



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2710**

**Appeals PA-060135-1 and PA-060175-1**

**Ministry of Natural Resources**



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## NATURE OF THE APPEALS:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the negotiations which took place between an identified company (the third party) and an identified group of operators who harvest forest resources (the operators). The relevant part of the request reads:

... [I am aware that the] ... operators and [the third party] negotiated for about two years before capturing their working relationship in a memorandum of agreement (MOA) (completed in June, 1997).

During this two year period, [the third party] and the operators exchanged letters outlining their understanding and agreements, copies of which were supplied to [the Ministry].

I would like copies of these negotiations and [the MOA] ...

In response to the request, the Ministry identified more than 50 records comprising 617 pages and, in accordance with section 28 of the *Act*, notified a number of parties whose interests may be affected by disclosure of the information (the affected parties, including the third party). The Ministry received responses from some of the affected parties (including the third party), all of whom did not consent to disclosure. The Ministry did not receive a response from a number of other affected parties.

The Ministry subsequently issued a decision on access, together with an index describing the responsive records. This decision was provided to the requester, the affected parties and the third party. The Ministry indicated that it would be disclosing some records and denying access to others, in whole or in part, based on the mandatory exemptions found in section 17(1) (third party information) and section 21(1) (personal privacy).

The requester (now the appellant) appealed the Ministry's decision to deny him access to some of the records, and Appeal PA-060135-1 was opened.

In addition, when it was notified of the Ministry's decision to disclose some portions of the records which it had objected to disclosing, the third party filed an appeal of that decision with this office, and appeal PA-060175-1 was opened.

During the mediation stage of the appeals, the number of records at issue was significantly reduced, and only six records remain at issue in these appeals. Also during mediation, the appellant confirmed that he was not pursuing access to the name or contact information of individuals identified in the records, and the exemption in section 21(1) was removed from the scope of these appeals. However, the requester (the appellant in PA-060135-1) continued to appeal the Ministry's decision to withhold the six records in whole or in part, and the third party (the appellant in PA-060175-1) continued to appeal the Ministry's decision to disclose portions of two of the six records remaining at issue.

Mediation did not resolve these appeals, and they were transferred to the inquiry stage of the process. A Notice of Inquiry identifying the facts and issues in these appeals was sent to the Ministry and the third party, initially. In the Notice of Inquiry, the Ministry and the third party were invited to provide representations on the application of section 17(1) to the records remaining at issue. In addition, the Notice of Inquiry identified that certain other affected parties were referred to in the records remaining at issue, and the Ministry and the third party were asked to include submissions on the impact of disclosure of the information in the records on these other affected parties. Both the Ministry and the third party provided representations in response.

Following receipt of the Ministry's representations, the adjudicator previously assigned to this file decided to seek representations from one affected party (on behalf of a number of other affected parties), and sent this affected party the Notice of Inquiry. In response to the Notice, this affected party informed this office that it had previously sent a letter to the Ministry that set out the position of nine affected parties. As a result, that previous letter was treated as the representations of those affected parties.

After issues regarding the sharing of portions of the representations were resolved, the Notice of Inquiry, along with the non-confidential representations of the Ministry, the third party and the affected party, was sent to the appellant, and the appellant was invited to respond to the issues and the other parties' representations. The appellant provided representations in response.

These files were subsequently transferred to me to complete the adjudication process. This order addresses the records and issues in both of these appeals.

Furthermore, I note that the parties in this appeal have on a number of occasions in their representations referred to Order PO-2575, a decision by Adjudicator Catherine Corban of this office. That decision deals with records relating closely to the records at issue in this appeal. In that appeal, Adjudicator Corban also provides some background to the circumstances leading to the creation of the records, and I will refer to Order PO-2575 in the course of this Order.

## **RECORDS:**

**The records remaining at issue in both these appeals are:**

### **Record 1 (pages 1-11):**

This record consists of a cover letter from the third party to the Ministry, and ten pages of attached agreements entered into by the third party and various affected parties.

The Ministry's decision was to release the cover page (page 1) and deny access to the attached agreements (pages 2-11). Accordingly, the attached agreements are at issue in appeal PA-060135-1, and page 1 is at issue in appeal PA-060175-1.

**Record 2 (pages 13-22):**

This record consists of a two-page cover letter from the third party to the Ministry, and an attached eight-page document described by the Ministry as “proposed license conditions”.

The Ministry’s decision was to release page 13 and all but one sentence on page 14, and deny access to pages 15-22. Accordingly, the appellant in PA-060135-1 is appealing the Ministry’s decision to withhold a portion of page 14 and all of pages 15-22 and, in Appeal PA-060175-1, the third party is appealing the Ministry’s decision to release page 13 and most of page 14 (except for one sentence).

