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

ORDER PO-2882

Appeals PA08-212, PA08-227, PA08-228, PA08-229, PA08-230, PA08-231, PA08-232 and PA08-233

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information concerning the Ministry's forest management program. The request specifically stated that:

> Pursuant to [the *Act*], we request the following information pertaining to the subject area described as being Forest Management Units with the Area of the Undertaking (Crown timber harvesting zone) of Ontario, and pertaining to Crown forest stumpage transactions by [identified corporation] and affiliated companies ([identified corporations]):
>
> - Annual summary records of all stumpage accrued, by forest management unit, for [identified corporation] and affiliated companies between April 1, 2000 and March 31, 2008.
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> - Annual Summary records of all annual balances, including amounts owing to the Crown, for: a) Forest Renewal Trust, b) Forest Future Trust Fund, and c) all applicable Management Unit Accounts, associated with [identified corporation] and affiliated Companies between April 1, 2000 and March 31, 2008.
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> - A statement of the net balance with, or owed to the Crown by [identified corporation] and affiliated companies as of March 31, 2008.

The Ministry identified records that were responsive to the request and, under section 28 of the *Act*, wrote to seven corporations whose interests may be affected by disclosure (the affected parties), requesting their views on the release of the responsive information. All of the affected parties responded and requested that no information be released.

Notwithstanding the objections of the affected parties, the Ministry decided to grant partial access to the records. It relied on the mandatory exemption at section 17(1) (third party information) and the discretionary exemption at section 18(1)(d) (economic interests of Ontario) to deny access to the portion it withheld.

The requester filed an appeal (PA08-212) from the Ministry's decision to withhold any responsive information in the records. The affected parties filed separate appeals (PA08-227, PA08-228, PA08-229, PA08-230, PA08-231, PA08-232 and PA08-233) from the Ministry's decision to release any responsive information to the requester. I will be addressing all these appeals in this order.

During mediation, the requester took the position that it is in the public interest that the requested responsive information be disclosed, thereby raising the possible application of the "public interest override" provision at section 23 of the *Act* as an issue in the appeals.

Mediation did not resolve the appeals and they were moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeals to the Ministry and the affected parties, initially. The Ministry provided representations in response. The affected parties provided representations that incorporated by reference the content of two earlier letters. The Ministry asked that portions of its representations be withheld due to confidentiality concerns. The affected parties requested that their representations be withheld in full. I subsequently determined that the affected parties' confidentiality concerns could be addressed by summarizing their non-confidential representations in the Notice of Inquiry seeking submissions from the requester and the Ministry.

I then sent a Notice of Inquiry to the requester, along with the non-confidential representations of the Ministry and a summarized version of the affected parties' non-confidential representations, inviting submissions in response. I also sent a Notice of Inquiry to the Ministry inviting its submissions on the summarized version of the affected parties' non-confidential representations. The requester and the Ministry provided representations in response to the Notices.

I determined that the representations of the requester and the Ministry raised issues to which the affected parties should be given an opportunity to reply. Accordingly, I sent a letter to the affected parties, accompanied by the representations of the requester and the Ministry, inviting their reply representations. The affected parties provided representations in reply.

RECORDS

At issue is the responsive information contained in twelve charts. The Ministry's position on disclosure of the responsive information is set out in its index of records which it provided to the requester. As discussed in more detail below, the Ministry takes the position that only three of the twelve charts qualify for exemption under the *Act*.

BACKGROUND AND OVERVIEW

In Ontario, there is more than 70 million hectares of forested land. The province of Ontario owns 90 percent of this area, referred to as Crown forest. About 26 million hectares of Crown forest is managed for a broad range of uses and benefits, including timber production. Although the management of Crown forests in Ontario is the responsibility of the provincial government, this responsibility is shared with forest products companies and communities.

