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

ORDER PO-2575

Appeal PA-050276-1

Ministry of Natural Resources

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BACKGROUND:

The context and background of this appeal were described by the Ministry of Natural Resources (the Ministry) in their representations. The Ministry first described the legislative context of this appeal:

> The statutory authority for the forest management of Crown lands in Ontario is the *Crown Forest Sustainability Act, 1994* ("CFSA"). Crown forests are divided into management units, pursuant to s. 7 of the CFSA. Operators that wish to harvest forest resources must have either a sustainable forest licence ("SFL") or a forest resource licence ("FRL").
>
> A SFL is issued under s. 26 of the CFSA for a period of up to 20 years and covers the entire management unit. It is the Ministry's practice to request applicants for SFLs to submit a business proposal to the Ministry; however, there is no legal obligation to make any such submission.
>
> A FRL, on the other hand, permits harvesting only in specific areas of a management unit for a term of no more than five years, pursuant to s.27 of the CFSA.
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> Overlapping FRLs may be issued to smaller operators on areas subject to a SFL, pursuant to s.28 of the CFSA. In these instances, an overlapping agreement must be negotiated between the operator and the holder of the SFL.

As factual background specific to this appeal, the Ministry explains in its representations that in early 1995 it expressed its intention to change the licensing structure for the Sioux Lookout management unit. At that time the Sioux Lookout was a Crown unit, managed by the Ministry in which operators hold Forest Resource Licences. It submits that the proposed licensing structure would convert the Crown unit to a Sustainable Forest Licence unit, in which only one party would hold a Sustainable Forest Licence (SFL). This would transfer the responsibility for forest management planning, forest renewal, monitoring and reporting for that unit from the Ministry to the forest industry, specifically the company granted the SFL.

The Ministry submits that at that time, an affected party, who had been harvesting on the Sioux Lookout management unit, began to pursue discussions with the Ministry about acquiring the SFL for that unit. The affected party subsequently met with traditional operators (individuals who have been harvesting on the unit), the First Nation, and others such as log home builders who held Forest Resource Licences to harvest on that unit to discuss its interest.

The Ministry explains that despite the concerns about the affected party's proposal held by traditional operators, the First Nation and others, negotiations ensued and agreements were reached to address the interests of all parties. The Ministry submits that the working relationships between the affected party and the traditional operations, the First Nation and the others, including log home builders, were captured in a series of Memoranda of Agreement

("MOA") which contemplate that the parties would acquire overlapping licences at the same time that the SFL was issued to the affected party.

The Ministry submits that it required the affected party to develop a business proposal for the SFL that reflected the MOAs in order to enable the Ministry to assess the viability of the affected party holding the SFL. Subsequently, the Ministry submits that it approved the affected party's business proposal in January of 1998.

The Ministry indicates that in April of 2001, the Sioux Lookout management unit was amalgamated with the adjacent Lac Seul management unit. The affected party was also the holder of the SFL of the Lac Seul unit, and continues to be the sole SFL holder for the newly amalgamated unit. The Ministry submits that in July of 2002, it amended the Lac Seul SFL to reflect the amalgamation of the units and to require the affected party to provide opportunities for the traditional operators and log home builders in the former Sioux Lookout unit, to also conduct harvesting operations on the former Lac Seul unit.

NATURE OF THE APPEAL:

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a log home builder for access to the following information:

> The O.M.N.R [Ontario Ministry of Natural Resources] approved a business proposal for a sustainable forest licence on the Sioux Lookout Forest in Jan 30, 1998 submitted by [named company].
>
> …
>
> I wish to know all relevant information concerning my interests as a crown operator who became a traditional operator, only on part of the Lac Seul Forest.

The Ministry identified one responsive record, the business proposal submitted in support of the application for the SFL. Pursuant to section 28 of the *Act*, the Ministry notified the affected party as it appeared that it might have an interest in the disclosure of the record. The affected party objected to the disclosure of the responsive record to the appellant.

The Ministry issued a decision letter to the appellant, denying access to the responsive record pursuant to section 17(1) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During the course of mediation, the Ministry clarified that it is relying upon sections 17(1)(a), (b), and (c) to deny access to the responsive record.

As no issues were resolved in mediation, the file was transferred to the adjudication stage of the appeal process.

I decided to begin my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the Ministry, initially. The Ministry provided representations in return. I also sent a copy of the Notice of Inquiry to the affected party, initially and received representations from it, as well.

