosure may cause other entities to unlawfully gain access to sunken logs and/or the retrieval equipment of businesses which have been granted MNR licences.

As I indicated above, I accept that any confidential information that was supplied, directly or indirectly, to the Ministry qualifies for exemption, to the extent that it meets the "harms" test under section 17(1)(a). As a result, it is not necessary for me to consider the application of sections 17(1)(b) and (c), and I do not accept that any information not exempt under section 17(1)(a) would qualify for exemption under paragraphs (b) or (c).

PUBLIC INTEREST IN DISCLOSURE

Introduction

The appellant takes the position that section 23 applies to override the applicability of the section 13 and 17 exemptions. Section 23 reads:

> 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 [emphasis added].

In order for the section 23 "public interest override" to apply, two requirements must be met: (i) there must be a compelling public interest in disclosure; and (ii) this compelling public interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*), [1999] O.J. No. 484 (C.A.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398, cited above).

Representations

The appellant explains why he believes disclosure of the information at issue will advance the public interest, from his own perspective as a former underwater logger and current operator of a tourist establishment:

> My concerns about underwater logging started approximately 7 years ago when I started doing some [underwater] logging in a small inland lake in northern Ontario.
>
> We have been running a tourist establishment for 35 years. The area I logged from was considered an excellent pickerel (walleye) fishing spot for decades. After I was done logging this area I have been monitoring the effects.
>
> The fishing spot has been eliminated. Our camp patrons would harvest 100s of pickerel each spring until I logged. For the past 5 years the fish have disappeared.
>
> I have spent over $12,000 of my own money trying to make the government aware of the damage that could occur. The Ministry of Environment is

responsible to protect and monitor our natural resource. The [MNR] continues to influence all ministries in response to underwater logging.

My own observations to operations on [named lake] in October of 2001 were as follows.

- Ministry of Labour was not aware of operations
- [MNR] guidelines and regulations were not followed
- removing logs from literal zone
- logs stored in literal zone
- logs removed in front of cottages, near water intakes
- cottage owners were not aware of operations
- [the federal] Department of Fisheries and Oceans do not have the manpower to monitor and regulate these operations
- no surveys or studies have ever been done on the effects of underwater logging to our environment and water supply

Does the Ministry of Environment know of all areas that could be contaminated in our watersheds?

So when we (the public) are at risk from underwater logging's effects, we believe we are entitled to know where operations are taking place to protect our future fresh water supply.

I have been trying to understand for over 3 years why my freedom of information requests have been appealed when all I requested was public information which I feel we are entitled to.

The Ministry of the Environment is obligated to protect the public from harm.

Sunken Crown timber (underwater logs) is owned by the public. This is a non-renewable resource. Once these logs are removed they can never be replaced again.

For centuries these logs have played a valuable role in providing habitat.

Senior Adjudicator Goodis addressed the application of section 23 in Order PO-2172 with respect to section 17(1) and I note that the appellant provided identical representations in that appeal.

The Ministry does not offer any specific representations on the application of section 23. However, its representations under section 17(1) touch upon this issue. The Ministry seems to suggest that disclosure of the third party information may deter businesses from obtaining work

permits which, in turn, would allow competitors to unlawfully gain access to sunken logs, disturbing fish habitat and the environment.

Findings

Is there a compelling public interest in disclosure?

In Order P-1398, former Adjudicator John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "arousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.
>
> In upholding former Adjudicator Higgins's decision in Order P-1398, the Court of Appeal for Ontario in *Minister of Finance* (above) stated:
>
> > . . . in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at p. 1].

In light of the Court of Appeal's comments, I am adopting former Adjudicator Higgins's interpretation of the word "compelling" contained in section 23.