Forest products companies pay a stumpage fee to the Crown for every cubic meter of timber harvested. A market-based pricing system is used by the Ministry to calculate the stumpage fee that companies and individuals pay for harvesting timber from Crown land. In times of strong market prices for forest products, higher fees are charged. In times of poor market prices, harvesters pay lower fees. Stumpage fees have four components. They are:

- a minimum charge per cubic meter of harvested timber, payable to the Consolidated Revenue Fund, regardless of market conditions;

- a forest renewal charge which generates funds necessary to cover the cost of renewing the forested area and varies depending upon the tree species and its anticipated renewal cost. Companies who have entered into Sustainable Forest Licenses (SFL) make payments based on these charges into two renewal fund accounts, including the Forest Renewal Trust fund (FRT). When it is time to regenerate the forest that has been harvested the SFL holder carries out the necessary renewal work and submits invoices to the FRT for reimbursement;

- a residual value charge, payable to the province's Consolidated Revenue Fund (CRF). This varies depending upon the market for forest products;

- a Forest Futures Trust Charge paid into the Forestry Futures Trust fund (FFT). The charge is the same for all tree species and management units.

The applicable fees for specific time periods are set out in publicly available Crown Charge tables.

The Ministry advises that reduced stumpage payments, in part due to stumpage arrears resulting from dramatically lower harvesting levels has placed financial stress on both the FRT and FFT. The Ministry says that it provided a $19.3 million "top-up" to the trusts in March 2008 to ensure forest renewal activity would continue unabated. The Ministry states that this "top-up" will be repaid to the Consolidated Revenue Fund as outstanding stumpage monies are collected. The Ministry submits that it has been working with companies that have stumpage arrears in order to determine if a viable repayment plan can be achieved, and that it is pursuing enforcement action where possible.

The requester states that the purpose of the request was to determine whether the requirements of Ontario's *Crown Forest Sustainability Act* (*CFSA*) are being met in the various Forest Management Units (FMUs) managed and harvested by the affected parties. Section 1 of the *CFSA* provides that:

> The purposes of this Act are to provide for the sustainability of Crown forests and, in accordance with that objective, to manage Crown forests to meet social, economic and environmental needs of present and future generations

Section 40 of the *CFSA* provides that:

> Crown charges in respect of forest resources authorized to be harvested or used for a designated purpose by a forest resource license shall be paid by the licensee whether the resources are harvested or used by the licensee or by another person with or without the licensee's consent.

The requester states that the *CFSA* requires that the Ministry ensure public forests are managed for environmental sustainability and, citing section 1 of the *CFSA*, to meet social, economic and environmental needs of present and future generations. It submits that although it has amassed evidence that management of the FMUs is most likely not sustainable from a forest practices standpoint, it wants to obtain information to determine whether stumpage accounts are being

responsibly managed in a way that effectively supports the renewal of public forests. The requester submits that because much of Ontario's forest industry is in crisis it is important to have public discourse on how public forests can be managed to ensure that "desirable industry survives ecological challenges in future and that public forests do not become degraded as a result of lack of funds to renew them after harvesting due to economic challenges."

PRELIMINARY MATTER

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661]. Certain records provided by the Ministry contain highlighted portions that the Ministry indicates are non-responsive. Although the issue of responsiveness was not raised at mediation or in the course of adjudication, my review of these records confirms that only the non-highlighted portions of records numbered 85011, 85012, 85013, 85014, 85015, 85271, 85272 and 85273 are responsive to the request because only these entries relate to the corporations identified by the appellant in the request.

THIRD PARTY INFORMATION

Section 17(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (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; or,
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)]. 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 in this appeal, the institution and/or the affected parties 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) and/or (c) 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:

> *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].

The Ministry takes the position that only Records 85005, 85007 and 85009 should be withheld. In the non-confidential portion of its representations, the Ministry submits that these records contain the affected parties' financial information in relation to the "non-payment of stumpage charges." As well, the Ministry submits that disclosing the information in these records "could allow the drawing of accurate inferences about the harvesting activities of the third parties. This is particularly the case with Record [85009]." The Ministry submits, therefore, that these records contain financial and/or commercial information.