I then sent a copy of the Notice of Inquiry to the appellant, seeking its representations. To assist the appellant in making its representations, I also enclosed the non-confidential portions of both the Ministry and the affected party's representations. The appellant provided representations in response.

RECORDS:

The record at issue in this appeal is a 30-page business proposal submitted to the Ministry by the affected party in support of an application for a SFL. The licence was subsequently granted to the affected party.

DISCUSSION:

PERSONAL INFORMATION

My review of the record reveals that section 8.2 of the proposal, pages 17 through 21, lists individual staff members who are to manage the proposed SFL. In my view, this information may qualify as personal information. Although the Ministry has not claimed that section 21(1) applies to this information, as it is a mandatory exemption that relates to information that qualifies as personal information, I am required to determine whether section 21(1) applies to this information.

For the mandatory personal privacy exemption at section 21(1) to apply, the information must first be found to qualify as the "personal information" of identifiable individuals. The term "personal information" is defined in section 2(1) of the *Act*. The relevant portions of that section read:

> "personal information" means recorded information about an identifiable individual, including:
>
> (b) information relating to the education … or employment history of the individual …
>
> …
>
> (h) the individual's name if it appears with the other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Having reviewed the record, under section 8.2 of the proposal, the affected party identifies staff members who will manage the licence. Pages 17 to 21 of the proposal list each staff member by name, by job title and professional designation if one is applicable. Following this general information, section 8.2 of the record provides a narrative description of each individual's qualifications including past work projects and experience, as well as, in some instances, the educational institutions where they obtained their training. Section 8.2 also includes an organization chart at page 18. This chart diagrams the hierarchy of the staff and identifies them by name and by job title.

Following the orders listed above, I find that the names of the affected party's staff, their job titles and any professional designations that follow their names do not qualify as personal information for the purposes of section 2(1). This information appears in the individual's business capacity and is not considered to be "about" the individual in a personal capacity. This includes the names and job titles listed in the organization chart at page 18 of the record. Accordingly, this information does not qualify as personal information and therefore, section 21(1) cannot apply.

However, the record also contains the details about each staff member's work on previous projects for the affected party and information about their formal training. Previous orders have established that, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [202] O.J. No. 4300 (C.A.)]. In some circumstances, if names are severed from the record, the individual ceases to be identifiable.

In the circumstances of this appeal, I find that even if the individual's names were severed from the record, the narrative descriptions contain sufficiently detailed information about the individuals such that, in my view, it is reasonable to expect that each of the individuals may be identified. Accordingly, I find the narrative descriptions that detail each staff member's past work projects and qualifications to qualify as the education and employment history of those individuals as contemplated by paragraph (b) of the "personal information" definition of section 2(1). I must now determine whether section 21(1) applies to exempt this information from disclosure.

PERSONAL PRIVACY

Where a requester seeks the personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. The only exception with potential application in the circumstances of this appeal is section 21(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

In order for the section 21(1)(f) exception to the mandatory exemption in section 21(1) to apply, it must be established that disclosure would not be an unjustified invasion of personal privacy. Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Furthermore, where the record contains the personal information of an individual other than the appellant, the only way that such a record can be disclosed is if I find that disclosure would not constitute an unjustified invasion of personal privacy of that individual.

The presumption at section 21(3)(d) may apply. That section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > relates to employment or educational history;

In Order P-216, former Assistant Commissioner Tom A. Wright held that a person's name and professional title, without more, does not constitute "employment history" within the meaning of the presumption at section 21(3)(d). I agree with that reasoning for the purposes of the present appeal.

I have reviewed the record and find that it contains information relating to the educational and employment history of some of the affected party's staff. I find that the narrative descriptions that detail the individual's past work projects and experience as well as, in some instances, the educational institution where they received their training, constitutes the educational and employment history of the individuals to whom this information relates. Previous orders issued by this office have found that information contained in resumes [Orders M-7, M-319, M-1084] and work histories [Orders M- 1084, MO-1257] falls within the scope of section 21(3)(d). Therefore, I find that disclosure of the personal information in the record would constitute a presumed unjustified invasion of privacy under section 21(3)(d) of the *Act*. This finding is consistent with previous orders issued by this office [see Orders M-7, M-319 and M-1084].

The Divisional Court has stated that once a presumption against disclosure under section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal

information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767). Section 23 has not been raised by the appellant. Section 21(4) has no application to the circumstances of this appeal since the affected party is not an institution as defined by section 2(1) of the *Act*.

