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

ORDER PO-2588

Appeal PA06-255

Ministry of the Environment

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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information relating to a power company:

> Water level observations on the Kagawong River from January 2005 to present.
>
> The dates on which the water levels were determined to peak.
>
> The dates determined to be the start dates for the 2005, 2006 rule curves.
>
> The calculation and plotting for the 2005, 2006 Rule Curves.
>
> The dates on which the operator closed the sluice gates on the dam in 2005 and 2006 after the spring freshet.

By way of background, the *Ontario Water Resources Act* (the *OWRA*) sets out a framework for protecting surface and ground water in the province. Section 34 of the *OWRA* requires anyone taking more than 50,000 litres of water a day (e.g., from a river or lake) to obtain a "Permit To Take Water" (PTTW) from the Ministry.

The power company named in the above request draws water from the Kagawong River for the purpose of generating hydroelectric power. In 2006, this company applied to the Ministry to renew its existing PTTW, and as part of this process, the Ministry asked the company to submit water level information and other data. The information that the power company provided to the Ministry is the subject of the above request.

The Ministry located 18 pages of records that were responsive to the request. After locating these records, the Ministry sent a letter to the power company under section 28 of the *Act* since it appeared that disclosure of these records might affect its interests. The Ministry included a copy of the responsive records and invited the power company to submit representations as to whether the records should be withheld from the requester pursuant to the third party information exemption in section 17(1) of the *Act*.

The power company did not submit any representations to the Ministry in response to the section 28 notice. Consequently, the Ministry issued a decision letter to the requester stating that it had decided to disclose the records to her. In addition, it sent a letter to the power company stating that it had decided to disclose the records to the requester.

After receiving this letter, the power company appealed the Ministry's decision to the Commissioner's office. During the mediation stage of the appeal process, the requester raised the application of the public interest override in section 23 of the *Act*. Under this provision, an exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where it is demonstrated that a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

This appeal was not settled in mediation and was moved to the adjudication stage of the appeal process. I started my inquiry by issuing a Notice of Inquiry, setting out the facts and issues, to the appellant (the power company). The power company did not submit any representations in response. I also issued the same Notice of Inquiry to the Ministry. In response, the Ministry submitted detailed representations, explaining why it had decided to disclose the records at issue to the requester.

Having received representations from the Ministry, but not from the appellant (the power company), I decided that it was unnecessary to seek representations from the requester.

RECORDS:

The 18 pages of records consist of email messages exchanged between the Ministry's staff and the power company's manager. The email messages sent by the power company's manager include attachments containing water level information and other data.

DISCUSSION:

THIRD PARTY INFORMATION

The power company claims that the mandatory exemption in section 17(1) of the *Act* applies to the records at issue.

General principles

Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, 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; or

> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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].

Section 53 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third parties who rely on the exemption provided by section 17(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record (Order P-203).

In the circumstances of this appeal, the Ministry decided to disclose the records at issue to the requester, and the third party (the power company) appealed that decision.

For section 17(1) to apply, the party resisting disclosure (in this case, the power company) 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.

The power company did not submit any representations in this appeal. However, the Ministry submitted representations that state that although Parts 1 and 2 of the three-part section 17(1) test are applicable to the records at issue, Part 3 of the test has not been met.

Part 1: type of information

In order to satisfy Part 1 of the test, the party resisting disclosure (the power company) must show that the records at issue contain one or more of the types of information listed in section 17(1).

Although the power company did not submit any representations in this appeal, I have reviewed the information in the records at issue and considered the Ministry's representations.

"Scientific information" is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

"Technical information" is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

The Ministry submits that the records at issue contain scientific and technical information:

> The Ministry published Guideline 5008e, Best Practices for Assessing Water Taking Proposals, [which] attests to the highly technical information of a PTTW application and monitoring data.
>
> As outlined in Appendix C (Technical Bulletin), the volume of water must be measured by a scientific method acceptable to the Director (O. Reg. 387/04).

I accept the Ministry's submission that the records at issue contain both scientific and technical information. These records contain water level information and other data collected by the power company through the use of measuring instruments. These measurements were presumably performed by engineers or other individuals at the power company with similar expertise, using scientific methods approved by the Ministry. Consequently, I find that the records at issue contain information that is both scientific and technical in nature. In short, Part 1 of the section 17(1) test has been met.

Part 2: supplied in confidence

In order to satisfy Part 2 of the test, the party resisting disclosure (the power company) must also satisfy the second part of the three-part test, which is that the information must have been supplied to the institution in confidence, either implicitly or explicitly.

