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

ORDER PO-2496

Appeal PA-040211-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for information relating to the allocations for lumber harvesting given out by the Ministry relating to the Nipissing Forest. In the original request dated February 9, 2004, the requester wanted all records, including correspondence, studies and reports used to grant these allocations. On March 5, 2004, the requester subsequently restricted his request to the following:

1. The Minister's letter dated September 25, 1998, committing 97967 M3 of non-veneer poplar, to [a specified company] (the affected party).

2. The Assistant Deputy Minister's letter dated March 25, 2002, committing 150000 M3 of non-veer poplar, to the affected party.

The Ministry notified the affected party of the request, under section 28 of the *Act*. In its notification letter, the Ministry did not refer to any specific exemption in the *Act*. The affected party provided submissions in which it objected to disclosure. After considering these submissions, the Ministry issued a decision granting access to the records. The Ministry also provided an index of records to the requester with its decision letter.

The affected party (now the appellant) appealed the Ministry's decision to grant the requester access to the records.

Mediation did not resolve the appeal, and it was moved to the inquiry stage of the appeal process. The Mediator confirmed that the appellant is relying on the exemption in section 17(1) of the *Act* (third party information). The appellant contacted the Mediator upon receiving the Mediator's report because while they had appealed the release of two records, three records were noted as at issue. The Mediator obtained clarification from the Ministry that although the request was narrowed to two records, the third record was forwarded as it was responsive to the request as it was a draft version of one of the records. Accordingly, all three records are at issue in this appeal.

This office sent a Notice of Inquiry to the appellant, who provided representations and raised a concern about information allegedly provided to the original requester by the Ministry. The appellant referenced a section of the Notice of Inquiry which referred to the narrowed request and stated:

> The requester could not have known of the Letters … and the specified commitment volumes unless it was revealed to the requester by the Ministry. If this is the case, the Ministry wrongly provided too much detail and confidential information to the requester in its attempt to streamline or narrow the request.

This office then sent a Notice of Inquiry to the Ministry and the original requester, inviting their representations, and enclosing portions of the appellant's representations. Some parts of these

representations were withheld due to confidentiality concerns. The Ministry and the requester provided representations in response.

This office then sent a supplementary Notice of Inquiry to the appellant, along with the entire reply representations from the Ministry and portions of the reply representations from the requester, which were partly withheld for reasons of confidentiality. The appellant was asked to respond to issues raised in the representations from the Ministry and the requester. The appellant provided reply representations.

The file was then transferred to me to conclude the inquiry. I sent a supplementary Notice of Inquiry to the Ministry. The Ministry then provided further representations. The complete further representations of the Ministry were shared with the appellant, along with a supplementary Notice of Inquiry. In response, the appellant provided further representations.

RECORDS:

- Minister's Commitment Letter attached to the cover letter from the appellant dated October 19, 1998, and its 3 tables (pages 1-9)

- Assistant Deputy Minister's letter, dated March 25, 2002, and attachment (pages 10-13)

- Minister's letter, dated September 25, 1998 and attachment (pages 14-20)

DISCUSSION:

ADDITIONAL ISSUE RAISED BY APPELLANT

In reply to the initial Notice of Inquiry, the appellant states that the requester was aware of his identity and ought not to have known it, and raised a new issue:

> ISSUE C: HAS THE MINISTRY DISCLOSED TOO MUCH INFORMATION TO THE REQUESTER
>
> …In the context of the … request the Ministry may have wrongly provided confidential information to the requester. Page 1 of the Notice of Inquiry states that the requester restricted his request to the following:
>
> (a) The Minster's letter dated September 25, 1998 **committing 97,967 M3 of non-veneer popular**, to a specified company; and

(b) The Assistant Deputy Minister's letter dated March 25, 2002 **committing 150,000 M3 of non-veneer popular** to a specified company.

[emphasis added]

The appellant states further that:

> The bolded portion in the description of the Letters [above] is very detailed and specific and contains confidential information and ought not to have been provided to the requester. The requester could not have known of the [information] unless it was revealed to the requester by the Ministry. If this is the case, the Ministry wrongly provided too much detail and confidential information to the requester in its attempt to streamline or narrow the request. If this is the case, this practice ought not to be permitted.