Therefore, I find that the educational and employment history of the staff members listed on pages 17 to 21 of the proposal (but not their names, job titles and professional designations which I have found not to qualify as personal information) are exempt from disclosure under section 21(1). For ease of reference, I will provide the Ministry with a highlighted copy of the record indicating those portions that I have found to qualify for exemption under section 21(1).

THIRD PARTY INFORMATION

The Ministry takes the position that the record at issue is also exempt from disclosure pursuant to the exemptions at section 17(1)(a), (b) and (c). Those provisions 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, 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

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].

For section 17(1) to apply, the parties resisting disclosure, in this case the Ministry and the affected party, must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders. The types that may be relevant in the circumstances of this appeal, technical, commercial and financial information, have been defined as follows:

> *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].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Representations

The Ministry submits that the record contains commercial information, arguing that:

> "Commercial information" has been defined in past orders to mean information that relates solely to the buying, selling or exchange of merchandise [orders P-493, PO-1687, PO-2010]. Moreover, [the Commissioner] has previously held that "commercial information" may include information that "sets out specific details regarding the business operations of the affected party or the business plan of the affected party to relocate and conduct its business" [Order PO-1687].

> The Record is a business proposal that details the commercial and financial relationships with respect to the SFL, including planned and on-going negotiations and commercial arrangements with third parties, such as the traditional operators and the local First Nation. The Record also describes the operational plans and management strategies of the affected party regarding the SFL, as well as information about its corporate structure, which is not otherwise available to the public. Moreover, the Record includes information about wood flow patterns, as well as future plans of the affected party with respect to other business activities.
>
> Therefore, it is the Ministry's position that the Record reveals sensitive commercial information relevant to the affected party's present and future operations in the management unit.

The affected party argues that "the information is technical, commercial and financial in nature". It submits:

> [T]he information involved deals with the business plan of the affected company, their commercial and financial operations and relationships as well as the related negotiations concerning the same between the companies and the government and other business third parties. The document also relates and details private and confidential aspects of the operation of the company and is key to ongoing negotiations and relationships between the government and the company as well as outside parties.

The appellant does not specifically address whether or not the record contains information that qualifies as technical, commercial and/or financial within the meaning of section 17(1). Rather, he explains that submitting business proposals is not a legal requirement of the "New Business Relationship" process by which SFLs are issued. The appellant's representations on this part of the section 17(1) test focus on what information the record contains and the fact that it is either dated information or readily available in public documents. He submits:

> These negotiations rightly form the first and main topic of the record. However, the "regular" Crown Unit Operators do not required access to the Record. They carry two and a half years of negotiations in their personal experience. The rest of the Record is dated information or readily available in public documents.

The appellant also submits that all Forest Management Plans, which are publicly available documents, are required to include a "snap-shot" of economic activity in dollars, a [Socio-Economic Impact model] S.E.I.M. analysis". He advises that any competitor interested in the operations of the Lac Seul Forest would be advised to look at these public documents for they are much more informative and current than the record at issue in this appeal.

Part 1: analysis and finding

On my review of the record and the representations submitted by the parties, consistent with many past orders dealing with similar records, I find that the information contained in the record at issue qualifies as "commercial information" for the purposes of section 17(1).

The record is a business proposal which sets out specific details regarding the business operation or the business plan of the affected party in support of a SFL for the Sioux Lookout management unit. It pertains to the proposed terms of a commercial relationship between the affected party and the Ministry; specifically, the granting of a licence by the Ministry which transfers the forest management of a particular management unit of a Crown forest to the affected party. Once granted, the SFL, gives the affected party the right to harvest forest resources on that management unit. In my view, this information relates solely to the "exchange of services".

Therefore, I find that all of the information contained in the record satisfies the definition of "commercial information" as that term has been defined by this office in previous orders and part one of the section 17(1) has been established.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

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

The 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 or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor.Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

There are two exceptions to the general rule that 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). These may be described as the "inferred disclosure" and "immutability" exceptions. [MO-1706, PO-2371]

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 immutability exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

In confidence

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

Part 2: representations

Specifically addressing the "supplied" component of this part of the test, the Ministry submits that:

> [T]he Record was created by the affected party and supplied directly by one of its representatives to the Ministry on or about January 23, 1998 further to ongoing discussions between the Ministry, the affected party and the other stakeholders.

