Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3077

Appeals PA11-372, PA11-373, PA11-374, PA11-375, PA11-392 and PA11-393

Ministry of Northern Development, Mines and Forestry

May 4, 2012

Summary: The requester sought access to the "total of all stumpage fees defaulted by the [named group] of companies". The ministry created a record containing a dollar figure representing the amount of the fees requested. After notifying the companies, the ministry decided to disclose the information in the record to the requester. The companies appealed this decision, claiming the information is exempt under section 17(1) and that the record created by the ministry is inaccurate. In this order, the ministry's decision to disclose the record is upheld. The exemption in section 17(1) does not apply to the record and the ministry's decision to create a record containing responsive information is upheld.

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

Order Considered: PO-2882.

OVERVIEW:

[1] The Ministry of Northern Development, Mines and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*), for information relating to the "total of all stumpage fees defaulted by

the [named group] of companies". This request was initially sent to the Ministry of Natural Resources, which forwarded it to the ministry pursuant to section 25 of the *Act*.

[2] The ministry notified ten parties whose interests may be affected by the disclosure of the information in the record, considered their representations and issued a decision granting complete access to a document which contains information relating to "the total amount of stumpage outstanding for the "[named group of companies], as a whole." Six of the ten notified parties, who are represented by the same legal counsel, appealed the ministry's decision to disclose the record at issue. As a result, Appeals PA11-372, PA11-373, PA11-374, PA11-375, PA11-392 and PA11-393 were opened for each of the appeals by the six parties (the appellants).

[3] During mediation, the appellants took the position that the record, which was prepared by the ministry in response to the request, is not responsive to the request and should not be disclosed on that basis. Furthermore, the appellants indicated that the named group of companies does not exist as a legal entity and that, without a clear definition of this group, the record could be misinterpreted. The appellants claimed that the third party information exemption in section 17(1) of the *Act* applies to the record at issue.

[4] Mediation was not successful in resolving the appeals and they were moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the appellants, through their legal counsel, initially. Because of the manner in which I address the appeals, it was not necessary for me to seek the representations of the requester or the ministry.

RECORDS:

[5] The record at issue consists of a one-page document entitled "Summary of outstanding stumpage collectively owed by the [named Group of Companies]".

ISSUES:

Issue A: What is the scope of the request? Is the identified record responsive to the request?

Issue B: Is the information contained in the record at issue exempt from disclosure under the mandatory third party information exemption in section 17(1).

DISCUSSION:

Issue A: What is the scope of the request? Is the identified record responsive to the request?

[6] The appellants take the position that the record at issue should not have been created by the ministry, and that it is not responsive to the request.

[7] With respect to the appellants' position that the record should not have been created, the appellants' argument appears to be that the ministry had no legal right to prepare the record because it is based on information provided by the appellants to the ministry in confidence. They argue that, in an agreement entered between the ministry and the group of companies identified in the request, the ministry agreed to treat the information provided to it in confidence.

[8] I do not accept the position taken by the appellants that the ministry had no legal right to create the record at issue. The ministry received the request for a specific category of information and, instead of identifying this information in the original documents in which it was contained, and severing the remaining non-responsive portions of these documents, it chose to prepare a one-page document summarizing the specific information requested. Previous orders have established that an institution has no obligation to create a record in response to an access request (Orders P-50, MO-1381, MO-1442, MO-2129 and MO-2130). However, there is nothing prohibiting institutions from creating a record which contains responsive information (Orders P-99, MO-1396, MO-1989 and PO-2484). Whether or not the responsive information is supplied to the institution in confidence does not impact the institution's decision to create a record. The question of whether the information at issue qualifies for exemption is addressed below.

[9] The appellants also contend that the record misrepresents the information contained in the original responsive records because not all of the original members of the group of companies still belonged to the group on the date the record was created. The appellants also state that the total amount contained in the record leaves the false impression that each of the component entities which comprise the group are jointly liable for the obligation described therein, which is not the case. As a result, the appellants take the position that the total amount contained in the record created by the ministry contains inaccurate and incorrect information, and that the record is therefore not responsive to the request as framed by the requester.