In reply to the Notice of Inquiry, the Ministry, the requester and the appellant provided representations on whether information has been "wrongly disclosed" to the requester and whether the adjudicator had jurisdiction over the issue. There is no suggestion that this was personal information.

The Ministry and the requester's submissions were similar in that they strongly disagreed with any characterization that information was "wrongly disclosed". Both were adamant that there is a legislated obligation to manage Crown forest resources in a transparent manner. The Ministry submitted further that the adjudicator had no jurisdiction over the matter because the "bolded description of the records" referred to in the Notice of Inquiry can be found in the public domain, and also in documents other than the records in the present appeal.

The appellant stated that it was unfortunate that some of the information they referred to as "wrongly disclosed" was publicly available. The appellant stated further that it was unaware of this disclosure, however, they did not object to the disclosure. The appellant submitted that it objected to any "wrongful disclosure" in the "context of this request".

Analysis and Finding

Given that this allegation does not relate to personal information, for which the *Act* imposes specific obligations on institutions, my authority to comment on this issue arises from the appellant's right to appeal "any decision of a head" under section 10(1) of the *Act*. I have carefully reviewed the representations and I note that the Ministry met its third party notice obligation regarding its decision to disclose the records under section 28 of the *Act*. I also note that, upon receiving an objection to its decision from the appellant, the Ministry did not disclose any of the requested information, and the information continues to be withheld pending the outcome of this appeal. In my view, the Ministry properly discharged its obligations under these sections.

I also note that, based on the confidential and non-confidential representations of the requester and the Ministry, it is clear that much of the information which the appellant considers "wrongfully disclosed", if disclosure was as a result of "this request", was available to the requester in that it was in the public domain in documents publicly available *outside of this request*. In my view, this aspect of the appellant's objection is not properly before me in this appeal, and I decline to comment further. If the appellant has issues with the Ministry's practices regarding disclosure of non-personal information in relation to forest resource management, it should take this up with the Ministry directly.

THIRD PARTY INFORMATION

The appellant relies on section 17(1)(a), (b) and (c):

Section 17(1) states, in part:

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

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) to apply, the appellant 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), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

Introduction

The appellant states that the records at issue are confidential commercial and financial information. Neither the Ministry nor the requester makes representations as to this part of the test.

This office has defined the terms commercial information and financial information as:

Commercial information

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

Financial information

> The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. (Orders P-47, P-87, P-113, P-228, P-295 and P-394)

I adopt these definitions for the purpose of this appeal.

Analysis and Finding

The representations provided as to "type of information" are sparse; nevertheless the records themselves may provide evidence on this point. In its representations, the appellant states that the records contain commercial and financial information. The appellant states further that the Ministry's and the requester's lack of representations is evidence in support of their position.

I do not agree with this reasoning. I do not find that the Ministry's or the requester's silence on this point or the requester's lack of denial is evidence to support the appellant's position. However, I have carefully reviewed the records and am satisfied that they contain commercial and financial information within the meaning of section 17(1) of the *Act*. This information includes, but is not limited to: planning data; supply, volume, and harvest specifications and requirements; wood commitment volumes; operating levels and wood requirements; implementation and monitoring schemes; quality and environmental control guidelines; indemnity considerations; sustainable forest licenses; and tables containing harvest supplies and projected harvest supplies. I therefore find that part one of the test has been satisfied.

Part 2: supplied in confidence

Introduction

In order to satisfy part two of the test, the appellant must establish that the records at issue were "supplied" to the Ministry in confidence, either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [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 contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

Analysis and Finding

The representations of the appellant

The appellant states in its initial representations:

> The requirement that the information was supplied in confidence is *not* restricted to the actual information contained in the requested record. Certainly, one aspect of assessing an exemption under s. 17 is to determine whether the actual information contained in the record was supplied by a third party. If the answer is yes, then the question of confidentiality is addressed. However, there are instances where the information contained in the requested record need *not* be actually supplied by a third party in order to gain third party privacy protection under s. 17.
>
> There is a well-established principle in the Orders of the IPC that records will be exempted under s. 17 even where the actual information contained in the record was *not* supplied by a third party. In Order 203, the IPC stated that information contained in requested records would be found to be "supplied" within the meaning of s. 17 of the Act where disclosure "would permit the drawing of accurate inferences with respect to information actually supplied to the institution." Subsequent Orders of the IPC have endorsed and employed this principle.