Addressing the "in confidence" component of this part of the test, the Ministry submits:

> [I]t is the Ministry's position that the affected party had a reasonable expectation of confidentiality. It was the Ministry's practice at the time when the Record was submitted by the affected party – and continues to be the practice of the Ministry today – to hold the business plans and proposals submitted by third parties in

> strict confidence and not to disclose them to third parties. The Ministry has and continues to recognize the sensitivity of the information included in business plans and proposals and the potential harm and prejudice that disclosure may cause to the submitting party.
>
> With respect to the record at issue, the Ministry refers you to the affected party's written representations to the Ministry, dated September 23, 2005, in which it stated:
>
> > [I]t is our view that the information requested:
> >
> > …
> >
> > (2) was supplied by the Ministry in response to certain Ministry requirements, as was so supplied in confidence. To the best of our knowledge, the information has been consistently treated in a confidential manner in the past.
>
> Therefore, in considering this statement in conjunction with the Ministry's practice of keeping business plans and proposals confidential, the Ministry submits that the affected party had a reasonable expectation that the Ministry would indeed hold the Record in confidence.

The affected party submits that the information contained in the record "was supplied to the Ministry in response to certain Ministry requirements, and was so supplied in confidence. To the best of our knowledge it has been consistently treated in a confidential manner". The affected party also states that it concurs with the Ministry's position that disclosure should not be allowed for the following reason:

> I would specifically like to note the critically confidential nature of these documents. They often give rise to serious business negotiations and discussions which can only be fruitful if conducted in confidence. Unless we, and all of industry, can be assured that our business plans (in their entirety) will be treated as confidential, the entire process will be put in jeopardy. This does not change because an applicant only wants to see "part" of a plan. The point is that all parts are confidential.

The appellant submits that the information was not "supplied in confidence". He submits:

> [T]he Record was actually the third draft, according to the history provided on pages one, two and three of the Record. [The affected party] sent a letter of intent, regarding the Sioux Lookout SFL to the [Ministry] on February 26, 1997. Negotiations with the "regular" Traditional Operators continued through the year with an MOA signed in June 1997. [The Record/page 8] These negotiations are also described in [named individual's] letter to the Sioux Lookout Local Citizens

> Committee, whose minutes are public. A second draft of the Record was submitted to the [Ministry] on June 25, 1997 [The Record/page one]. The third draft was submitted and accepted in January 1998.

Part 2: analysis and finding

I accept that the affected party "supplied" the information contained in the record "in confidence" to the Ministry.

As noted above, in previous orders the provisions of a contract have frequently been treated as mutually generated, rather than "supplied" by the third party. This is because such terms have generally been agreed upon in negotiations. The appellant points out that the proposal at issue in this appeal is the third draft of the document, previous drafts having been reviewed by the Ministry. Therefore, the appellant takes the position that the information is not "supplied" because it has been negotiated.

In the circumstances of this appeal, I do not accept that the business proposal qualifies as a contract, nor do I accept that the information contained in the proposal has been negotiated by the Ministry and the affected party.

- As explained by the Ministry in its representations, the business proposal was prepared and submitted to enable the Ministry to assess the viability of the affected party holding a SFL. Although the record at issue received approval by the Ministry and a licence was issued, the parties have not provided me with any evidence to demonstrate that a contract was entered into. In my view, in the circumstances of this appeal, the granting of the licence based on a review of a business proposal does not necessarily mean that a contract has been entered into. Additionally, I do not accept that, in the circumstances of this appeal, the approval of the proposal and the subsequent issuance of the licence means that the proposal itself has become a contract.

Although it appears that the Ministry reviewed earlier drafts of the proposal, having reviewed the record closely, the information that it contains is not the type of information that would have resulted from negotiations between the two parties. The proposal itself details in a rather general fashion how the affected party runs its business and how it intends to manage the specific management unit covered by the licence. Even if the Ministry reviewed the proposal and requested certain information be added or deleted, given the nature of the information in the record I do not accept that it was mutually generated or that it resulted from "negotiations" between the Ministry and the affected party.

Moreover, in my analysis below on the harms component of the test, I find that much of the record should be disclosed. The information that I have found to be exempt in my discussion below is, in my view, information that has clearly been "supplied" by the affected party. Even if it were to be established that the proposal became a contract as a result of its approval, I would still find that the information that I have ultimately withheld under section 17(1) was "supplied" by the affected party, under the inferred disclosure exception discussed above.

I also find that the information was supplied "in confidence" to the Ministry. In the representations of both the Ministry and the affected party, both parties assert that the affected party had an expectation of confidence with respect to the information in the proposal. Given the Ministry's practice and the way such information was consistently treated in the past, I accept that the expectation of confidentiality on the part of the affected party was reasonably held.