Supplied

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].

In the circumstances of this appeal, the 18 pages of records consist of email messages exchanged between the Ministry's staff and the power company's manager. In particular, the power company's manager sent emails to the Ministry's staff that include attachments containing water

level information and other data. Consequently, I find that for the purposes of Part 2 of the three-part section 17(1) test, the power company "supplied" the information in the records at issue to the Ministry.

In confidence

In order to satisfy the "in confidence" component of Part 2 of the three-part section 17(1) test, the party resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The Ministry submits that the power company supplied the information in the records at issue "in confidence":

> In terms of the second part of the test, the records were supplied by the appellant to the Ministry via email.
>
> The email and handwritten notation on the graph are marked "proprietary information", which was interpreted by the FOI Office as supplied "in confidence" and triggered the section 28 notice to the appellant.
>
> This is sufficient to satisfy the second part of the test.

I have reviewed the records at issue. The first page contains an email sent by the power company's manager to the Ministry's staff stating that, "Per our discussion, this graph is provided to demonstrate compliance to the terms of the PTTW. It is proprietary information and shall not be made public nor disseminated." On the attached graph itself, the power company's manager has written in hand that the information is "proprietary" and "do not disseminate nor copy."

However, I have not been provided with evidence from either the Ministry or the power company (which did not submit representations) as to whether the power company's explicit expectation of confidentiality with respect to the information in these records was based on reasonable and objective grounds.

Moreover, the remainder of the emails and accompanying water level information and related data do not contain any explicit notations that the information is "proprietary" or should not be disseminated. I have not been provided with any evidence from the power company that would suggest that it had a reasonable expectation of confidentiality that was either explicit or implicit with respect to the information in these portions of the records.

Given the paucity of evidence before me, I find that the party resisting disclosure (the power company) has failed to satisfy the requirements of Part 2 of the section 17(1) test.

For section 17(1) to apply, the party resisting disclosure must satisfy each part of the three-part test. Given that I have found that the power company has failed to satisfy Part 2 of the section 17(1) test, it is technically not necessary for me to consider whether it has also met Part 3. However, in the interests of completeness, I will consider whether the last part of the section 17(1) test has been satisfied.

Part 3: harms

General principles

For section 17(1) to apply, the party resisting disclosure (the power company) must satisfy the last part of the three-part test, which is that the prospect of disclosure of the records must give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) or (d) of section 17(1) will occur.

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

The Ministry submits that the last part of the section 17(1) test has not been met:

> It is the Ministry's position that the third part of the [section 17(1)] test, the harms of disclosing the information, has not been established.
>
> The [appellant] has simply indicated that the information is proprietary without any additional explanation.
>
> It is up to the appellant to provide detailed and convincing evidence of the possible harm.

The Ministry further submits that the type of information in the records at issue should be routinely disclosed to the public:

> It is the Ministry's position that the taking [of] water, a public resource at no user cost to the permit holder, should be made available to the public, which has a right to information that affects the natural environment.
>
> The records at issue inform the Ministry about compliance with conditions in the appellant's PTTW and members of the public [have] the right to satisfy themselves that the appellant is in compliance.
>
> In the circumstances of this case, the Ministry deemed that water taking and level of surface water would fall into the category of information that should be routinely made available to the public without the need of a request under the Act.

In appeals involving the section 17(1) exemption, the third party is often in the best position to provide evidence as to whether any of the harms specified in paragraphs (a) to (d) (e.g., significant prejudice to its competitive position) could reasonably be expected to occur if the information in a record is disclosed. However, the power company chose not to provide any representations in this appeal. In short, I have not been provided with the detailed and convincing evidence required to satisfy the third part of the section 17(1) test.

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

I have reviewed the records at issue in their entirety. In my view, there are no other circumstances in this appeal, exceptional or otherwise, that would lead to an inference that any of the harms specified in paragraphs (a) to (d) of section 17(1) could reasonably expected to occur if these records are disclosed to the requester.

Conclusion

The party resisting disclosure (the power company) has failed to discharge the burden of proving that the section 17(1) exemption applies to the records at issue.

Given that I have found that the section 17(1) exemption does not apply, it is not necessary to consider whether the public interest override in section 23 of the *Act* applies to the records at issue.

ORDER:

1. I uphold the Ministry's decision to disclose the records at issue to the requester.

2. The Ministry must disclose the records at issue to the requester by **July 9, 2007** but not before **June 29, 2007.**

Original signed By: May 31, 2007
Colin Bhattacharjee
Adjudicator