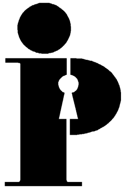
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2172

Appeal PA-000335-2

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The appellant made 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 records relating to underwater logging in Ontario.

The Ministry then notified a number of individuals and organizations of the request (the affected parties), seeking their views on disclosure of the records.

The Ministry then issued an access decision with respect to some of the responsive records. In this decision, the Ministry advised the requester that it had decided to grant partial access to this group of records. The Ministry indicated that it intended to withhold portions of these records on the basis of the exemptions at sections 13 (advice to government), 15 (relations with other governments), 17 (third party commercial information) and 21 (personal privacy) of the *Act*.

The appellant appealed the Ministry's decision, and this office opened Appeal PA-000335-1 (the first appeal).

The Ministry later notified an additional group of affected parties, again seeking their views on disclosure of the remaining records.

The Ministry then issued a second access decision with respect to both the original group of records, and the balance of the responsive records. In its second decision, the Ministry advised the requester that, again, it had decided to grant partial access to the balance of the records, and that it had decided to withhold portions of the records on the basis of the same exemptions relied on in its first decision, as well as the exemptions at sections 12 (Cabinet records) and 14 (law enforcement).

The appellant appealed the Ministry's second decision, and this office opened Appeal PA-000335-2 (the second appeal).

Since the records at issue in the first appeal were subsumed in the second appeal, this office decided to close the first appeal.

During mediation, the Ministry withdrew its reliance on the exemptions at sections 12 and 13. Also, the appellant indicated he was no longer seeking any information withheld under the section 21 personal privacy exemption. As a result, the section 12 and 13 exemptions, as well as a large number of records, and portions of records, are no longer at issue in this appeal.

Finally, the appellant raised the possible application of section 23, the public interest override.

Mediation was not successful in resolving all of the issues in the appeal, so the matter was streamed to the adjudication stage of the process.

This office sought written representations from the Ministry, the appellant and the affected parties. The Ministry, the appellant and two affected parties submitted representations. In its representations, the Ministry withdrew its section 15 exemption claim. Therefore, this

exemption is no longer at issue. As a result, the only exemptions remaining at issue are those at sections 14, 17 and 19.

RECORDS:

There are a very large number of records at issue, which I have broadly categorized 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
- correspondence and emails between the Ministry/federal government, and the affected parties
- Ministry notices of underwater logging applications to parties that may be affected by the work, and those parties' responses
- land use permits and applications
- work permits and applications
- contracts
- records relating to the development of a revised Ministry underwater logging approval process
- miscellaneous internal Ministry records

The Ministry has provided both the appellant and this office with a detailed index of the records.

DISCUSSION:

RESPONSIVENESS OF RECORDS/SCOPE OF THE REQUEST

The request is dated June 20, 2000, and reads:

> I request that the following information be forwarded to us:
>
> 1. Copies of all applications for underwater logging permits received by the [Ministry] since 1995.
>
> 2. Copies of all permits for underwater logging issued by the [Ministry] since 1995.

> 3. Copies of all reports, memos, email, internal correspondence, guidelines, procedures, water monitoring, studies, and any other relevant documents received by or produced by the [Ministry] relating to the practice of underwater logging.

The Ministry takes the position that Records 7287 (pages 2-5), 7421, 7422 and 8038 are not responsive to the request, and explains its position as follows:

> In addition to the subject matter of the request as described above, the requester established the boundaries for the time frame for the request. This limits the request to those records received by or produced by the Ministry in the period from 1995 to June 2000.
>
> . . . . .
>
> Record 7287, pages 2-4 are internal emails that . . . refer to attached documents. There is no indication of the subject matter of the attachments. Page 5 is a letter from the Ministry to a client that discusses the Ministry boat cache program and is unrelated to the practice of underwater logging.
>
> Records 7421, 7422 are reports that summarize fisheries information that was collected from the Ottawa River. These reports list fish species found and other fisheries-related data. The subject matter of these reports is unrelated to the practice of underwater logging . . .
>
> Portions of Record 8038 are dated August 4, 2000 (page 1) and October 20, 2000 (pages 2-8), after the time frame established by [the] requester in his request . . .