Accordingly, based on my review of the record and the representations of the parties, I accept the position of the Ministry and the affected party that the record was supplied to the Ministry by the affected party, and that it was supplied with a reasonably held expectation of confidentiality.

Part 3: harms

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

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

Part 3: representations

The Ministry and the affected party submit that disclosure of the record at issue could result in the harms identified in sections 17(1)(a), (b) and (c) of the *Act*. Specifically addressing the reasonable expectation of harm contemplated by sections 17(1)(a) and (c), the Ministry submits:

> It is the Ministry's position that the disclosure of the Record will significantly prejudice the competitive position of the affected party and its negotiations with other business parties and result in undue loss or gain. The Record contains sensitive information which would not otherwise be released to the public and which distinguishes the affected party's business from that of its competitors. The Record includes information regarding, *inter alia:*
>
> - the corporate structure of the private company, which is particularly sensitive since the affected party is a private corporation that holds business information closely and is not like a publicly held company for which such information is readily available;
>
> - business relationships and contractual agreements, including financial arrangements, with the traditional operators, log home builders, the First Nation and the Ministry; and

- commercial strategies and planned operations integral to the affected party's competitiveness.

As your office has repeatedly affirmed, an order that section 17(1) of the *Act* does not apply in a given situation results in the inability of the Ministry to refuse disclosure of the Record to persons who subsequently request it. Accordingly, the release of the Record to the appellant would result in the sensitive information discussed herein becoming available to the affected party's competitors; information in which they and other business parties could reasonably be expected to take a keen interest and use to their benefit or advantage. Moreover, since businesses spend substantial amounts of time and money preparing business plans and proposals, releasing such plan or proposals to the public would enable competitors to replicate or model their own plans on the Record, thus saving them money and strengthening their competitive position relative to the affected party.

Disclosure of the Record could also significantly prejudice the competitive position of the Hudson Sawmill, which is owned by the affected party, as the Record contains commercial and financial information relating to the sawmill's major source of wood supply. The Hudson Sawmill is highly competitive in the sawmill industry, with the affected party exporting a substantial amount of the lumber produced at that facility to the United States each year (e.g. 90% of lumber produced in 2004-2005). Consequently, the release of the Record will make this information available to the affected party's sawmill competitors not only in Canada but in the United States, as well. Such disclosure further heightens the extent of potential harm that may be caused to the affected party in the circumstances, particularly in light of the ongoing, contentious softwood lumber dispute between Canada and the United States.

Disclosure of the Record would also result in the sensitive information identified herein becoming available to the affected party's negotiating partners. As a result, the release of the Record could be reasonably expected to undermine the affected party's negotiations with third parties, notably the traditional operators and log home builders (including the appellant) in the Lac Seul management unit. Specifically, disclosure of the Record could prejudice the affected party's negotiating position in ongoing and future negotiations involving matters fundamental to the affected party's operations in the management unit, such as [Memorandum of Agreements] associated with the overlapping licences.

Therefore, if the Record is released, it could be reasonably expected that the affected party would suffer significant prejudice to its position as a viable and profitable enterprise with a competitive advantage in the marketplace, as well as to its negotiating position with other business parties.

With respect to the harms in section 17(1)(b), the Ministry submits:

> Encouraging full disclosure of commercial and financial information in the SFL licence application process is clearly in the public interest as it enables the Ministry to fully determine the capabilities of applicants to fulfill the obligations associated with the SFL and to manage Crown forests is a sustainable manner. However, disclosing business plans and proposals to the public under the *Act* would significantly affect the willingness of SFL applicants to provide such sensitive business information in their business plans or proposals. As noted by the affected party in its written representations to the Ministry dated September 23, 2005:
>
> > In the long run, the ability of companies such as ours to deal on an "up front" basis with the government will be significantly affected if such information can be accessed by our competitors. We would be shocked to discover that this type of information can become public knowledge. Business plans generally, and this one in particularly, are replete with sensitive information which we would <u>never</u> disclose if it was thought the information would become public. [emphasis in original]
>
> Accordingly, the Ministry submits that the affected party and other SFL applicants are unlikely to entrust the Ministry with similar sensitive information in the future if the Record is disclosed in this instance.

The affected party also takes the position that disclosure should not be permitted because the information is confidential and gives rise to "serious business negotiations and discussions which can only be fruitful if conducted in confidence". As noted above it submits: "[u]nless we, and all of industry, can be assured that our business plans (in their entirety) will be treated as confidential, the entire process will be put into jeopardy".