**The records remaining at issue in Appeal PA-050135-1 only are:**

**Record 3 (pages 46-49):**

This record is described by the Ministry as a Draft Business Arrangement between the operators and the third party, and includes a brief cover letter from the third party to the Ministry.

**Record 4 (pages 82-87):**

This record is described by the Ministry as the Terms and Conditions of the Agreement between the third party and operators, and includes a brief facsimile cover letter.

**Record 5 (pages 451-454):**

This record is a letter from the third party to the Ministry relating to a business arrangement for identified negotiations.

**Record 6 (pages 579-586):**

This record is described by the Ministry as a Memo of Agreement (and a preamble) between the third party and an affected party.

**DISCUSSION:**

**THIRD PARTY INFORMATION**

The Ministry and the third party take the position that the exemptions at sections 17(1)(a) and (b) apply to many of the pages of the records remaining at issue. Those sections state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*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 institution and/or the third 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) and/or (b) of section 17(1) will occur.

### **Part 1: type of information**

The third party and the Ministry submit that the withheld records contain information that is technical, commercial and/or financial. These terms have been defined in prior orders 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].

I adopt these definitions for the purposes of this appeal.

### ***Representations***

The Ministry takes the position that the disclosure of the information remaining at issue would reveal commercial information as that has been defined by this office. It states that the records pertain to a series of business negotiations and arrangements and include the following information:

- documentation of commercial negotiations;
- documentation of the negotiating history and business arrangements between the third party and other affected parties;
- details regarding a number of matters including various costs, the marketing of timber products, harvest allocations and operations, forest management and road construction and maintenance costs.

The third party also provides representations in support of its position that the records remaining at issue contain technical, commercial or financial information, and states:

The documentation involved deals with commercial negotiations which took place during the relevant period. These documents contain both negotiating history and business agreement outcomes relating to the business plans of our company and others .... The documentation sets out proposed and concluded financial arrangements and relationships between the companies ....

The appellant does not address this aspect of the three-part test in his representations.

## ***Findings***

From my review of the records and the representations of the parties, I find that all of the records remaining at issue contain “commercial information” as they relate to the buying, selling or exchange of merchandise or services. The records include agreements and negotiating positions of the third party and other affected parties relating to the buying, selling or exchange of various forest harvesting products and/or services. Accordingly, I find that all of the information for which section 17(1) is claimed meets the requirements for part 1 of the test for the application of that section.

## **Part 2: supplied in confidence**

### ***General***

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].

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]

### ***Representations***

The third party, the affected parties and the Ministry all submit that the information at issue was supplied to the Ministry in confidence.

The Ministry states that the records were “created by the affected parties [including the third party]” and supplied directly by the third party to the Ministry. It also states that the affected parties had a reasonable expectation of confidentiality, and refers to the third party’s statement that it consistently treated the information contained in the Records in a confidential manner. The Ministry also states that the third party:

... supplied the records to the Ministry with the understanding that they would be held in the strictest of confidence. Moreover, it was the Ministry’s practice at the time when the records were submitted by the affected parties - and continues to be the practice of the Ministry today - to hold such documents and information submitted by third parties in strict confidence and not to disclose them to others. The Ministry has and continues to recognize the sensitivity of the information included in the records and the potential harm and prejudice that disclosure may cause to the affected parties.

Therefore, in considering the written representations of [the third party] in conjunction with the Ministry's practice of keeping this type of information confidential, the Ministry submits that the [parties] had a reasonable expectation that the Ministry would indeed hold the records in confidence.

The third party states that the records were supplied to the Ministry “in response to certain Ministry requirements”, and was so supplied in confidence. The third party also states that, to the best of its knowledge, the information has been consistently treated in a confidential manner in the past.

The appellant acknowledges in his representations that this type of information would have been supplied to the Ministry in confidence.

### ***Findings***

I have carefully examined the information remaining at issue in this appeal, and note that a number of the records include a cover letter from the third party to the Ministry, referencing the attachments to those cover letters. In addition, Record 5 is a letter from the third party to the Ministry, and Record 6 is a copy of an agreement between the third party and another affected party.



Based on my review of the records and on the representations of the parties, which confirm that these records were provided to the Ministry, I am satisfied that these records were “supplied” to the Ministry by the third party for the purpose of section 17(1). Although some of the records or portions of records are agreements, these agreements are ones entered into between the third party and other affected parties (not the Ministry) and, based on the representations of the parties, I am satisfied that the copies of the agreements were then provided to the Ministry. I have not been provided with evidence to suggest that the agreements at issue (some of which are draft) form part of any agreement entered into between the third party and the Ministry and, in the circumstances, I find that the records at issue were “supplied” to the Ministry by the third party.