The Ministry further submits that the remaining records, which it decided to disclose, do not reveal the state of accounts of the affected parties. It writes:

> The Ministry in deciding to release the [remaining] records determined that the forest renewal accounts balances did not disclose any individualized levels of contribution to the accounts. There are a set of variables that could cause one or more of the accounts to fluctuate from year to year which are not directly related to the commercial activities of the licensee. The accounts reflect the amount of money put in the account as well as amounts taken out over a quarterly basis for

> its use in activities, including silviculture. Also, these funds are invested and fluctuate as a result of changes in the investment market. …

The affected parties submit that all the records set out in the index contain highly sensitive and confidential financial information, which would be of great interest to its competitors and would cause severe prejudice if released. In particular, they take the position that the forest renewal account balances show the level of contribution to the account, which level is a direct function of the extent of the affected parties' business activity. Given the size of its operations on these units, which is a matter of public knowledge under the terms of the respective SFLs, the affected parties submit that one can easily infer the level of commercial activity as well as the financial health of the affected parties' businesses.

The requester submits that the records "contain no confidential informational assets created by the affected parties but rather, set out [the Ministry's] collection of stumpage fees from the affected parties."

I find that all of the records at issue in this appeal contain financial and/or commercial information. In the result, I find that part 1 of the test for the application of section 17(1) has been met.

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 Ministry references the tone and content of correspondence the affected party had incorporated by reference into its representations and submits with respect to Records 85005, 85007 and 85009 that:

> The records in their entirety were based on confidential information provided to the government to meet ministerial requirements, for instance, to calculate a company's contribution to the Forest Renewal Trust Fund. 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 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. There was a reasonable expectation of confidentiality. There was, therefore, a reasonable expectation of confidentiality on the part of the Third Parties at the time the information was supplied.

The affected parties generally take the position that the information in all of the records satisfies the requirements for exemption under section 17(1). As set out above, the affected parties assert that the forest renewal account balances show the level of contribution to the account, which level is a direct function of the extent of the affected parties' business activity. They submit that if this information is disclosed it would allow an easy inference of the level of their commercial activity and financial health.

The requester takes the position that none of the information in the records that were generated by the Ministry would meet the requirement of having been "supplied in confidence" by the affected parties to the Ministry.

Analysis and Findings

In *Ontario (Workers' Compensation Board v. Ontario Assistant Information and Privacy Commissioner)* (1998), 3 O.R. (3d) 464, the Ontario Court of Appeal upheld a decision of former Assistant Commissioner Tom Mitchinson in which he ordered disclosure of information about employers with high penalty rankings in five accident prevention programs operated by the Workers' Compensation Board (WCB). The records at issue were lists showing the names and addresses of the top 50 employers, in descending order, according to the amount of penalty surcharge. In reaching this conclusion, the Court commented on part 2 of the test. It stated at paragraph 26:

> With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. *The records had been generated by the WCB based on data supplied by the employers*. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers.

All of the records at issue in this appeal were generated by the Ministry based upon data supplied by the affected parties. With respect to Records 85005, 85007 and 85009, the Ministry submits that disclosing the information in these records "could allow the drawing of accurate inferences about the harvesting activities of the third parties. This is particularly the case with Record [85009]." The Ministry takes an entirely different position from that of the affected parties with respect to the balance of the records at issue. As set out above, in deciding to release these records it "determined that the forest renewal accounts balances did not disclose any individualized levels of contribution to the accounts."

The affected parties' submissions allege that disclosing the forest renewal account balances will allow an easy inference of the level of their commercial activity, as well as the financial health of the affected parties businesses. That may well be, but it doesn't address the issue of whether that would reveal the actual information "supplied" by the affected parties to the Ministry. For example, the affected parties did not provide me with sufficiently detailed and convincing evidence to refute the Ministry's position that releasing those records would not disclose any individualized levels of contribution to the forest renewal account balances.