The affected party states that:

> [T]he information requested is of such a nature that its release will result in harm to the corporation in that it will <u>significantly</u> prejudice the competitive position of the Company, or interfere with its contractual or other relationships with its customers, contractors, suppliers and employees.

The affected party goes on to submit that:

> [T]he information involved deals with the business plan of the affected Company, their commercial and financial operations and relationships as well as the related negotiations concerning the same between the Companies and the government and other business third parties. The document also relates and details private

> and confidential aspects of the operation of the Company and is key to ongoing negotiations and relationships between the government and the Company as well as outside parties. All of this information is highly confidential, as it will disclose matters which will affect our contractual and other relationships with other business entities.
>
> The information details operational plans which distinguish our business form others. These are confidential and would cause serious prejudice to our competitive position if disclosed.
>
> I draw your attention to the fact that the document, inter alia, discloses:
>
> 1) Information concerning the corporate structure of the company (which is a private company) and which is closely held confidential information, not available or otherwise disclosed.
> 2) Information concerning specific business relationships and contracts which are confidential between the parties and which release would prejudice those relationships and new ones being negotiated today.
> 3) Information concerning agreements which are confidential including financial arrangements therein, which are equally confidential and which would prejudice present negotiations with other parties if made public.
> 4) Technical information concerning methods of operation specific (and private) to our Company.
>
> As I have noted above, this information has been supplied to the government in the strictest confidence and is expected to be held in confidence by it. In the long run, the ability of companies such as ours to deal on an "up front" basis with the government will be significantly affected if such information can be accessed by our competitors. We would be shocked to discover that this type of information can become public knowledge. Business plans generally, and this one in particular, are replete with sensitive information which we would never disclose if it was thought the information would become public.

Specifically addressing the application of sections 17(1)(a) and (c), the appellant submits:

> It would be difficult for disclosure of the Record to affect negotiations with the Traditional Operators, other than the Appellant…The effect of non-disclosure of the Record and the supporting Record … The effect of non-disclosure of the Record and the supporting documents has allowed [the affected party] to continue the impression that they or their delegate were allowed first right of refusal on the Appellant's finished products. Until the Appellant discussed this issue with [named individual], the MNR Regional Forest Liaison and Wood Flow Specialist, [the affected party] had insisted this was their right…

Addressing the application of section 17(1)(b), the appellant submits:

> The [New Business Relationship] process was not unique to Sioux Lookout. If a feature of this process allowed some inherent stakeholder with vested commercial interests to be left out of the process and have their commercial interests unavailable to be ratified, through the submission of a business proposal, then it is feasible that other forestry companies would include this feature in their business proposals. It would be likely that other forest companies might not submit similar information, however, MNR processes like the [New Business Relationship] must have guidelines and policies regarding these activities.

Part 3: analysis and finding

As a preliminary point, I have found above that the information in the records relating to the educational and employment history of a number of individuals is no longer at issue, as it is exempt under section 21(1) of the *Act*. Accordingly, with respect to the information about identifiable individuals in the records, I need only consider the application of section 17(1) to the names of identifiable individuals, their job titles, and any professional designations in the record.

Sections 17(1)(a) and (c): prejudice to the affected party's competitive position, interfere with negotiations or result in undue loss or gain

Having reviewed the record, as well as the representations of all of the parties, I am satisfied that the disclosure of some portions of the record could reasonably be expected to result in the harms identified in sections 17(1)(a) and/or (c). I find that the Ministry and the affected party have provided me with sufficient evidence to demonstrate that disclosure of these portions could reasonably be expected to prejudice significantly the affected party's competitive position, interfere significantly with negotiations of the affected party, or result in an undue loss or gain.

Specifically, I find that the portions of the proposal which contain information that is exempt under section 17(1)(a) and/or (c) are:

- The list of traditional operators and their allowable harvest levels under section 6.1, "The Traditional Operators", on page 8.

- The information detailing specific business arrangement between the affected party and others found under section 6.2, "The Log Home Builders", on page 11.

- The information detailing specific business arrangements between the affected party and others found in paragraphs 2 and 3 on pages 13, under section 6.5 "The Wood Supply Commitment".

- The information detailing specific business arrangements between the affected party and others found under section 7 "Relationships with Aboriginal People" on pages 13 through 16.

- The information relating to how a management charge is to be calculated and the formula detailed under section 8.3 "The Financial Arrangement", on page 22.

