

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3079

Appeal PA11-43

Ministry of Northern Development, Mines and Forestry

May 14, 2012

Summary: The appellant made a request to the ministry for records about two ministry programs related to the forestry industry. The ministry denied records on the basis of the mandatory third party information exemption in section 17(1) and the discretionary economic and other interests exemption in section 18(1)(g). The ministry's decision to withhold the proposed project information upheld under section 18(1)(g).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1) and 18(1)(g).

OVERVIEW:

[1] The Ministry of Northern Development, Mines and Forestry (the ministry) notes that the Ontario forestry sector has experienced a seven year decline that started in 2004 and intensified through the global recession and financial crisis of 2008 – 2010. Major increases in supply of pulp and paper products from low-cost offshore sources have displaced a significant amount of North American pulp and paper, including Ontario's product, from the market. The ministry also attributes the decline in the forestry sector to the decline in demand for newsprint in the last 20 years, with the global recession accelerating this trend. Further, as the value of the Canadian dollar has risen, Canadian forest products have become more expensive in the American marketplace. The result of this decline in demand for Canadian forestry products has been the loss of both forest industry businesses and jobs in Ontario.

[2] The subject matter of the request relates to two ministry-led programs aimed at the forestry industry in Ontario. The first is the Forest Sector Prosperity Fund (FSPF) which was introduced to address the challenges the forest sector was and still is facing raising capital to modernize, boost productivity and efficiency and shift to higher value-added markets.

[3] The FSPF was designed to provide grants of up to 10% of eligible capital costs and up to 20% towards electricity generation projects. The Fund provided grants for projects supporting and leveraging new capital investment projects in:

- New value-added manufacturing
- Increased fibre use efficiencies
- Energy conservation/efficiency
- Development of co-generation

[4] The maximum grant available was \$25 million per company and eligible projects were restricted to sites in northern or rural Ontario. Once a project is approved, a legal agreement outlining the terms and conditions of the FSPF grant is prepared and executed ensuring appropriate accountability disbursements are made against incurred and paid eligible project costs. Companies do not receive money until a legal agreement is in place with specified milestones and deliverables. Companies submit payment requests and are reimbursed based on paid invoices with proof of payment for eligible costs as per the legal agreement.

[5] Similarly, the Loan Guarantee Program was created to promote new investment in the forest sector and was designed to address the challenges the forest sector faces in raising capital to modernize, boost productivity and efficiency and shift to higher value added markets. The loan guarantees were issued to the forest industry's lenders to support and leverage the similar type of capital investment projects listed above for the Forest Sector Prosperity Fund.

[6] The appellant made a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

...a list of grants and loan guarantees provided to companies through the Forest Sector Prosperity Fund and the Loan Guarantee Program, since these programs' inception including:

- The date the grant and/or loan announcement was made;
- The grant and/or loan commitment;
- The grant and/or loan flowed (in cash terms) to date;
- The total uncommitted funds for both programs.

I'd like to receive this information updated quarterly for the next two years. An update is not required if the information has not changed between quarters.

[7] The appellant subsequently amended the continuing access request under section 24(3) of the *Act* to include the following:

- The total flowed (in cash terms) to date to companies through the Forest Sector Prosperity Fund.
- The total flowed (in cash terms) to date to companies through the Loan Guarantee Program.

[8] The ministry granted the request for continuing access and provided the appellant with a schedule of dates for the two year period covering August 2009 to August 2011.

[9] The ministry subsequently granted partial access to a record containing the responsive information. Access to portions of the record was denied pursuant to the mandatory third party information exemption in section 17(1) and the discretionary economic interests exemption in section 18(1)(g) of the *Act*. The appellant appealed this decision to the Commissioner's office.

[10] During mediation, the appellant advised the mediator that he only wishes to pursue access to the information withheld under the "Offers Made & Accepted" portion of the record.

[11] During my inquiry into this appeal, I sought representations from the ministry, eight organizations whose interests may be affected by the outcome of this appeal (the affected parties) and the appellant. I received representations from the ministry and one affected party only. Representations were shared in accordance with *Practice Direction 7* and the *IPC's Code of Procedure*.

[12] In this order, I uphold the ministry's decision that the information is exempt under section 18(1)(g) of the *Act*.

RECORD:

[13] The information at issue consists of part of the withheld portion of a spreadsheet, under the "Offers Made & Accepted" heading.

ISSUES:

- A. Does the section 18(1)(g) exemption apply to the information at issue?

B. Was the ministry's exercise of discretion under section 18(1)(g) proper?

DISCUSSION:

A. Does the section 18(1)(g) exemption apply to the information at issue?

[14] The ministry claims that the information at issue is exempt from disclosure under section 18(1)(g), which states:

A head may refuse to disclose a record that contains,

information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[15] 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.

[16] For section 18(1)(g) 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.)].

[17] 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].