Accordingly, with respect to the records other than Records 85005, 85007 and 85009, I find that disclosing them would not reveal the underlying information or data supplied by the affected parties to the Ministry. As a result, I find that information in these records was not "supplied" by the affected parties to the Ministry for the purposes of part two of the test under section 17(1).

Accordingly, I find that the undisclosed responsive information in the records other than Records 85005, 85007 and 85009 does not meet part two of the test. As all three parts of the test must be met, this information is not exempt under section 17(1).

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 [Orders PO-2043, PO-2371, PO-2497].

The Ministry submits with respect to Records 85005, 85007 and 85009 that there is no explicit indication that the records were supplied in confidence, however:

> The information supplied to the Ministry was done with the implicit understanding and honest belief on the part of the [affected parties] that this information would not be made public. The records were prepared for a purpose that would not entail disclosure and is not otherwise available through a source to which the public has access. [Order reference omitted]

As set out above, the affected parties submit that all of the records contain highly sensitive and confidential financial information. In their view it is abnormal for this type of information to be made public and "it would be more than ironic if material which would not be made public by a Court (except perhaps at trial) because of its confidential nature and the prejudice disclosure would cause, would now be made public by a simple request."

The requester submits:

> With regards to any documents withheld which were created by the affected parties, despite the fact that stumpage fees can vary as outlined in the [Ministry's] representations [reference omitted], this variation does not absolve the affected parties from being responsible from paying such fees and [the Ministry] from collecting such fees under the *CFSA*. The *CFSA* mandates that when public forests are harvested under the authority of a Sustainable Forest License, the affected parties must pay stumpage fees and MNR must collect such fees [reference omitted].
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> The affected parties should therefore have no expectation that documents sent to [the Ministry] setting out payment of stumpage fees remain confidential, Rather, as the affected parties are operating in public forests and benefiting from exclusive access to public resources, they should expect to have details of whether they have met their legal duties under section 40 of the *CFSA* to pay stumpage publicly available.

In my view, there is sufficient evidence before me to establish that the information in Records 85005, 85007 and 85009 was provided with an implicit expectation of confidentiality. Although the affected parties are subject to the provisions of the *CFSA*, this does not supplant the affected parties' implicit expectation, as supported by the Ministry, that the Ministry would hold the information in the records in confidence. Accordingly, I am satisfied that part 2 of the test for the application of section 17(1) has been met with respect to Records 85005, 85007 and 85009.

Part 3: Harms

As a result of my findings above, it is necessary for me to also consider whether disclosure of the information in Records 85005, 85007 and 85009 could reasonably be expected to lead to the harms contemplated in sections 17(1)(a), (b) and/or (c).

General principles

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

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]. Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1) [Order PO-2435].

Representations

The Ministry submits:

> Disclosure of the records would reveal the [affected parties'] financial information. Indeed, knowledge of the [affected parties'] financial arrangement with the Ministry and related financial information could have negative effects on the [affected parties'] competitiveness and financial position in the market. In particular, disclosure would make negotiations between the [affected parties] and the Ministry more difficult.
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> …
>
> If the records are released, the negotiations with the [affected parties'] and the Ministry may become difficult. Also, trade creditors may choose to take action that would prejudice the [affected parties'] relationship with its suppliers. Further, as a result of pressure from trade creditors the [affected parties] may permanently close sawmills, leaving them open to the risk of sale to a competitor. All three outcomes either alone or in tandem would result in significant undue loss to the [affected parties] and potential undue gain to competitors. These are large companies with a number of operations throughout Ontario and are a major employer in that region. Closures of mills due to the action of creditors relying on disclosed records would be detrimental to those communities.