Again, the analysis and conclusions reached by Senior Adjudicator Goodis in Order PO-2172 apply in this case. In addressing the first requirement under section 23, he states:

> In my view, there is a compelling public interest in the disclosure of any information that would shed light on the serious environmental and health and safety issues raised by the practice of underwater logging in Ontario. I am persuaded by the appellant's representations that there are legitimate concerns about the practice of underwater logging, to the extent that it has potential impacts on both the environment (including the habitat of fish and other species) and public health and safety (including the integrity of the water supply). These concerns are reflected not only in the appellant's representations, but also in many of the records at issue, including media reports and statements by environmental groups, government agencies at the municipal, provincial and federal levels, and other individuals and organizations. The Ministry's submission that underwater logging does not have significant potential impacts on the environment and health and safety is strongly contradicted by the material before me.
>
> A number of previous orders of this office have concluded that certain matters relating to the environment also raise serious public health and/or safety issues.

In Order PO-1909, for instance, Adjudicator Donald Hale found that matters relating to the safety of Ontario's air and water, by their very nature, raise a public safety concern. In considering the factors outlined in Order P-474, he stated:

> In considering the factors listed above to the information which is the subject of these appeals, I find that the subject matter of the responsive records is a matter of public, rather than private interest. In addition, I find that issues relating to non-compliance with environmental standards with respect to discharges of pollutants into the air and water of the province which are at the root of this request relate directly to a public health or safety concern. Without having reviewed the voluminous records responsive to the request, it is difficult for me to determine whether their disclosure would yield a public benefit by disclosing a public health or safety concern. The records may, or may not, contain information about a public health or safety risk. This is precisely the reason for the appellant's request.
>
> I agree with the position taken by the appellant, however, that the dissemination of the record would yield a public benefit by contributing meaningfully to the development of understanding of an important public health or safety issue. In my view, issues relating to the contamination of Ontario's air and water are, by their very nature, important public health or safety concerns. …

In Order PO-1688, I dealt with an appeal involving certain records relating to an application for a certificate of approval under section 9 of the *Environmental Protection Act* to discharge air emissions into the natural environment at a specified location. In concluding that there is a compelling public interest in the disclosure of the records under section 23 of the *Act*, I stated:

> The public has an interest, from the perspective of protecting the natural environment and protecting public health and safety, in seeing that the Ministry conducts a full and fair assessment before deciding whether or not to grant the appellant a certificate of approval to discharge air emissions into the natural environment. This necessarily entails disclosure of the relevant data contained in the record. In addition, the public has an interest in knowing the extent to which the appellant's proposal to change its operations, if implemented, will impact the environment.
>
> My finding is consistent with one of the fundamental, public interest purposes of the *EBR* which, as the [Environmental Commissioner of Ontario] has stated, is the protection of the

> environment, in part by providing mechanisms to ensure that government ministries act in the public interest when making decisions about the environment. I agree with the ECO's submission that disclosure of relevant information is crucial if these mechanisms are to work effectively and that, therefore, disclosure of a record regarding the environmental impacts of proposed air emissions, such as the record in this case, would be in the public interest.
>
> Further, this finding is consistent with Orders P-270 and P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)), in which compelling public interests were found in the disclosure of nuclear safety records. Although the circumstances in these cases were not the same as those found here, what is common to all of these cases is that the records at issue concerned *environmental matters with the potential to affect the health and safety of the public*. [emphasis added]

As part of Order PO-1688, I also considered the overall purpose of the *EBR*, explaining that the *EBR* was enacted for the following reasons, as described in its preamble:

> The people of Ontario recognize the inherent value of the natural environment.
>
> The people of Ontario have a right to a *healthful environment*.
>
> The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.
>
> While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner. [emphasis added]

The right to a safe environment was also emphasized in the Supreme Court of Canada decision in *R. v. Canadian Pacific Ltd.* (1995), 125 D.L.R. (4th) 385 at 417-418 (S.C.C.), where the court said:

> . . . Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the

> Chernobyl nuclear accident, and the Exxon Valdez oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming, and air quality have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that, individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment* [Working Paper 44 (Ottawa: The Commission, 1985], which concluded at p. 8 that:
>
> > ... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.
> >
> > . . . environmental protection [has] emerged as a fundamental value in Canadian society . . .

