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

# ORDER PO-2222

## Appeal PA-020322-1

## Ministry of Natural Resources

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## NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Natural Resources (the Ministry) for access to:

> . . . the source data of growth and yield results from [two named companies] test plots. I am looking for the most recent information.

The requester later clarified her request as follows:

> One test plot from each company would suffice. The oldest plots would be best.
>
> 1. actual tree measurement information collected from a growth and yield plot;
> 2. one plot from [each company] – any plot will suffice;
> 3. re-measurement data would be much appreciated;
> 4. data from the companies themselves;
> 5. data from permanent sample plots (PSPs) only.

The Ministry identified four responsive records and decided to deny access to them on the basis of the mandatory exemption for third party information at section 17 of the *Act*. Specifically, the Ministry stated:

> . . . The information is technical and commercial in nature and was supplied in confidence by third parties. Disclosure of the information could be expected to result in undue loss to the third parties and could result in similar information no longer being supplied.
>
> The ministry does not hold the intellectual property rights to the data. The data is from a dataset created by and for the Forest Ecosystem Science Co-operative, of which the ministry is a member. As such, use of the data is governed by a data sharing agreement that prohibits [the Ministry] from distributing the data. I have enclosed Appendix C of this agreement for your information.

The requester (now the appellant) appealed the Ministry's decision to this office, stating:

> The information withheld by [the Ministry] has huge implications for the general public and the natural environment and therefore cannot and should not be withheld.
>
> Because this is a big issue regarding the privatization of forestry information – growth and yield data – that could have serious impacts on biodiversity and the public's ability to scrutinize forestry practices . . .

During the mediation stage of the appeal, the Mediator notified the two companies named in the request, as well as Forest Ecosystem Science Co-operative Inc. (the Co-operative), of the

request. One company (Company A) responded, advising that it did not consent to disclosure of information relating to it. The other company (Company B) did not respond. The Co-operative provided the Mediator with a form entitled "Data Sharing Application", and suggested that the appellant complete this form and submit it to the Co-operative as a request for access to information outside the scope of the *Act*. The Mediator passed this form on to the appellant, who in turn completed and submitted it to the Co-operative as suggested. To date, the Co-operative has not responded to this additional request. In any event, the appellant advised the Mediator that the Co-operative's rules on use and distribution are "too restrictive" for her purposes, and that she wishes to proceed with her request under the *Act* regardless of the outcome of her non-*Act* request.

I sent a Notice of Inquiry to the Ministry, the Co-operative and the two companies, initially, outlining the facts and issues and requesting written representations. Only the Ministry and Company A submitted representations in response. I then sent a copy of the Ministry's representations and the Notice to the appellant, who in turn provided representations.

## RECORDS

There are four records consisting of 15 pages at issue in this appeal, as follows:

| Record Number | Number of Pages | Description |
|---|---|---|
| 1 | 4 | Table containing information about Company B's plot |
| 2 | 7 | Table containing information about Company A's plot |
| 3 | 1 | Description of fields in Records 1 and 2 |
| 4 | 3 | Tree species codes as used in Records 1 and 2 |

The Ministry describes the background to the creation of the records as follows:

> The records relate to information, which has been gathered from a permanent growth, and yield, plot. A growth and yield plot is permanent sample plot that has been established to measure tree growth over time, i.e., it notes how much a tree has grown in size and volume over specific periods of time. There are separate plots for individual species or set of species found through out the province in a variety of soil and climatic conditions. The data from the plots show how a forest matures over time and produces volume. The information is used in developing predictions . . . of yield for that species in that environmental condition . . . [a]nd is used for modelling for forest management planning. The Province of Ontario has invested heavily in the development of a standardized approach towards the collection of comprehensive ecologically based forest growth and yield data. Forest Companies and the Ministry have worked together to establish permanent and temporary plots of the long-term assessment of various forest ecosystems.
>
> As part of the assessment, the information is collected by a number of forest companies who provide it to [the Co-operative]. These forest companies are

> members of the Co-operative, as is the Ministry. Members of the Co-operative sign an agreement, which limits the uses and dissemination/sharing of the information. (Copy attached). The agreement specifies that intellectual property associated with the information will be held by the Co-operative who will make decisions pertaining to its use. The data from the growth and yield plots is collected, entered and verified by the Co-operative. The Ministry is prohibited from sharing the data. Those who wish to access the data and who are not members may be granted access to it after filing a data sharing application. If the application is granted, the applicant use and distribution of the data is restricted by … agreement. (See attached Acknowledgement of Data Access Form).