As set out above, the affected parties submit that disclosing the withheld information would detrimentally affect ongoing negotiations concerning matters described in the request between the affected parties, other parties and the government. In the confidential portion of their representations the affected parties reference what they say is one of the reasons for the negotiations. They also submit that disclosure "…would be tragic and would clearly cause undue harm to us and great gain to our opponents and competitors who are actively seeking to influence the negotiations and their outcomes. This cannot be in the public interest."

The requester submits:

> It is submitted that no harm to the affected parties will ensue if the documents are released. The evidence provided by the affected parties and [the Ministry] in this regard is completely speculative and also, given that the affected parties have recently gone into receivership, any expected harm has essentially been nullified.
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> …
>
> The only reason these documents could be considered harmful is that they document [the Ministry's] failure to collect stumpage fees from the affected

> parties and could therefore potentially embarrass [the Ministry] or the affected parties. Embarrassment is not a ground to which s.17 applies.

The affected parties submit in reply that unlike a general statement as to the state of the stumpage account there are more specific risks associated with the particular information sought by the requestor. The affected parties submit that the information sought by the requester is significantly different in nature and character than information which is either already public or otherwise available.

Analysis and Finding

Both the Ministry and the affected parties make general submissions with respect to harms that would be suffered from disclosure but provide no detailed and convincing evidence in support of these assertions.

For example, the Ministry asserts that if the records are released, the negotiations between the affected parties and the Ministry "would" (or as set out in a subsequent paragraph "may") become difficult. The affected parties also refer to interference with negotiations between them, other parties and the government. However, in both cases neither the Ministry nor the affected parties go the next step to explain how this would transpire. Furthermore, the matter discussed in the confidential portion of the affected parties' representations involves the affected parties and the government. There is no additional explanation given for how disclosing this information, which is already in the hands of the Ministry, could jeopardize negotiations relating to that matter. Furthermore, neither the Ministry nor the affected parties provide sufficiently detailed and convincing evidence for the assertion that if the information in Records 85005, 85007 and 85009 is disclosed trade creditors may choose to take action that would prejudice the affected parties' relationship with its suppliers or that as a result of pressure from trade creditors the affected parties' may permanently close sawmills, leaving them open to the risk of sale to a competitor, especially in light of the current circumstances facing the affected parties. In my view, both the Ministry and the affected parties are engaging in speculation of possible harm from disclosure of the information in Records 85005, 85007 and 85009, rather than providing sufficiently detailed and convincing evidence to establish a reasonable expectation of harm under sections 17(1)(a), (b) and/or (c) of the *Act*.

In my view, the affected parties and the Ministry have failed to provide sufficiently detailed and convincing evidence to establish that the disclosure of Records 85005, 85007 and 85009 could reasonably be expected to cause the section 17(1)(a), (b) or (c) harms alleged.

ECONOMIC AND OTHER INTERESTS

The Ministry submits that section 18(1)(d) of the *Act* applies to the records that it seeks to withhold, namely Records 85005, 85007 and 85009.

Section 18(1)(d) states:

> A head may refuse to disclose a record that contains,

> information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233].

For section 18(1)(d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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 need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363].

The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests [see Orders MO-2363 and PO-2758].

The Ministry submits:

> The Ministry works to balance its interest in assisting the forest industry as a whole with its duty to the people of Ontario. Releasing the records could unnecessarily impact its ability to continue to receive stumpage fees from companies who may erroneously view the records as grounds to stop or delay payment of their stumpage charges. Shortfalls in stumpage payments can have a