The appellant makes no specific submissions on this point.

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 of 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 7287, pages 2-5, I agree with the Ministry that the records do not clearly on their face relate to underwater logging. However, the Ministry itself identified these records as responsive, but later changed its position, and they are attached to other records that clearly are responsive. In the circumstances, I find that the ambiguity should be resolved in the appellant's favour, and I conclude that pages 2-5 of Record 7287 are responsive to the request. I will consider the application of the exemption at section 17 to Record 7287 below.

I agree that Records 7421, 7422 are reports that summarize fisheries information that was collected from the Ottawa River. However, in the circumstances, I do not accept that these records are "unrelated to the practice of underwater logging". Again, the Ministry itself identified these records as responsive, but later changed its position. In addition, since the practice of underwater logging is said to have an impact on fish and fish habitats, the two

subjects may be related in some circumstances. While there is some ambiguity here, I find that this ambiguity should be resolved in the appellant's favour. Since the Ministry has claimed no exemptions for these records, I will order it to disclose Records 7421 and 7422 to the appellant.

The Ministry claims that Record 8038 consists of pages dating from August and October 2000, and that they are by definition non-responsive since the request was made in June 2000. However, the Ministry's ultimate decision was not made until February 2001. The request does not on its face provide an end-date. While it is arguable that a request by definition "crystallizes" upon it being sent or received, it is also arguable that the Ministry should treat the date of its final decision as the end-date. In my view, the Ministry's position is overly technical and contrary to the spirit of the *Act*. Again, I find any ambiguity should be resolved in the appellant's favour. Therefore, I find that Record 8038 is responsive to the request. I will consider the application of the exemption at section 17 to Record 8038 below.

Conclusion

Records 7287, 7421, 7422 and 8038 are responsive to the request. The Ministry must disclose Records 7421 and 7422 to the appellant. I will determine the extent to which the Ministry must disclose Records 7287 and 8038 below.

LAW ENFORCEMENT

Introduction

The Ministry claims that the discretionary exemptions at sections 14(1)(b) and 14(2)(a) apply to all or portions of Records 6621, 6719, 6814, 6857, 6858, 6859, 6864, 6865, 6866, 7690, 7693, 7767, 7768, 7769, 7770, 7772, 7816, 7890. Those sections read:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (2) A head may refuse to disclose a record,
>
> > (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The term "law enforcement", which appears in both sections, is defined in section 2(1) of the *Act* as follows:

> "law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b)

Section 14(1)(b): law enforcement investigation

Ombudsman investigation

The section 14(1)(b) exemption does not apply where the matter is completed [see Orders PO-2085, MO-1578].

The Ministry submits that the records for which it claimed section 14 relate to an investigation by the Ombudsman under the *Ombudsman Act*, but concedes that this investigation was concluded in May 2000. The Ministry acknowledges that this office has found section 14(1)(b) cannot apply where the investigation is completed, but submits that "due to the unique nature of an investigation under the *Ombudsman Act*", the requirement that the investigation be ongoing be "waived" for these records.

I am not persuaded that there is anything about this case that would bring it outside the norm. I fail to see how, in these circumstances, disclosure of records relating to a completed investigation could harm that investigation. Therefore, I find that section 14(1)(b) does not apply to the records listed above.

In any event, I am also not persuaded that an investigation under the *Ombudsman Act* would constitute "law enforcement", since such an investigation does not lead to proceedings in a court or tribunal where a penalty or sanction can be imposed. Rather, these investigations, at most, lead to recommendations. This finding is consistent with a previous decision of this office, Order P-170.