## DISCUSSION:

### THIRD PARTY INFORMATION

#### General principles

The Ministry claims that sections 17(1)(a) and/or (b) apply.

Sections 17(1)(a) and (b) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1)(a) or (b) to apply, the institution and/or Company A 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 paragraph (a) and/or (b) of section 17(1) will occur.

**Part 1: type of information**

The Ministry claims that the information in the records is "scientific" or "technical" information. Company A submits that the information is "scientific". The definitions of those terms have been discussed in prior orders, as follows:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While 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 [Order PO-2010].

More specifically, the Ministry submits:

> . . . The records contain information recording the growth of trees on a plot of land. The information clearly falls within the organized field of knowledge known as forestry. The information was collected as part of a study conducted within strict scientific guidelines designed to measure tree [growth] and would be undertaken under the supervision of forestry. Therefore, it is the position of the Ministry that it clearly falls within the definition of scientific information.
>
> . . . . .
>
> . . . [T]he records contained the results of studies measuring the growth of tree species in particular natural environments and will be used in modeling of forecasting forest growth as part of the forest management planning process. Accordingly, it is the alternative position of the Ministry that it falls within the ambit of technical information under the *Act*.

Company A submits:

> This data is scientific information because they are observations that have been made by professionals in the field to test growth and yield hypotheses . . .

The appellant makes no specific submissions on this issue.

Based on my review of the records and the submissions of the Ministry and Company A, I am persuaded that the information in the records at issue qualifies as scientific information as that term is defined in section 17. The information belongs to the organized field of knowledge in the natural/biological sciences, relates to the observation and testing of specific hypotheses or conclusions, and is undertaken by experts in the field. Therefore, part 1 of the test has been met.

**Part 2: supplied in confidence**

***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 [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The Ministry submits:

> . . . This information was collected by individual forest companies provided to the Co-operative who confirmed and entered the information. The information was then provided to the Ministry pursuant to its agreement with the Co-operative. Therefore, it would appear reasonable to conclude that the records were supplied to the Ministry.

Neither Company A nor the appellant makes submissions on this point.

I am satisfied that Company A and Company B supplied the information to the Ministry, by way of the Co-operative. The fact that the information was not directly provided to the Ministry does not alter my "supplied" finding.

**In confidence**

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [PO-2020].

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 that would not entail disclosure [PO-2043]

The Ministry submits:

> . . . There is a regulated manual approved pursuant to ss. 68(4) and (1) of the *Crown Forest Sustainability Act* which provides on page 191 Part 6.1.4 (excerpt attached) . . . that information such as growth and yield information will be sensitive or confidential information in accordance with the [*Act*] and access may be restricted. While the Forest Information Manual is not binding on the [IPC] and its decision under the *Act*, the contents of the Manual would lead the affected parties to have a reasonable expectation that the information would be treated on a confidential basis by the Ministry and is supplied on the basis that it would be so treated. Thus, the contents of the manual support a conclusion that the information was supplied in confidence.
>
> In addition, the information was supplied pursuant to agreements between the Ministry and the Co-operative. Both the main agreements and Acknowledgement of Data Access Agreement restrict the Ministry from dissemination of the records and provide that the information is to be treated as confidential. As these agreements are the basis upon which the information was supplied, it is the position of the Ministry that the information was supplied in confidence . . .

Neither Company A nor the appellant makes submissions on this issue.

I agree with the Ministry that the documents to which it refers set out a general understanding that data collected by the Co-operative and in turn communicated to the Ministry is supplied in confidence. Therefore, part 2 of the three-part test is met.