> serious impact on the ability of the Ministry and its license holders to conduct renewal activities. Under-funded renewal trusts would undermine the sustainability of Crown forests and thus any revenues generated by the Ministry from forest as well as industries that rely on the forest resources contained therein. Such a result would interfere with Ontario's ability to manage the economy of Ontario, particularly in those areas where the local economy is dependent on the forest industry.
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> Second, if the records were released, they could jeopardize the Ministry's financial interests. If the records are released, as indicated earlier, the negotiations with the [affected parties] and the Ministry may become increasingly more difficult. Moreover, the Government of Ontario is limited in the action it can take to obtain an outstanding debt, making negotiations of the utmost importance.
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> Third, creditors may consider calling in any outstanding loans owed by the [affected parties], which could ultimately jeopardize the Ministry's ability to recover deferred stumpage. Also, it is not unreasonable to assume that trade creditors may take action that would prejudice the [affected parties'] relationship with its suppliers. In these uncertain economic times, the actions of trade creditors could lead to one or more of the [affected parties] choosing to permanently close sawmills, leaving it open to the risk of sale to a competitor. All three outcomes either alone or in tandem would result in significant injury to the [affected parties], the Ministry and the economy of Ontario. With operations throughout Northwestern Ontario, the [affected parties] are a major employer in that region. Closure(s) of mill(s) due to the action of creditors relying on the disclosed records would be detrimental to those communities.
>
> Internationally, the release of the records could result in a further dispute under the Softwood Lumber Agreement (SLA). Based on past practice, the U.S. has not been reticent in challenging Canada and the provinces for slight variations in practice. Currently, the Government of Ontario is involved in two arbitrations under the SLA. While confident that Ontario will succeed, these claims require continued investment of time and substantial financing to defend. In addition, a challenge under the SLA impacts the forest industry and is prejudicial to the economic position of Ontario throughout North America and injurious to the financial interests of the Government of Ontario.

As set out above, the affected parties submit that disclosing the withheld information would detrimentally affect ongoing negotiations between the affected parties, other parties and the government of Ontario.

With respect to the application of section 18(1)(d), the requester submits:

> As trade creditors have recently started recovery actions against the affected parties [reference omitted], the argument of the [Ministry] that withholding documents that may reveal the financial status of the affected parties is necessary in order to allow [the Ministry] to collect outstanding stumpage fees has no merit.

> The affected parties and [the Ministry] have also provided representations suggesting that noncompliance with the Canada-US Softwood Lumber Agreement (SLA) by [the Ministry] ought to absolve the Ministry of the duty to disclose documents under [the *Act*]. The Requester takes the contrary view that [the Ministry's] non-compliance with an international legal obligation should not absolve it of meeting legal obligations to disclose documents under [the *Act*].
>
> Further, as the affected parties have gone into receivership, [the Ministry] (and the public interest by extension) has already experienced significant financial harm given that it has now become responsible for determining how to address a shortage in stumpage fees and how to address lack of forest renewal to be left remaining by the affected parties.

In Order PO-2816, Adjudicator Jennifer James addressed an argument that section 18(1)(d) applied to exempt three repayment agreements for stumpage arrears. The Ministry's submissions in that appeal are strikingly similar to the Ministry's representations in this appeal. Adjudicator James found that section 18(1)(d) did not apply. She wrote:

> For section 18(1)(d) to apply, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". In my view, the appellant's submissions highlight the need for public accountability regarding the Ministry's administration and collection of stumpage fees. The need for public accountability in the expenditure of public funds has been cited in previous orders as an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363]. In my view, this principle extends to the collection of government fees from private companies relating to the use of public lands. …
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> …
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> Further, the main financial harm which the Ministry submits would result from disclosure is the underfunding of forest renewal and reforestation programs administered by the Ministry. The Ministry submits and I agree that the underfunding of these programs undermine the sustainability of Ontario's forests and communities reliant on the forest industry. However, it appears that this is already an issue facing the Ministry. As indicated previously, the total revenue the Ministry collects from stumpages fees is public information and is found on the Ministry of Finance's website for any given year. Since 2006 the amount of stumpage royalties the Ministry has reported collected has declined. For example, in 2004 and 2005, $104,492,746 and $32,974,166 was collected. This was a marked difference from the $32,974,166 and $60,213,322 collected in 2006 and 2007. Accordingly, public sources of information indicates that in recent years the Ministry collected substantially less monies for stumpage fees than collected in the past.
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> …