Ministry investigation

The Ministry also submits that section 14(1)(b) applies on the basis of its own investigation into the unauthorized retrieval of sunken logs:

> . . . [T]he Ministry's investigative and compliance functions with respect to Ontario's natural resources law, and in particular the *Public Lands Act*, qualify as law enforcement activities for the purpose of s. 14 [see Orders P-306, P-1653, PO-1706, PO-1898].
>
> . . . . .
>
> An investigation into allegations that [named individual] retrieved sunken logs without a permit from the Ottawa River was commenced by [named conservation officer] with the Ministry, on February 21, 2000. A complaint made by an

> employee of [the named individual's] company . . . to . . . the Pembroke District office on that date lead to an investigation. This investigation was completed on May 29, 2001 when [named conservation officer] sent a letter to [the named individual] informing him that criminal charges would not be brought against him. In the same letter, [the named conservation officer] requested that [the named individual] make a payment to the Ministry in the amount of the Crown charges outstanding on the logs allegedly retrieved from the Ottawa River by [the named individual]. No payment has been made to the Ministry by [the named individual]. The Ministry is considering its options on how to proceed further in this matter.
>
> . . . . .
>
> Record 7693 is an internal email that queries whether enforcement proceedings have commenced against [the named individual]. If this record were disclosed it would interfere with the investigation because it would alert the individual that he is the subject of an investigation and that further action may be taken against him. This may lead him to take actions that might compromise further inquiries into his sunken log activities and the decision on how to proceed.

The appellant makes no specific submissions on this issue.

Record 7693 has been partially disclosed to the appellant. I accept the Ministry's submission that disclosure of the remainder of this record would reveal information that could reasonably be expected to interfere with a law enforcement matter, specifically the investigation of potential breaches of the *Public Lands Act* that may result in penalties or sanctions. Further, the Ministry claimed that section 14(1)(b) applies to Record 7690, although it made no specific submissions on it. The withheld information in Record 7690 is very similar to that in Record 7693. Therefore, I find that the withheld portions of Record 7690 and 7693 are exempt under section 14(1)(b).

Section 14(2)(a): law enforcement report

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The Ministry claimed that this section applies to the records listed above, but makes no specific submissions on this issue. None of these records appears on their face to be a "report" and, in the absence of supporting representations, I find that the Ministry has failed to establish that section 14(2)(a) applies to any of the records at issue.

Conclusion

The section 14 exemption does not apply to Records 6621, 6719, 6814, 6857, 6858, 6859, 6864, 6865, 6866, 7767, 7768, 7769, 7770, 7772, 7816 or 7890. I will determine below the extent to which these records may be exempt under section 17.

The withheld portions of Records 7690 and 7693 are exempt under section 14(1)(b).

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that all of the records at issue are exempt under section 19 of the *Act*.

General principles

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches. Branch 1 includes two common law privileges:

- solicitor-client communication privilege; and
- litigation privilege.

Branch 2 contains two analogous statutory privileges that apply in the context of Crown counsel giving legal advice or conducting litigation.

Here, the Ministry relies on solicitor-client communication privilege under both branches. The Ministry does not rely on litigation privilege under either branch. I will first consider the application of common law solicitor-client communication privilege under Branch 1.

Common law solicitor-client communication privilege under Branch 1

General principles

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Representations

The Ministry submits:

> The records in question to which solicitor-client privilege attaches can be divided into three groups . . .
>
> 1. Communications from legal counsel to staff members
>
> The exempted portions of records 7704, 8218 are emails or communications from [Ministry counsel] to Ministry staff in which he provides legal advice . . .
>
> . . . . .
>
> Record 8218 (pages 1-20) is an email and an attachment from Ministry counsel containing legal advice . . .
>
> 1. Communications from staff members to counsel requesting legal advice
>
> The exempted portions of records 7688, 7705 contain either instructions/request for legal advice with respect to issues . . . associated with the file to [Ministry counsel] or updates on the status of [Ministry counsel's] work on the file. The exempted portion of record 7706 contains a request for legal advice . . .
>
> Record 7688 (pages 2, 3) is an attachment to an internal email from staff to counsel requesting legal advice on a number of issues . . .
>
> Record 7705 (page 1) is an internal email from staff to counsel requesting legal advice on an issue . . .
>
> Record 7706 (page 1) is an internal email from staff to counsel requesting legal advice . . .
>
> 1. Communications passing on of legal advice
>
> Records 6613, 6872, 6970, 7025, contain communications that pass on legal advice received from Ministry legal counsel to other employees of the Ministry. They include internal communications between staff members in a variety of mediums. These materials refer to issues . . . and contain references to the legal advice that was given by counsel on one or more of the issues. Records 7680

> (page 1), 7709, 7716, 7749, 8211, 8214 are emails from staff members to other Ministry staff members that relay legal advice obtained from counsel . . .
>
> Record 6613 (pages 2, 4) is a summary table of responses to EBR postings. The page 2 entry indicates that legal advice was received from Ministry Legal Counsel and acted upon. The second clarifies that legal advice was obtained from Ministry of Labour that clarified an issue.
>
> Record 6872 (page 4) is a presentation on issues and frustrations . . . The record indicates that legal advice was given on the approach.
>
> Record 6970 (page 2) is a set of conference call minutes . . . The exempted portion states a legal position . . .
>
> Record 7025 (page 5) [is a] briefing note regarding the issuing [of] authorizations . . . Page 5 contains a reference to legal counsel raising a legal issue . . .
>
> Record 7680 (page 1) is an internal email from one staff member to another relaying legal advice received from legal counsel to another staff member.
>
> Record 7709 (page 1) is an internal email from one staff member to another that relays legal advice from counsel . . .
>
> Record 7716 (page 1) is an internal email from one staff member to another that relays legal advice from legal counsel . . .
>
> Record 7749 (page 1) is an email from Ministry of Labour staff to a Ministry staff member relaying legal advice obtained from MOL legal services . . .
>
> Record 8211 (page 1) is an email from Ministry staff member to a staff member at another Ministry relaying legal advice received from Ministry Legal Counsel . . .
>
> Record 8214 (page 1) is an email from a Ministry staff member to a number of persons relaying legal advice received from legal counsel . . .

Regarding the category 1 records, I am satisfied that Records 7704 and 8218, in their entirety, are confidential communications between legal counsel and Ministry staff made for the purpose of giving or receiving legal advice. Therefore, these records qualify for exemption under section 19.

Regarding the category 2 records, I am persuaded that the withheld portions of Records 7688 (pages 2, 3) and 7706 (page 1), and all of Record 7705 are confidential communications between legal counsel and Ministry staff made for the purpose of giving or receiving legal advice. Therefore, these records or portions qualify for exemption under section 19.

Finally, with respect to category 3, I am satisfied that the withheld portions of Records 6613, 6872, 6970, 7025, 7680, 7709, 7716, 7749, 8211 and 8214 all consist of passages that would reveal confidential communications between legal counsel and Ministry staff made for the purpose of giving or receiving legal advice. Therefore, this information is exempt under section 19. Record 7680 also contains passages withheld under section 17, and I will determine whether these passages so qualify for exemption below.

I note that the Ministry also withheld all of Record 7833, and portions of Record 7864, 7865 on the basis of the section 19 exemption. For reasons similar to those above, I find that this information also is exempt under section 19.

THIRD PARTY INFORMATION

Introduction

The Ministry claims that section 17(1)(a) and/or (b) apply to a large number of the records at issue. Those sections read:

> 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;

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) and/or (b) the Ministry and/or the relevant 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 paragraph (a) or (b) section 17(1) will occur [Orders 36, P-373, M-29 and M-37].