**Part 3: harms**

***General principles***

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

***Section 17(1)(a): prejudice to competitive position***

The Ministry submits:

> . . . [T]he affected parties, and not the Ministry, are in the best position to present argumentative evidence on this question. The [IPC] has reaffirmed this view. (See Orders P-454, P-463, P-479, P-561, P-582 and P-610). However, I would again draw your attention to the fact that the collection of this information is done at some cost to the companies. Not all forest companies are involved in the project. If the information was released or was found not to be exempt under the *Act*, forest companies who are not involved in the project and have not incurred costs in collecting information could gain access to the information for free or at a nominal cost. This would [be] unfair. Accordingly, it is the position of the Ministry that disclosure of the information would result in unjust gain by those seeking information but have made no contribution to the cost of collecting the information . . .

Company A submits:

> . . . Interpretation of this data by an untrained person is a concern to [us].
>
> [We have] submitted this data to the [Co-operative] to be analyzed with other data to produce usable yield curves. The [Co-operative] is willing to sign a data sharing agreement with any individual to share the data as well as assist in its interpretation . . .

The appellant states:

> While I wish to review the data so I can better understand what sort of research is currently being done, I am not interested in releasing the "raw" or "source" data to the public. The general public would not be interested in such data, as it would be too comprehensive and boring. Rather, the general public would be interested in a third party's (not government or industry) review and summary of the data. In fact, very few people would be interested in this detailed [information].
>
> I was very happy to sign the confidentiality agreement.

In my view, the material before me falls short of the kind of detailed and convincing evidence that is required to establish a reasonable expectation of harm. I agree with the Ministry that the affected parties, Company A and Company B (as well as the Co-operative), are in the best position to provide evidence and argument explaining why it is reasonable to expect disclosure will result in prejudice to those companies' competitive position or interfere significantly with their negotiations. Company A's submissions are very brief and seem only to be concerned with the prospect of an untrained person interpreting the data, as opposed to the type of harm described in section 17(1)(a). I also find it significant that Company B, a major corporation, chose not to submit representations, despite being notified during the mediation and adjudication stages of the appeal. In my view, this undermines the "harm" arguments of the Ministry and Company A, although I do not take the absence of representations from Company B to constitute its consent to disclosure (see Order PO-1791). In the end, I am left with little if any guidance as to how the information in the records would be useful to a competitor or otherwise could reasonably be expected to cause section 17(1)(a) harm. Therefore, I conclude that the records are not exempt under section 17(1)(a).

***Section 17(1)(b): similar information no longer supplied***

The Ministry takes the position that disclosure of these records could reasonably be expected to result in similar information no longer being supplied to it:

> As can be seen from the attached agreements, the Co-operative restricts the access, [dissemination] and use of the information. If this information was not exempt under section 17 of the *Act* and the Ministry was required to disclose it without restriction, the Ministry would be in breach of the agreement. Accordingly, the Co-operative would no longer be legally obliged to provide the Ministry with the information. Given the sensitivity of the information, it is unlikely that the Co-operative or its members would do so willingly. . . [T]his information is critical to the development of forecasts, models and predictions for forest growth, which is used in Forest Management planning. If it were no longer supplied, it would hamper the Ministry's ability to improve the conduct of forestry on Crown Lands. Accordingly, there is a strong public interest in the information continuing to be provided.

In my view, the section 17(1)(b) argument must fail for many of the same reasons as the section 17(1)(a) argument. The Ministry's position seems to be that because disclosure of the information could reasonably be expected to cause competitive harm under section 17(1)(a), it stands to reason that affected parties would be reluctant to disclose it to the Ministry either directly or indirectly. However, as I explained above, the evidence under section 17(1)(a) is not persuasive. Given that finding, I am not satisfied that it is reasonable to expect that companies will no longer supply this information to the Ministry. I also note that I have no other evidence in support of the application of section 17(1)(b), apart from that of the Ministry. In the absence of supporting evidence from the Co-operative or Company A or Company B, I find that the threshold for section 17(1)(b) has not been met.

**Conclusion**

I find that the records do not qualify for exemption under section 17(1)(a) or (b) of the *Act*.

## ORDER:

1. I order the Ministry to disclose the records to the appellant no later than **January 30, 2004**, but not earlier than **January 23, 2004**.

2. In order to verify compliance with provision 1, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant.

Original signed by: December 23, 2003
David Goodis
Senior Adjudicator