The information outlined above is either information that describes and/or reveals specific business agreements with specific business partners or affected individuals or is information that details specific financial calculations that have been specifically created by the affected party's company for the specific circumstances. In my view, the Ministry and the affected party have provided me with the sufficiently detailed and convincing evidence to establish that disclosure of this information could reasonably be expected to prejudice the competitive position of the affected party, interfere with its negotiations with other parties, and/or give rise to either an undue loss on the part of the affected or an undue gain on the part of its competitors. As a result, I will order that this information be withheld from the appellant due to the operation of the exemptions at section 17(1)(a) and/or (c).

However, I am not satisfied that the remaining portions of the record qualify for exemption under either of sections 17(1)(a) or (c).

In Order MO-2151, Adjudicator Frank DeVries made a finding that some of the information contained in a successful proposal did not qualify for exemption under the provincial equivalent of section 17(1)(a). Adjudicator DeVries stated:

> In my view, the remaining portions of the record do not contain information which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. I find that I have not been provided with sufficiently detailed evidence to persuade me that the information contained in these portions of the record qualify for exemption under section 10(1)(a). Some of the information is information about the affected party and its history, experience and qualification. This information appears to be of a public nature, and I have not been provided with sufficiently detailed and convincing evidence supporting the position that the disclosure of the information could reasonably be expected to result in the harms set out in section 10(1)(a).
>
> The other information contained in the proposal…contains information about the manner in which the affected party proposes to meet the requirements of the RFP. The affected part has made general representations with respect to the concern that disclosure of the proposal would result in the identified harms. The affected party also identifies its concern that the disclosure of the form and structure of the proposal will allow others to use their successful proposal as a "template". I recently reviewed a similar argument in Order PO-2478. In that case the

arguments were put forward by an affected party and the Ministry of Energy in respect of a proposal received by the Ministry, and in which the exemption in section 17(1)(a) and (c) of the *Freedom of Information and Protection of Privacy Act*, (which is similar to section 10(1)(a) and (c) of the *Act*) was raised. After reviewing the argument, I stated:

> In general, I do not accept the position of the Ministry and affected party concerning the harms which could reasonably be expected to follow the disclosure of the record simply on the basis that the disclosure of the "form and structure" of bid would result in the identified harms under sections 17(1)(a) and (c), as it would allow competitors to use the information contained in the successful bid to tailor future bids. In a recent order, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms.

In Order PO-2435, Assistant Commissioner Beamish made the following statement:

> The fact that a consultant working for the government may be subject to more competitive bidding process for future contracts does not, in an of itself, significantly prejudice their competitive position or result in undue loss to them.

I accept the position taken by the Assistant Commissioner. In my view, the arguments put forward by the Ministry and affected party regarding their concerns that disclosure of the "form and structure" of a bid, or its general format or layout, will allow competitors to modify their approach to preparing proposals in the future would not, in itself, result in the harms identified in either section 17(1)(a) or (c).

I agree with the analysis set out in Orders MO-2151, PO-2478, and PO-2435 as outlined above and find that it is equally applicable to the remaining portions of the record at issue in this appeal.

As identified above, I have found that certain specific information contained in the record is exempt under sections 17(1)(a) or (c). The information that remains at issue is information which I consider to be fairly general about the manner in which the affected party proposes that it would manage the specific management unit if it were granted the SFL. This information also includes the names of staff members, their job titles and any professional designations. In the circumstances of this appeal, the SFL has already been issued to the affected party and, presumably, it has begun to put into place some of the things that it outlined in its proposal. While the information is general in nature, it relates to how it would conduct business of a specific management unit. Presumably, another management unit would have different challenges and would have to be approached in a different way. For these reasons, I find that the

disclosure of information that remains at issue could neither be reasonably expected to result in prejudice to the affected party's competitive nature or interfere with future negotiations, nor result in undue loss or gain to any person, group, committee or financial institution or agency.

With respect to the Ministry's concerns that competitors will use the record as a template for future proposals, following Orders MO-2151, PO-2478 and PO-2435, I am not satisfied that the disclosure of general information contained in the proposal which discloses the "form and structure" could reasonably be expected to result in either of the harms identified in section 17(1)(a) or (c).

The affected party and Ministry's arguments on the reasonable expectation of harm on both of these points, the disclosure of the remaining information itself and the disclosure of the "form and structure" of the proposal, are speculative in nature. In my view, I have not been provided with the requisite sufficiently detailed and convincing evidence to demonstrate that disclosure of this general information could reasonably be expected to result in the harms set out in either section 17(1)(a) or (c). Therefore, I find that the remaining portions of the record are not exempt under either of these sections.