Part 1: type of information

The Ministry submits that the records at issue contain both technical and commercial information. This office has defined those terms as follows:

> *Technical Information*
>
> 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 would include architecture, engineering or electronics. Technical information 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 P-454].
>
> *Commercial Information*
>
> Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order P-493].

The Ministry states:

> The portions of the records that have been exempted under s. 17 contain specific technical information related to procedures used to retrieve sunken logs. The exempted portions of records cover a wide range of technical details that describe the operational aspects of retrieving sunken logs. Some of these details include, but are not limited to, descriptions (in words and by basemap coordinates) of exact locations where log retrieval operations are planned to take place, type and manufacturers' model of equipment to be used during retrieval operations, and hand drawn maps indicating site specific conditions that are important to the planning and conduct of sunken log operations.
>
> . . . . .

> Some of the portions of the records exempted under s. 17 specify the type of equipment to be provided by the purchaser of retrieved logs, the rates to be charged to the operator for the use of rental retrieval equipment and the rates to be charged to repair and maintain the equipment by the owner of the equipment. Other records provide financial details on the purchase price of equipment and the terms and conditions of long term purchase and sale agreements.

The first affected party submits:

> These [underwater logging permit] applications contain a large quantity of scientific and/or technical data . . . This particularly applies to side scan sonar data and sampling data from exploratory dives. Additionally, other researched information from fish species to bottom composition, to water currents, to navigational routes, to historic shoreline industries, etc. is readily found in the applications . . .
>
> The applications also contain clear descriptions of our operational (retrieval) methodology . . . our "trade secrets" . . .
>
> Finally, our applications contain information with respect to the actual product we are retrieving to sell in the commercial marketplace . . . sunken logs. They also identify who the purchaser of our logs will be.

The second affected party makes no specific submissions on this issue, nor does the appellant.

I agree with the Ministry and the first affected party that the withheld portions of the records at issue contain both technical and commercial information, including information about log retrieval procedures, descriptions of log and logging locations, descriptions of fish and habitat conditions, equipment to be used, rates to be charged for various goods and services, and contract details. This finding is consistent with earlier orders regarding underwater logging and records of a similar nature [see Orders PO-2009, PO-2158].

Part 2: supplied in confidence

Introduction

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

"Supplied"

The requirement that the information be "supplied" reflects the purpose the section 17(1) exemption claim - 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 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].

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.

Neither the appellant nor the second affected party makes specific submissions on this point.

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.

"In confidence"

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that there was a reasonable implicit or explicit expectation of confidentiality on the part of the supplier at the time the information was provided. This expectation must have an objective basis (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 Ministry 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 consultant prior to being communicated to the Ministry
- 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]

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.

The first affected party's representations set out above touch on the "in confidence" issue, and support the Ministry's position. Neither the appellant nor the second affected party submit representations on this issue.

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.

Part 3: harms

Introduction

To discharge the burden of proof under part 3 of the test, the parties opposing disclosure must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the parties 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.)].

Representations

The Ministry begins with general submissions regarding competitive harm under section 17(1)(a):

> Prejudice to competitive position
>
> The affected party is in the best position to present evidence to show that the release of the records would prejudice their competitive position. The Commission has reaffirmed this view in a number of orders in the past. However, the Ministry would like to make some comments on this subject. The very nature of a competitive market, including the sunken log retrieval business, operates on the basis that business information must remain confidential. Some of the commercial information contained in the records contains details of contractual

arrangements between sunken log operators and the mills that purchase the logs once retrieved. Some of the records reveal purchase prices for logs by species, discounted rates for equipment rented by operators that may be lower than market rental rates. In a competitive environment like the forestry sector, any competitive edge that one operator can gain over others in the industry can often make the difference between success and failure of their operations. New, innovative or unique operational methods may make a difference to the cost of operations that affect the overall profitability of a sunken log operator.