[18] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

[19] The ministry submits that the undisclosed portions of the record at issue contain information relating to agreements under both the Forest Sector Prosperity Fund and Loan Guarantee Program that have not yet been finalized. It argues that disclosure of this information could reasonably be expected to result in undue loss to the affected parties in question. The ministry states:

Offers that have been made and accepted often cannot be completed until several conditions have been met. These conditions could include securing of financing, equipment and property. Announcing a project prior to a reasonable conclusion of these factors could have a detrimental impact on the companies and their abilities to negotiate. Should the company be publicly traded, there is also the potential to influence stock prices by announcing a project that should the conditions of the offer not be met, may never actually happen.

In addition, any premature release of information could prompt competitors to take actions that have consequences for the companies in question, and influence negotiations with customers and input suppliers.

[20] In order for section 18(1)(g) to apply, the ministry must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and
2. disclosure of the record could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.¹

Part 1: Proposed plans, policies or projects

[21] The ministry submits that the withheld information is about planned undertakings or projects to provide financial assistance to applicants. In each case, however, while the decision to offer funding (or a guarantee) has been made, the projects are not yet complete, as the arrangements for the funding or the guarantee are not finalized. The ministry cites Order P-772 where former Assistant Commissioner Irwin Glasberg defined the term "project" for the purposes of section 18(1)(g) as "a planned undertaking" and stated that a proposed project is one that has not yet been completed. The ministry notes that in Order P-772, this office determined that the institution's approach to the negotiation of agreements constituted a "planned undertaking" and thus was a project for the purposes of the exemption. The ministry

¹ Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).

also cites Orders P-1085, PO-2861 and P-1264 in support of its position that the exemption applies because its offer of funding or guarantee has been made, but the projects being funded are not yet complete and the agreements have not yet been finalized.

[22] Based on my review of the information at issue and the ministry's representations, I accept that the information at issue relates to a proposed project. In particular, the undisclosed portion of the record at issue contains information about funds that are either to be guaranteed or disbursed to various affected parties under either the FSPF or the Loan Guarantee Program. Further, I accept the ministry's representations that while the guarantee or the funds have been offered, the agreements or projects are not yet finalized. Accordingly, I find that the ministry has satisfied part 1 of the test for the application of section 18(1)(g).

Part 2: undue financial benefit or loss to a person

[23] The ministry submits that the offers that have been made cannot be completed until several conditions have been met, including the securing of financing, equipment and/or property by the affected parties. The ministry submits that premature disclosure of an incomplete funding arrangement could reasonably be expected to have a potentially detrimental impact on the affected parties. The ministry states:

If the company is publicly trade, stock prices could be influenced by the introduction of uncertainty about the company's financial situation, or about its ability to meet conditions for financing and even the possibility that the funding may never happen at all.

[24] The ministry also argues that disclosure of the information also could reasonably be expected to affect the affected parties' abilities to negotiate with its customers and suppliers and allow potential competitors to act on the information to the affected parties' detriment.

[25] Based on my review of the information at issue and the ministry's representations, I accept that disclosure of the information could reasonably result in undue financial loss to the affected parties. The information at issue relates to the funds that are either being guaranteed or loaned to the affected parties. The amount of these funds is not insubstantial and I accept the ministry's representations that premature disclosure of this information when the agreements have not yet been finalized could reasonably be expected to result in undue financial loss for the affected parties. Accordingly, I find that section 18(1)(g) applies to the information at issue, subject to my finding on the ministry's exercise of discretion.

B. Was the ministry's exercise of discretion under section 18(1)(g) proper?

[26] The section 18(1)(g) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[27] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[28] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[29] In support of its exercise of discretion, the ministry notes that it has worked to provide the appellant with continuing access to the information at issue. In doing so, the ministry has provided disclosure of much of the information, subject to limited and focused severances, which it submits serves the purpose of the *Act*. The ministry states:

In this case, not only was most of the information sought provided to the appellant, but the information that was severed is likely to be only temporarily withheld, until the terms and conditions have been met. Once the terms and conditions of an offer are met and legal agreement[s] finalized, the information on those deals would be added to the next scheduled disclosure report.

...while information about how government is spending public money, and to whom government financial assistance is provided is certainly information the public is entitled to know, the release of the withheld information would be premature. It concerns situations in which the public's money has not been "flowed" nor the loan guarantee finalized. In fact the deals may never be finalized, and the financial assistance may never be offered.

[30] Finally, the ministry notes that the temporary and limited withholding of information is designed to balance the interests and sensitivities of the affected companies given the difficulties faced by the industry over the past several years with the appellant's right to know about government financial assistance to the forest industry.

[31] Based on my review of the information at issue and the ministry's representations, I find the ministry's exercise of decision to withhold the information at issue under section 18(1)(g) to be proper. The ministry properly considered the interests of both the government and the affected parties in not prematurely disclosing the information as well as the interests of the appellant in knowing about government financial expenditures. I find that the ministry's decision to grant the appellant's request for continuing access to the information to be indicative of its good faith decision to disclose the information in a timely manner, once the agreements have been finalized. Accordingly, I uphold the ministry's decision to withhold the information at issue under section 18(1)(g) of the *Act*.

[32] As I have found the information exempt under section 18(1)(g), I do not need to consider the possible application of section 17(1).

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: _____
Stephanie Haly
Adjudicator

_____ May 14, 2012