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

Both the Ministry and the affected party take the position that the record is also exempt under section 17(1)(b) because its disclosure could reasonably be expected to result in similar information no longer being supplied to the Ministry, where it is in the public interest that similar information continue to be so supplied.

I have carefully reviewed the record and considered the representations of all of the parties. I am not persuaded that disclosure of the information that remains at issue (not having qualified for exemption under section 21(1) or 17(1)(a) and (c)), could reasonably be expected to result in similar information no longer being supplied to the Ministry in the future, as contemplated by section 17(1)(b).

In Order MO-2151, Adjudicator Frank DeVries in MO-2151, reviewed whether portions of a successful proposal submission should be disclosed. Addressing the municipal equivalent of section 17(1)(b) Adjudicator DeVries determined that:

> [I]n my view companies doing business with public institutions, such as the Town, understand that certain information regarding how it plans to carry out its obligations will be public. Furthermore, I do not accept that the prospect of the release of the type of information contained in the portions of the records which I have found do not qualify under section 10(1)(a) could reasonably be expected to result in a reluctance on the part of companies to participate in future projects.
>
> Accordingly, I am not satisfied that it is reasonable to expect that the disclosure of this information will have the effect that companies will no longer supply similar information to the Town…

I agree with Adjudicator DeVries' analysis and find it relevant to the current appeal.

I accept the Ministry's argument that it is in the public interest to encourage full disclosure of relevant commercial and financial information from parties applying for SFLs. However, in the circumstances of this appeal, I have not been provided with sufficiently detailed evidence to demonstrate that disclosure of the specific information that remains at issue could reasonably be expected to result in reluctance on the part of forestry companies to compete for SFLs. Although I recognize that given that there is a finite amount of Crown forest land available for management, the affected party must work in a competitive environment in its pursuit of such licences. However, in my view, it is not credible that the affected party and other companies in the forestry industry would forgo such opportunities simply because the general information that remains at issue could be disclosed as a result of a request under the *Act*. In my view, the parties' arguments amount to a speculation of possible harm and do not provide the detailed and convincing evidence required to establish the harm.

Therefore, I find that the Ministry and the affected party have failed to establish that the harms contemplated in section 17(1)(b) of the *Act* could reasonably be expected to occur if the information that remains at issue is disclosed.

In conclusion, with respect to the application of the exemption at section 17(1), I find that part 3 of the test, as outlined in section 17(1)(a) and (c), has been established and operates to exempt portions of the record from disclosure. With respect to the remaining portions of the records, in my view, I have not been provided with sufficiently detailed and convincing evidence to establish a "reasonably expectation of harm" as contemplated by any of sections 17(1)(a), (b), or (c). As all three parts of the test under section 17(1) must be met, the remaining information contained in the portions of the record, does not qualify for exemption under section 17(1).

For ease of reference, I have enclosed a highlighted copy of the records indicating the portions that are exempt from disclosure under section 17(1)(a).

ORDER:

1. I uphold the Ministry's decision not to disclose the educational and employment history of the identifiable individuals at pages 17 to 21. I have provided the Ministry with a highlighted copy of the record. To be clear, only the portions which I have highlighted in blue are exempt from disclosure under section 21(1).

2. I uphold the Ministry's decision not to disclose the following parts of the record under section 17(1):

    - The list of traditional operators and their allowable harvest levels under section 6.1, "The Traditional Operators", on page 8.

- The information detailing specific business arrangement between the affected party and others found under section 6.2, "The Log Home Builders", on page 11.

- The information detailing specific business arrangements between the affected party and others found in paragraphs 2 and 3 on pages 13, under section 6.5 "The Wood Supply Commitment".

- The information detailing specific business arrangements between the affected party and others found under section 7 "Relationships with Aboriginal People" on pages 13 through 16.

- The information relating to how a management charge is to be calculated and the formula detailed under section 8.3 "The Financial Arrangement", on page 22.

I have provided the Ministry with a highlighted copy of the record. To be clear, only the portions which I have highlighted in yellow are exempt from disclosure under section 17(1).

3. I order the Ministry to disclose the remaining parts of the record by [35 days from date of order] but not before [30 days from date of order].

4. In order to verify compliance with the provisions of this Order, I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the appellant.

Original Signed by: May 11, 2007
Catherine Corban
Adjudicator