As a result, I conclude that there is a compelling public interest in the disclosure of much of the withheld information. However, this compelling public interest is limited to those categories of information that would shed light on the relevant environmental and health and safety concerns. I found above that much of the information the Ministry withheld under section 17 is not exempt. A significant portion of this information would fall into the category of environmental and health and safety related information, including:

- Ministry habitat and fishery studies of particular water bodies containing data such as measurements of water areas and water temperatures, and descriptions of fish species, vegetation and the like

- data regarding water conditions, fish and habitat conditions, log densities and conditions, boat traffic, shoreline and related information

- generalized descriptions of underwater logging processes and/or methodologies that are widely used and not linked to any individual company or project

Thus, although I found this information not to be exempt, I also find in the alternative that there is a compelling public interest in its disclosure, for the reasons cited above.

On the other hand, I found certain types of information to be exempt, since I was satisfied its disclosure could reasonably be expected to cause competitive harm as described in section 17(1)(a). For ease of reference I will reproduce the list from above:

- accurate locations of individual logs, usually contained in sonar and/or D-GPS readings, where this information is clearly more precise than the information generally contained in the public notices
- specific logging processes and/or methodologies, where they may be linked to a specific company
- descriptions of specialized equipment that is not necessarily widely used in the industry, where that information is linked to a specific company
- specific numbers and species of logs a specific company intends to retrieve (in contrast to information about estimated numbers of logs in a given area)
- names and locations of mills that purchase logs, where the information is linked to a particular logging company
- detailed information about mill operations
- names and addresses of suppliers and sub-contractors (*e.g.*, commercial diving operators) of specific logging companies
- business plans of specific logging companies
- Workplace Safety and Insurance Board account numbers and firm numbers

In my view, none of these categories of information would shed light or otherwise significantly advance the environmental and public health and safety issues at play. Therefore, I conclude that section 23 cannot apply to any of the information I have found to qualify for exemption under section 17(1)(a).

I endorse Senior Adjudicator Goodis' analysis and find that it applies in the circumstances of this case. In my view, there is a compelling public interest in the disclosure of much of the withheld

information that would shed light on relevant environmental and health and safety concerns. As in Order PO-2172, this environmental and health and safety information falls into the following categories:

- Ministry habitat and fishery studies of particular water bodies containing data such as measurements of water areas and water temperatures, and descriptions of fish species, vegetation and the like

- data regarding water conditions, fish and habitat conditions, log densities and conditions, boat traffic, shoreline and related information

- generalized descriptions of underwater logging processes and/or methodologies that are widely used and not linked to any individual company or project

I have found that this information is not exempt under section 17(1). In the alternative, I also find that there is a compelling public interest in its disclosure, for the reasons set out above in Order PO-2172.

Conversely, I have also found certain types of information to be exempt, since I was satisfied that its disclosure could reasonably be expected to cause competitive harm under section 17(1)(a). As discussed above, this information can be categorized as the "informational assets" of businesses and others who provide information to the government. Following Senior Goodis' reasoning in Order PO-2172, none of these categories of information are relevant to a discussion of the environmental and public safety issues related to underwater logging. Therefore, I conclude that section 23 cannot apply to any of the information I have found to qualify for exemption under section 17(1)(a).

I found above that section 13(1) applies to portions of records 4, 8, 12, 60 and 65. In particular, record 60 (in contrast to the other four records) contains information regarding the steps that the Ministry would like a named underwater logging company to take should its underwater logging activity impact upon the water supply of local residents in the area. While this portion of the record does contain a recommendation, in my view, this is not the end of the story. The severed information in this record contains important environmental and health and safety information. I find that there is a compelling public interest in the disclosure of it.

Does the compelling public interest in disclosure "clearly outweigh" the purpose of the exemptions?

In addressing the second requirement under section 23 as it applies to section 17(1), Senior Adjudicator Goodis states:

Although I have found that section 23 does not apply to any of the information I found exempt under section 17(1)(a), I did conclude that it would apply to much of the information I found *not* exempt under this section. In the circumstances, I have decided to continue the section 23 analysis with respect to this information, in the event I have erred in finding information not to be exempt.

As I stated above, the general purpose of section 17(1) is to protect the "informational assets" of businesses and others who provide information to the government. The purposes of section 17(1) of the *Act* were also articulated in *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):

> . . . 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 (p. 313).