[10] I do not accept the appellants' position. The request in this appeal was for a specific category of information (the total of all stumpage fees defaulted by the named group of companies). As is clear from the discussion below, these amounts were

submitted by the entities in the group of companies to the ministry pursuant to the agreement entered between the ministry and the group of companies. In response to the access request, which is simply for the total of all stumpage fees, the ministry created the record by calculating the total based on the aggregate of the information contained in the various records. In doing so, I am satisfied that the record created by the ministry contains the information that is responsive to the request. I reject the appellants' argument that, because this total amount might be misinterpreted in some way, the record is not responsive to the request.

Issue B: Is the information contained in the record at issue exempt from disclosure under the mandatory third party information exemption in section 17(1).

[11] The appellants take the position that the information contained in the record is exempt under section 17(1) which 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[12] 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].

[13] For section 17(1) to apply, the appellants 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

[14] The appellants argue that the record contains information which qualifies as "commercial" or "financial" information within the meaning of section 17(1). The appellants rely on the findings of Adjudicator Steven Faughnan in Order PO-2882 with respect to similar information relating to stumpage fees paid by forestry companies to the ministry. I adopt the findings in Order PO-2882 with respect to the categorization of the information in the records as "commercial" or "financial" information and find that the record contains information that fits within these descriptions.

Part 2: supplied in confidence

Supplied

[15] 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].

[16] The appellants submit that the information contained in the record was provided to the ministry pursuant to the requirements of a Stumpage Repayment Agreement (the Agreement) which they entered into with the ministry.

[17] I have reviewed the contents of the Agreement and find that Article 6 thereof refers to certain reporting requirements whereby the appellants agreed to provide the

ministry with certain information, including the type of information that is contained in the record. As a result, I agree with the appellants that the information in the record was supplied by it to the ministry.

In confidence

[18] 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].

[19] 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].

[20] Along with its representations, the appellants provided me with a copy of a confidentiality agreement entered into with the ministry in conjunction with the Agreement governing the treatment of information passing between the parties to the main Agreement. This document sets out in clear and unambiguous language the need for maintaining the confidentiality of the information passing between the parties to the Agreement, unless "such disclosure is required by law." The confidentiality agreement also refers directly to a disclosure of information pursuant to *FIPPA* and acknowledges that because such a disclosure may be required, the appellants are entitled to the notifications and other procedures provided for in the *Act*.

[21] In my view, the language of the confidentiality agreement clearly indicates the intention of all the parties to the Agreement to maintain the confidentiality of the information passing between them pursuant to their mutual obligations, with an acknowledgement that a request under the *Act* requires different and specific treatment. I find that the parties had an explicitly described expectation that the

information shared pursuant to the Agreement, including information of the sort contained in the record, would be treated in a confidential manner.
Accordingly, I find that the information contained in the record was supplied in confidence and, accordingly, the second part of the test under section 17(1) has been satisfied.

Part 3: harms

General principles

[22] To meet this part of the test, the party resisting disclosure, in this case the appellants, 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.)].

[23] 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].

[24] 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].

[25] 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].

[26] In support of this aspect of the test under section 17(1), the appellants repeat the language of section 17(1)(a), (b) and (c), and argue that the disclosure of the information would result in the loss of "access to credit" or an increase in the cost of obtaining credit which may result in "a loss of operation or prohibit recommencement of operations."

[27] I note that similar arguments were addressed by Adjudicator Faughnan in Order PO-2882 as follows:

> 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 [the records] 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 [the records], 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 [the records] could reasonably be expected to cause the section 17(1)(a), (b) or (c) harms alleged.

[28] I find that the appellants in the appeals before me have also failed to sufficiently describe, in detail, the reasons behind their assertions that the harms set forth in sections 17(1)(a), (b) and (c) could reasonably be expected to result from the disclosure of the information contained in the record. In my view, it is not self-evident that such harm would result, and the evidence provided by the affected parties is simply not sufficiently detailed and convincing, as is required under this exemption.

[29] Because all three parts of the test under section 17(1) must be met, I conclude that the information at issue in the record is not exempt under this exemption. As no other exemptions, mandatory or otherwise, apply, I will order that the record be disclosed to the requester.

ORDER:

1. I order the ministry to provide a copy of the record to the requester by **June 8, 2012** but not before **June 4, 2012.**

2. In order to verify compliance with the terms of this order, I reserve the right to require the ministry to provide me with a copy of the record which is disclosed.

Original Signed by: May 4, 2012
Donald Hale
Adjudicator