Based on these representations, the appellant appears to state that although the information was **not** supplied, there is IPC jurisprudence supportive of information that was not "supplied" as being exempt. However, in its reply representations, the appellant states:

> The Ministry and the Requester do not deny that information in the [records] was supplied to the Ministry by [the appellant]. The Ministry states that 'to the relatively limited extent that such information has been supplied it was not supplied in confidence'. By this statement the Ministry admits that some of the information has been supplied. Therefore the 'supplied' part of the test has been satisfied.
>
> Although the Ministry alleges that it may have utilized information from other sources, that does not diminish the fact that some information was supplied to the Ministry by [the appellant]. Again, the Ministry does not deny this. Without [the appellant's] supplied data, it would be impossible to produce the documents in the [records] from public sources. For instance, the [records] specify operating levels for [the appellant] from both Crown land and private land sources. Both [the appellant's] operating level information and wood from private land sources do not appear in any publicly accessible sources.
>
> …
>
> In any event, disclosure of the [records] 'would permit the drawing of accurate inferences with respect to information supplied to the institution by [the appellant]. Contrary to the submissions of the Requester, release of the [records] would allow [the appellant's] competitors, such as the Requester or others, to draw accurate inferences about [the appellant's] economic health and future profitability, which would compromise [the appellant's] ability to effectively partake in business transactions in the forest industry.
>
> Accordingly, [the appellant] supplied the information which is contained in or is the basis of the [records].

The representations of the Ministry and the Requester

As noted above, the Ministry states that the appellant supplied information to a "relatively limited extent", and it also states that "(t)his information is a blend of information which comes from Ministry sources and that of the forest industry, including the appellant, but from other members of the industry as well". This is echoed in the representations from the requester.

Analysis and Finding

The records at issue in this appeal are essentially a contract between the appellant and the Ministry. The records are "commitment letters" which confirm agreed-upon terms. As noted previously, the provisions of a contract, in general, have been treated as mutually generated,

rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation.

In Order MO-2345, Assistant Commissioner Brian Beamish adopted the view articulated in Orders MO-1706, PO-2371 and PO-2384 that, except in unusual circumstances, agreed upon essential terms are considered to be the product of a negotiation process and therefore are not considered to be "supplied". In Order PO-2453, Adjudicator Catherine Corban followed this line of reasoning and, in her analysis of whether information was supplied, found:

> …in my view, in choosing to accept the affected party's quotation bid, *the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract*. [Emphasis added]

In Order MO-2052, I adopted this line of reasoning and found that information contained in a negotiated proposal agreement was not supplied.

Following the line of reasoning in these orders, I find that the information in the records that are the subject of this appeal was not supplied. My reasons are based on a careful review of the representations and the records, and I note:

- the information that the appellant seeks to protect from disclosure is contained in letters *to* the appellant *from* the Ministry.

- it is clear from the Ministry's correspondence to the appellant that the information in the records was the result of negotiations between the appellant and the Ministry.

- in his representations, the appellant states that the "…Letters were created and developed *in consultation with* [the Ministry]". [emphasis added]

Previous orders have discussed several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution. The appellant refers to this exception in his representations. Nevertheless, having carefully reviewed all of the information in this appeal, including the appellant's arguments on this point, I conclude that I have not been provided with sufficient evidence to show that any of the information at issue is "immutable", or that disclosure of the information would permit accurate inferences to be made with respect to *underlying non-negotiated confidential information* supplied to the Ministry by the appellant.

My finding is further supported, in my view, by the appellant's own statement that the records were "created in consultation with" the Ministry. As such, this negotiated information does not qualify as having been "supplied" for the purpose of section 17(1). Accordingly, part 2 of the test is not met.

Therefore, as all three parts of the test under section 17(1) must be satisfied, it is not necessary for me to make a finding regarding part 3 of the test. I find that the records at issue in this appeal do not qualify for exemption under section 17(1). As no other exemption has been claimed, I will order that they be disclosed to the requester.

ORDER:

1. I uphold the Ministry's decision to disclose the requested information to the requester in its entirety. I order the Ministry to disclose the records to the requester before **September 21, 2006** but not before **September 18, 2006** by sending a copy of the records to the requester.

2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed pursuant to Provision 1.

Original Signed By
Beverley Caddigan
Adjudicator

August 17, 2006