> It is reasonable to expect that the competitive position of a company who has spent considerable time and money to obtain authorization to retrieve sunken logs in one location on a lake might be prejudiced if a rival company was able to obtain technical and/or commercial information relating to the operations on that lake. A rival company could easily make an application to the Ministry to retrieve sunken logs by taking advantage of the research and other preparatory work completed by a company already operating on the lake with little cost to them.

> It is [the] position of the Ministry that disclosure of the information contained in the records would result in prejudice in the competitive position of the affected parties and that s. 17 should apply to the records to [exempt] them from disclosure.

The Ministry submits that section 17(1)(b) applies to information affected parties supplied to the Ombudsman, which was then sent to the Ministry:

> . . . [I]f the records produced by the Ombudsman and the records produced by the Ministry in response to inquiries directly related to an investigation are disclosed, it would be reasonable to expect to result in similar information no longer being supplied to their office . . . [I]t is in the public interest that similar information continues to be supplied to the Ombudsman to fulfil their statutory mandate.

The first affected party submits:

> . . . We consider the unique structure, methodology and content of our applications to be proprietary in nature and, if released whatsoever in the public domain, would clearly have the potential of damaging our competitive position and ultimately expose us unjustly to pecuniary harm.

> Application Packages are not completed on any government form or other forms provided to us. They are entirely of the applicant's own design. The way we have organised and designed our applications to present our collection of data in satisfaction of the [Ministry] and other governmental guidelines is unique to us. Not all applications to the [Ministry] have been successful . . . ours have been and we attribute it in no small part to the arrangement, design and designated content of our applications. Competitors should not be allowed to bypass the months it

has taken us to "get it right" by copying our model. This application process has cost us thousands of dollars to perfect, as well as hundreds of hours of hard work. We do not feel we should have to share our successful application formula with our competition, giving away a competitive advantage (directly or indirectly, intentionally or unintentionally).

. . . . .

Unfortunately, once disclosed, this data and information is equally as useful to any competitor who wishes to make a subsequent application to licence a retrieval site adjacent to ours or in the same vicinity. Disclosure of such information facilitates the "gold rush mentality" of simply "staking a claim" beside the experienced log retriever who has done all the homework. In school, copying is cheating and punished accordingly. Competitors may know where our sites are, but to be forced to turn over our data and research is an entirely separate matter. It seems patently unfair and unjustifiable to give the benefit of the results of our costly exploratory and investigative efforts *free* to others through such disclosure. Furthermore, it would clearly have the potential to put us at a competitive disadvantage in pricing our product based on cost!

. . . In this young industry we do not believe it to be in our business interest to disclose such information to our competition, particularly to those who are behind us in building their own experience and have not yet discovered their own efficiencies. We engaged the services of an independent commercial diving contractor and paid for the creation of the Diving Operations Plan and the Diving Contingency Plan set our in our applications. They could easily be used as a model for someone else to copy. The applications reveal openly the name of our diving sub-contractor who we sources ourselves. We must be allowed to protect such investments and any competitive advantage which we have gained through the expenditure of considerable time, money and energy.

Finally, our applications contain information with respect to the actual product we are retrieving to sell in the commercial marketplace . . . sunken logs. They also identify who the purchaser of our logs will be. If disclosed, the data with respect to numbers of logs and their species, coupled with log density information and the depths at which they are found, gives any competitor confidential knowledge about how we evaluate the financial feasibility of potential retrieval sites. This private commercial information is not for public consumption. The identity of our log purchaser is also confidential as we have sought out and established this market on our own. Surely we cannot be obliged to identify markets and potential buyers for our competitors to our own disadvantage.

The second affected party submits:

. . . [Disclosure of the records] will directly inflict upon my ability to function as a business, and although I understand that the request is made by a group claiming concern for the environment, a further concern to forward to your attention is the following.

> Amongst the many delays I experienced in even getting an opportunity to pull logs out of the water, an added delay came as a result of the public notice that I was forced to publish, a fallacious claim from environmental interests that there was significant fish spawning in the area that would be disturbed by log removal. There were no fish spawning, and that added delay helped cost me $70,000 US dollars worth of logs lost to theft.
>
> I am still not happy about that, and I see no point in the release of information to the public domain that can be used to aid illegal behaviour, even if no illegality is deliberately intended.