> I do not agree with the Ministry's position that the Government's ability to effectively manage the economy will be affected by the disclosure of the repayment agreements in question. The repayment agreements contain information specifying the amount of stumpage arrears not paid for a relatively short period of time. The repayment agreements also contain information regarding the parties' agreement for the repayment of these arrears. In my view, the repayment agreements represent one of the many tools the Government has at its disposal to manage the economy. Accordingly, I do not accept the Ministry's argument that disclosure of the agreements, which the Ministry entered into over two years ago, would impact the Government's ability to continue to receive stumpage fees from other logging companies. In making my decision, I note that the Ministry's representations do not explain how disclosure of the terms of the agreements and the amount of stumpage arrears one logging company owed would place other logging companies in a position to *successfully* contract out of their obligations to pay stumpage fees to the Ministry.
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> …
>
> I also do not accept the Ministry's argument that disclosure of the records would hamper its ability to collect stumpage arrears from the logging company. The Ministry's argument in this regard is that disclosure of the records could reasonably be expected to result in the logging company's creditors demanding payment of any outstanding debt owed by the logging company which would result in "increasingly more difficult" negotiations with the logging company and its banks. The final result being that the logging company will not be in a position to pay its stumpage arrears to the Ministry, as its creditors will force it to shut down or sell its operations. In my view, the domino argument the Ministry presents in support of its position is highly speculative and not substantiated by the evidence it provided me.
>
> Similarly, I find that the Ministry's argument that disclosure of the records could reasonably result in a further dispute under the Softwood Lumber Agreement is highly speculative and not substantiated by the evidence provided to me. In particular, I am not satisfied that the Ministry provided detailed and convincing evidence demonstrating that disclosure of the terms of agreement relating to the repayment of stumpage arrears owed by one logging company to one province could result in negatively impacting an already long-standing protracted dispute between Canada and the United States.

Although this analysis is based on a request for access to repayment agreements for stumpage arrears, I find it to be helpful in addressing the request for access to the records at issue in the appeal before me. For reasons similar to those outlined by Adjudicator James above, based on the evidence before me in this appeal, I find that disclosing the information in Records 85005, 85007 and 85009 could not reasonably be expected to lead to the section 18(1)(d) harms alleged. The main financial harm which the Ministry submits would result from disclosure is the underfunding of forest renewal and reforestation programs administered by the Ministry, which

is already an issue facing the Ministry. The information in Records 85005, 85007 and 85009 relate to a time period that ended over two years ago. Accordingly, I do not accept the Ministry's argument in this appeal that disclosure of these now-dated records, would impact the Government's ability to continue to receive stumpage fees from other logging companies. I also do not accept the Ministry's argument that disclosure of the records would hamper its ability to collect stumpage arrears from the affected parties. Simply put, releasing the information in Records 85005, 85007 and 85009 now, in light of the circumstances facing the affected parties and the forestry industry generally, could not reasonably be expected to lead to the section 18(1)(d) harms alleged by the Ministry in this appeal.

In light of my finding that none of the claimed exemptions apply, I will order that the responsive portions of the records at issue in this appeal be disclosed to the requester. Accordingly, it is not necessary to consider whether the public interest override at section 23 of the *Act* is applicable in the circumstances of this appeal.

ORDER:

1. I uphold the decision of the Ministry with respect to Record 85010 and the responsive portions of Records 85011, 85012, 85013, 85014, 85015, 85271, 85272 and 85273, only.

2. I order the Ministry to disclose Records 85005, 85007, 85009, 85010 and the responsive portions of Records 85011, 85012, 85013, 85014, 85015, 85271, 85272 and 85273 to the requester by sending it to the requester by **May 28, 2010**, but not before **May 24, 2010**.

3. The affected parties' appeals are dismissed.

4. In order to verify compliance with the terms of this order I reserve the right to require the Ministry to send me a copy of the records as disclosed to the requester.

Original signed by: April 23, 2010
Steven Faughnan
Adjudicator