Furthermore, based on the representations of the third party, the affected parties and the Ministry, in which they identify their expectations that records of this nature would remain confidential, I am also satisfied that these records were supplied to the Ministry with a reasonable expectation of confidentiality.

Accordingly, I find that all of the information for which section 17(1) is claimed meets the requirements for part 2 of the test for the application of that section.

### **Part Three: Harms**

#### ***Introduction***

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]

#### ***The Ministry’s representations***

The Ministry provided the following representations with respect to the harms issue, in support of its position that the records qualify for exemption under section 17(1). The Ministry takes the position that the disclosure of the information would prejudice the competitive position of the affected parties (including the third party). It states:

... the disclosure of the records will significantly prejudice the competitive position of the affected parties and their negotiations with each other and other business parties. The records contain sensitive information which would not otherwise be released to the public and which detail the negotiations of specific

business arrangements between [the third party] and each of [the other affected parties].

[The third party] stands to suffer the greatest harm by the disclosure of the records, as [the third party] negotiates with each of the [other affected parties].

The Ministry proceeds to identify the other financial and business matters which the third party is involved in, and the nature and current status of those matters. It then identifies how the release of the records could be reasonably expected to undermine the third party's negotiations with other parties. It also refers to the third party's representations in support of the section 17(1)(a) harms, and states:

Finally, it should be noted that in Order PO-2575, the Adjudicator upheld the Ministry's decision to withhold certain portions of a business plan submitted by [the third party] with respect to the same management unit and same set of negotiations. In particular, Order PO-2575 upheld the Ministry's decision not to disclose information regarding, among other things, the allowable harvest levels of the traditional operators; [other business arrangements]; information regarding wood supply commitments; and the calculation of certain charges. Since the information contained in the records at issue herein provides substantial detail regarding these matters and more, the Ministry submits that it is appropriate to withhold the records in the present circumstances.

### ***The affected parties' representations***

The representations of the affected parties also focus on the records which comprise the actual agreements entered into between the affected parties and the third party. The affected parties then state:

If this information were to be released our group believes that it would have a negative impact with [other identified parties] and potentially risk future negotiations with [the third party].

### ***The third party's representations***

The third party also provided representations in support of its position that disclosure of the records would result in the section 17(1)(a) harms.

With respect to the actual agreements at issue, entered into between the third party and the other affected parties, the third party refers to its earlier submissions made to the Ministry. These state that the agreements are private as between the parties to an agreement, and that disclosure of the agreements (including proposed drafts) is "commercially prejudicial" and could be used to the third party's "significant business detriment both in relation to this forest and in relation to the similar matters presently being considered and negotiated ...."

The third party also states:

The documents also relate and detail private and confidential aspects of our company operations which are key to current discussions, negotiations and relationships. All of this information is considered highly confidential. Disclosure of this information will affect our contractual and business relationships with other entities.

With respect to the two cover letters which comprise the records at issue in appeal PA-060175-1, (namely, page 1 of Record 1, and page 13 and most of page 14 of Record 2), the third party states:

... the status of negotiation information contained in this correspondence is confidential. It seems to make no sense to us that confidential updates [from the third party to the Ministry] and discussions with [the Ministry] concerning the status of negotiations can become public. It is in the public interest to provide this information, but that practice will necessarily cease if the same information becomes public at anyone's request.

The third party also refers to its earlier submissions made to the Ministry, in which it states:

The documents contain many pieces of correspondence between the company and the Ministry in which the company not only outlines the status of negotiations but also discusses possible paths forward it is considering and sets out draft and concluded negotiations. Again, this type of information is shared with the Ministry on the implicit understanding that it is confidential. We understand that the Ministry has a key role to play in the management of the forest - which includes the need to manage many interests. We understand that this role is best undertaken with accurate and up to date information, but it has always been given in confidence.

The third party also states:

The documents ... are all related to negotiations surrounding [the third party's] business plan. Business plans set out [the third party's] plans for negotiations and business models which are not always specific to a certain situation. Negotiations and plans in one forest, may give rise to similar (or different) approaches in another forest where the company is also dealing with the same issues. This is particularly important today for [the third party] because the Ministry has indicated that it desires to proceed to [an identified model] of forest licencing which will involve the same issues dealt with in this [licence]. ... [T]he release of these documents has an immediate and present effect on corporate operations, negotiations and creates the possibility of real risk of loss (to the company) or gain (to the appellant or people in his position) as the interests of various parties in such [licences] are negotiated.

...

Given the specificity of the information contained in the documents, it is impossible to release these documents without further putting at risk [the third party's] negotiating position in the dealings with the ... parties involved.