The appellant makes no specific submissions on the harm issue.

Findings

Section 17(1)(a): harm to competitive position/contractual or other negotiations

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].

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

I also do not accept some of the specific points raised by the Ministry and the affected parties, for the following reasons.

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).

However, I am persuaded that disclosure of other categories of information in the records could reasonably be expected to cause competitive harm under section 17(1)(a). This information includes:

- 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.

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

The Ministry argues that information the logging companies supplied in confidence to the Ombudsman should be protected, and that, if not, this would compromise the Ombudsman's ability to gather information in the future. As indicated above, I accept that any confidential information that was supplied indirectly to the Ministry by way of the Ombudsman qualifies for exemption, to the extent that it meets the "harms" test as explained above under the section 17(1)(a) heading. As a result, it is not necessary for me to make a separate finding under section 17(1)(b).

PUBLIC INTEREST IN DISCLOSURE

Introduction

The appellant takes the position that the section 23 applies to override the applicability of the section 17 exemption (section 23 cannot override section 19). 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 the Environment is responsible to protect and monitor our natural resource. The [Ministry of Natural Resources] 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
> - [Ministry of Natural Resources] 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 the 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.

The Ministry submits:

> . . . [T]here is no compelling public interest in the disclosure of any of the records [at issue] that outweighs the purpose of the exemptions claimed herein.
>
> To date, sunken log retrieval activity in the province has been conducted on a small scale. Ministry staff directly involved in the processing of sunken log retrieval applications have estimated that the size of area affected by sunken log retrievals in any one year may be equal to the size of a football field or less. Prior to retrieval activities taking place, the Ministry and other government agencies require applicants to satisfy a rigorous set of requirements designed to ensure the integrity of the aquatic environment. Given this, it would seem that claims from the public that large areas of fish habitat are being adversely affected by sunken log retrieval operations seems unlikely.
>
> While there has been some media interest in sunken logs, it has not focused on the adverse impact on fish habitat. Instead, the interest has been on the value of the logs and the unique resource development opportunity that retrieving sunken logs presents. There has been no interest in the media or the general public at large that would be satisfied by the release of the records.
>
> The requester in the past has been engaged in the retrieval of sunken logs and it would be open for him to resume the practice. The release of information contained in the request could give him some advantage if he were to pursue his private interests. Past orders of your office have indicated that the public interest over ride is not to be applied to the release of information that furthers private interests rather than public ones [see Orders P-12, P-270, P-282, P-1439].

The first affected party makes no submissions on the section 23 issue, and neither does the second affected party, beyond acknowledging "the request is made by a group claiming concern for 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.

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).

Does the compelling public interest in disclosure "clearly outweigh" the purpose of the section 17(1) exemption?

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.

ORDER:

1. I uphold the Ministry's decision with respect to the following records:

6593, 6877

7000, 7051, 7081, 7100, 7105, 7108, 7131, 7192, 7193, 7204, 7206, 7207, 7210, 7239, 7246, 7247, 7328, 7368, 7683

8040

11128, 11143, 11186, 11200, 11263

2. I order the Ministry, not later than **September 5, 2003**, but not earlier than **August 29, 2003**, to disclose to the appellant the following records in full, except for any portions withheld under section 21, or those portions I found exempt under sections 14 or 19:

6592, 6594, 6596, 6597, 6598, 6602, 6621, 6719, 6767, 6777, 6808, 6814, 6857, 6858, 6859, 6864, 6865, 6866, 6875, 6876, 6982, 6891, 6956, 6959, 6965, 6966, 6967, 6968, 6971, 6974, 6975, 6977, 6990, 6997