In addition, in my Order PO-1688, I stated:

> Clearly, the purposes of the section 17(1) exemption are serious, and are intended to protect the public interest in the manner expressed by the Williams Commission. However, in this case, the public interest in protecting business interests is clearly outweighed by the compelling public interest in disclosure of this record for the purposes of advancing the fairness and comprehensiveness of the *EBR/EPA* approval process, informing the public about the potential effects should the certificate of approval be granted, and ultimately enhancing environmental protection and public health and safety. Therefore, I find that section 23 would apply to override the application of section 17 in this case.
>
> My finding that the "public interest override" would apply in these circumstances is supported by the legislative history of the *Act*. It is clear that the Legislature intended that the public interest in protecting business by way of the section 17 exemption should

yield in circumstances where disclosure of the information is in the public interest because it relates to matters of environmental protection. In discussing whether or not the proposed commercial information exemption should be subject to a "public interest override", the Williams Commission stated:

> . . . In short, if the public interest in disclosure of matters relating to environmental protection, public health and safety and consumer protection is not explicitly stated, it is likely to appear in strained interpretations of other phrases in the exemption. For this reason, we recommend the adoption of a limitation of this kind . . . We recommend that the limitation make express reference to the public interest in such matters as the protection of the environment, consumer protection and public health and safety.

Although ultimately the Legislature did not incorporate specific language in the section 23 public interest override referring the public interest in the protection of the environment, consumer protection and public health and safety, in my view, it is reasonable to assume that in adopting more general language in section 23, the Legislature intended that the override could apply in these types of circumstances, among others. This view is reinforced by Assistant Commissioner Tom Mitchinson's finding in Order P-1190 with regard to nuclear safety records.

The Legislature also recognized the significant weight which should be attributed to information concerning environmental protection and public health and safety matters. Section 11(1) reads:

Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

Section 18(2) reads:

> A head shall not refuse under subsection (1) to disclose a record that contains the results of product

> or environmental testing carried out by or for an institution, unless . . .
>
> I do not suggest that either section 11 or 18(2) would necessarily apply in the circumstances of this case; however, it is clear that the Legislature recognized the special importance of environmental protection and public health and safety information, and indicated that in certain circumstances it must be disclosed despite any other exemption in the *Act*.
>
> My comments in Order PO-1668 resonate here. In my view, any competitive harm that may accrue as a result of disclosure of the information I found not exempt under section 17(1)(a) would be clearly outweighed by the important environmental and health and safety concerns. I note also that I have found the more sensitive competitive information to be exempt under section 17(1)(a), such as pricing information, log retrieval methodology and business plans.

Again, I concur with Senior Adjudicator Goodis' reasoning and findings in Order PO-2172. In my view, any competitive harm that may accrue as a result of disclosure of the information, which I found not exempt under section 17(1)(a), would be clearly outweighed by the important environmental and health and safety concerns relating to underwater logging activities.

With respect to section 13, as indicated above, in Order 94, former Commissioner Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

With respect to record 60, in my view, where water quality is concerned the compelling public interest in disclosure clearly outweighs the purpose of the section 13(1) exemption set out above.

Therefore, I find that section 23 applies to override the application of section 13(1) to record 60.

ORDER:

1. I order the Ministry, not later than **October 17, 2003**, but not earlier than **October 10, 2003**, to disclose to the appellant records 5-6, 9, 10-11, 13-15, 16-20, 23-24, 27-29, 31-41, 43-45, 46, 49, 52, 54, 58-59 and 62, except for any portions withheld under section 21.

2. I order the Ministry, not later than **October 17, 2003**, but not earlier than **October 10, 2003**, to disclose to the appellant records 4, 7-8, 12, 22, 42, 56-57, 60-61, 63 and 65, in accordance with the highlighted version of those records I have included with the Ministry's copy of this order. To be clear, I have highlighted only the information to be withheld under section 17(1); I have not highlighted any information the Ministry withheld under section 21, but this information also should be withheld.

3. I reserve the right to require the Ministry to provide me with copies of any records referred to in provisions 1 and 2.

August 29, 2003

Bernard Morrow
Adjudicator