### *The appellant's representations*

The appellant's representations focus on the reasons why the appellant is interested in access to the records for his own purposes. In his representations, the appellant appears to agree with the third party's position that records of this nature ought not to be disclosed, stating that he also finds it "inconceivable" that these records would become "public knowledge", and stating that he has "the same concerns as [the third party]". Much of the appellant's representations focus on why he believes that, based on his status, he ought to have access to the records at issue. Although he acknowledges that "the public" should not have access to the records, he takes the position that he ought to have access.

### *Findings*

I have carefully reviewed the representations of the parties and the records remaining at issue in these two appeals.

The request resulting in these two appeals was for records containing information about the negotiations, understandings and agreements entered into between the third party and other affected parties.

Record 6, portions of Records 3 and 4, and pages 2-11 of Record 1 are agreements or drafts of agreements entered into between the third party and various affected parties. Based on the representations and on my review of these records, I am satisfied that the disclosure of these records could reasonably be expected to significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of the third party and/or the affected parties. It is clear from the records and the representations that these agreements are confidential, commercial agreements entered into between commercial entities, and that disclosure of the terms and contents of these agreements could reasonably be expected to prejudice the interests of those commercial entities. Accordingly, I am satisfied that these records qualify for exemption under section 17(1)(a).

Furthermore, Record 5 consists of a letter from the third party to the Ministry, but includes a detailed review of an agreement entered into between the third party and an affected party. Pages 15-22 of Record 2 contain a draft of proposed conditions involving the third party and various affected parties. For the same reasons as set out above, I am also satisfied that disclosure of these records could reasonably be expected to prejudice the interests of the commercial entities whose agreements are set out in considerable detail in these records, and I am satisfied that they also qualify for exemption under section 17(1)(a).

Furthermore, I have carefully reviewed pages 13 and 14 of Record 2. These pages are the cover letter to pages 15-22, and they describe in some detail the negotiations, agreements and understandings that have been reached and/or discussed between the third party and other affected parties. Although the Ministry was prepared to disclose portions of these two pages, on my review of these pages and based particularly on the representations of the third party, I am satisfied that the disclosure of these pages could reasonably be expected to interfere significantly with the negotiations of the third party and other affected parties. The third party has stated that the release of the record would have “an immediate and present effect on corporate operations [and] negotiations” as the interests of various parties in arrangements such as these are negotiated. In the circumstances, I am satisfied that these pages of Record 2 also qualify for exemption under section 17(1)(a).

The remaining pages of the records consist of three cover letters (page 1 of Record 1, the first page of Record 3, and the first page of Record 4). On my review of these three pages, I am not satisfied that their disclosure would result in the harms found in section 17(1)(a). The cover pages of Records 3 and 4 consist largely of brief, general information about the process of reviewing the attachments to those pages (which are not being disclosed). Page 1 of Record 1 also consists of a brief review of the process by which the attached agreements are provided to the Ministry. Although this page also contains some information about what might be regarded as a “negotiating strategy”, in my view, based on the nature of the information and the age of this record, and in the absence of further representations on how the disclosure of this record could lead to the harms set out in sections 17(1)(a) or (b), I find that the harms in those sections have not been established. Accordingly, I will order that these pages of the records be disclosed to the appellant.

Lastly, with respect to the appellant’s view that, because of his status, he ought to have access to the records requested, previous orders of this office have recognized that the identity of a requester is not determinative of the issues to be decided at inquiry. In general, these orders have found that disclosure under the *Act* is disclosure to the world (See: Order M-96, upheld on judicial review in *Ontario Secondary School Teachers' Federation, District 39 v. Wellington County Board of Education et al.* (20 December 1994), Toronto 407/93 (Ont. Div. Ct.), leave to appeal refused (16 October 1995), Doc. M15357 (C.A.)). I have not been provided with evidence to support the view that the appellant was the intended recipient of the records at issue, and any particular right that the appellant asserts he has to the information contained in the records is a determination to be made in another venue. My obligation is to review the harms set out under the *Act*.

In summary, I have found that page 1 of Record 1, the first page of Record 3, and the first page of Record 4 do not qualify for exemption under sections 17(1)(a) or (b), but that the other records at issue in these appeals qualify for exemption under section 17(1)(a).

Accordingly, with respect to Appeal PA-060135-1, I uphold the Ministry's decision to deny access to all of the records it claimed fit within section 17(1), with the exception of the first page of Record 3, and the first page of Record 4. With regard to Appeal PA-060175-1, I uphold the Ministry's decision to disclose page 1 of Record 1, but I find that pages 13 and 14 of Record 2 qualify for exemption under section 17(1).

**ORDER:**

1. I find that page 1 of Record 1, the first page of Record 3, and the first page of Record 4 are not exempt under section 17(1), and order that they be disclosed to the appellant by **September 26, 2008** but not before **September 22, 2008**.
2. I find that remaining records or portions of records qualify for exemption under section 17(1)(a).
3. 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 to the appellant.

Original Signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ August 21, 2008