7029, 7035, 7039, 7041, 7042, 7043, 7046, 7057, 7059, 7061, 7062, 7063, 7064, 7072, 7074, 7079, 7080, 7082, 7083, 7084, 7087, 7088, 7109, 7121, 7122, 7123, 7124, 7125, 7126, 7128, 7129, 7130, 7132, 7143, 7144, 7146, 7149, 7190, 7191, 7194, 7195, 7197, 7199, 7200, 7202, 7208, 7209, 7211, 7212, 7213, 7216, 7219, 7220, 7221, 7222, 7223, 7225, 7228, 7230, 7231, 7232, 7234, 7235, 7237, 7238, 7241, 7248, 7249, 7251, 7252, 7258, 7265, 7283, 7286, 7287, 7288, 7307, 7308, 7311, 7312, 7315, 7316, 7317, 7318, 7319, 7322, 7323, 7326, 7330, 7331, 7334, 7341, 7343, 7344, 7351, 7352, 7353, 7354, 7356, 7357, 7358, 7359, 7360, 7363, 7365, 7366, 7367, 7369, 7370, 7371, 7372, 7373, 7374, 7388, 7389, 7390, 7391, 7393, 7397, 7398, 7399, 7401, 7403, 7404, 7405, 7406, 7408, 7409, 7411, 7413, 7421, 7422, 7427, 7431, 7432, 7433, 7434, 7435, 7436, 7437, 7438, 7439, 7440, 7443, 7445, 7446, 7453, 7674, 7680, 7681, 7682, 7694, 7696, 7708, 7712, 7713, 7721, 7723, 7725, 7731, 7744, 7760, 7766, 7767, 7768, 7769, 7770, 7771, 7772, 7816, 7889, 7890, 7947

8038, 8041, 8042, 8043, 8046, 8051, 8054, 8056, 8058, 8064, 8065, 8219, 8719, 8720, 8721, 8726, 8784

9050, 9052, 9053, 9056, 9057, 9058, 9061, 9066

10287

11099, 11100, 11102, 11103, 11107, 11110, 11111, 11114, 11115, 11119, 11120, 11124, 11125, 11126, 11131, 11132, 11133, 11134,

11135, 11144, 11149, 11150, 11154, 11155, 11157, 11181, 11184, 11194, 11195, 11196, 11197, 11266, 11268, 11327

3. I order the Ministry, not later than **September 5, 2003**, but not earlier than **August 29, 2003**, to disclose to the appellant the records listed below 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; I have not highlighted any information the Ministry withheld under section 21, but this information also should be withheld:

   6595, 6601, 6880, 6888

   7007, 7016, 7032, 7035, 7037, 7038, 7040, 7045, 7050, 7051, 7052, 7053, 7054, 7066, 7067, 7068, 7069, 7070, 7071, 7073, 7075, 7076, 7077, 7078, 7085, 7089, 7090, 7091, 7092, 7096, 7104, 7127, 7173, 7196, 7203, 7214, 7215, 7217, 7218, 7226, 7227, 7233, 7240, 7242, 7245, 7250, 7254, 7255, 7256, 7257, 7261, 7282, 7283, 7284, 7285, 7304, 7305, 7306, 7309, 7310, 7313, 7314, 7320, 7321, 7324, 7325, 7327, 7329, 7332, 7335, 7342, 7345, 7350, 7355, 7362, 7375, 7376, 7377, 7378, 7379, 7380, 7418, 7420, 7441, 7447, 7448, 7451, 7452, 7458, 7675, 7676, 7695

   8069, 8073

   9051, 9054, 9055

   10284, 10285, 10286

   11101, 11108, 11112, 11116, 11121, 11123, 11129, 11130, 11136, 11145, 11152, 11156, 11159, 11160, 11165, 11167, 11179, 11182, 11183, 11185, 11187, 11189, 11190, 11191, 11192, 11193, 11198, 11264, 11265, 11326

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

Original Signed By: July 31, 2003
David Goodis
Senior Adjudicator