Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3119

Appeal PA11-321

Ministry of Natural Resources

October 12, 2012

Summary: The ministry received requests for information pertaining to the operation of a gravel pit, its current operator and some named individuals. The ministry notified third parties whose interests may be affected by disclosure of the requested information. One of the third parties, the appellant, objected to the disclosure of his information. This order finds that the record does not contain the personal information of the appellant and is not exempt under the third party information exemption in section 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of "personal information"), 10(1), 17(1)(b), (c).

OVERVIEW:

[1] The Ministry of Natural Resources (the ministry) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information pertaining to the operation of a gravel pit commonly known as "Pit 7" located in a specified township, its current operation, and some named individuals. The requests were submitted by two different requesters.

[2] After clarifying the requests, the ministry notified certain third parties whose interests may be affected by the disclosure of the requested information (the affected parties). After reviewing the affected parties' submissions, the ministry issued a decision advising that partial access will be granted to the records. The ministry further

advised that the personal information contained in the records would be severed pursuant to section 21(1) of the *Act*.

[3] One of the third parties, now the appellant, appealed the ministry's decision to disclose certain records.

[4] During mediation, the appellant indicated that he is specifically objecting to the ministry's decision to disclose the content of a particular email. The appellant takes the position that the email and its attachment contain sensitive data that he collected and supplied with an expectation of confidentiality to the ministry. The records consist of his proprietary information, raising the possible application of section 21(1) of the *Act*, according to the appellant.

[5] During my inquiry into this appeal, I sought and received representations from the appellant and the ministry. Representations were shared in accordance with *Practice Direction 7* and section 7 of the IPC's *Code of Procedure*.

[6] I also sought representations from one the original requesters[1] regarding the application of the mandatory personal privacy exemption in section 21(1) to the personal information in the record. I did not receive any representations from the original requester.

[7] In this order, I uphold the ministry's decision.

RECORDS:

[8] The records at issue consist of one email and its attachment identified as TIFF #A0126599 pages 708 and 709.

ISSUES:

A. Does the ministry have custody or control of the records for the purposes of the *Act*?
B. Do the records contain "personal information" within the meaning of section 2(1) of the *Act*?
C. Does the mandatory personal privacy exemption in section 21(1) apply to the appellant's name and email address?
D. Is the information exempt under section 17(1) of the *Act*?

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[1] The other original requester confirmed that she is not interested in pursuing access to the personal information in the records.

DISCUSSION:

[9] In his representations, the appellant concedes that section 21(1) can not apply to the information at issue as it is not about him.[2] Instead, the appellant submits that that the mandatory third party exemption in section 17(1) applies to the information. Accordingly, the sole issue to be determined in this appeal is the application of section 17(1) to the two records at issue.

[10] However, even though the appellant submits that section 21(1) does not apply, as this is a mandatory exemption, I will briefly consider its application.

[11] The appellant raised the argument in his submissions that the record is not in the custody or control of the ministry and the ministry should not be able to issue an access decision to this information. I will address this first as a preliminary issue.

A. Does the ministry have custody or control of the record for the purposes of the *Act*?

[12] Section 10(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[13] Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[14] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.[3]

[15] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it (Order PO-2836). A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

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[2] The appellant's original claim that the information was exempt from disclosure under section 21(1) was based on his position that as he created the record it is his "personal information".

[3] Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

[16] The courts and this office have applied a broad and liberal approach to the custody or control question.[4]

[17] The appellant submits that the ministry does not have control of the record for the following reasons:

- The record is not "government" information.
- The appellant is the creator of the record and he is neither an employee of the ministry nor does he have a contractual relationship with the ministry.
- The appellant created the record for his own private use and interest.
- The ministry came to possess the record through intercepting a private communication.
- The record does not relate to the ministry's mandate or functions.
- The ministry does not have the right to possess the record or regulate its use and disposal.

[18] The appellant also provided the context surrounding how he submitted the record to the ministry. The appellant's argument focuses on the fact that when he submitted the record to the ministry, the ministry had taken the public position that public safety regarding truck traffic and the pit entrance was a municipal matter and not a ministry matter.

[19] The ministry submits that it received the record from the appellant during a statutory application process administered by it and it has physical possession of the record. The ministry asserts that it has custody and control of the record at issue. The ministry states:

> The Record consists of an email together with an attachment from which all personal information has been severed. It was authored by the appellant and addressed to an aggregate technical specialist employed by the Ministry. The Record relates to an application for a site plan amendment relating to an existing ARA[5] licence. Initially, the appellant made a formal objection to the proposed site plan amendment through the Environmental Registry. Later, the appellant submitted the Record to

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[4] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.

[5] ARA – *Aggregate Resources Act*.

the Ministry's aggregate technical specialist as part of his continued opposition to the application before the Ministry.

[20] Based on my review of the record and the parties' representations I find that the record is in the custody and control of the ministry. The appellant has not established that the record is not within the ministry's control. The appellant's arguments arise from his belief that because he does not have a contractual or employment relationship with the ministry, the record is in his control. The appellant's argument that the ministry only gained possession of the record through an interception of a private communication is not borne out by the facts in this appeal or the content of the record. The appellant's arguments on this issue arise from his mistaken belief that custody and control under the *Act* relate to "government information" only and he ascribes his own definition of that term to bolster his arguments.

[21] What is evident from the circumstances in this appeal is that the appellant submitted the email and the attached graph to a ministry representative within the context of an issue that is clearly within the ministry's mandate and statutory power. The ministry has possession of the record only because it was voluntarily provided by the appellant to the ministry's representative. The appellant does not indicate on the record in any way that his communication was of a personal nature and that it did not relate to the ministry's mandate regarding the pit and the site plan amendment or that he intended that it not be shared with the ministry when he supplied it.

[22] Accordingly, I find that the ministry properly issued an access decision to this record as it is in its custody and control for the purposes of the *Act*.

B. Does the record contain "personal information" within the meaning of section 2(1) of the *Act*?

[23] In order to determine which section of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or whether disclosure of the name would reveal other personal information about the individual [paragraph (h)].

[24] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

[6] Order PO-1880, upheld on judicial review in *Ontario (Attorney General)* v. *Pascoe*, [2002] O.J. No. 4300 (C.A.).

[25] Based on my review, I find that the appellant's name and his email address is his "personal information" within the meaning of paragraphs (d) and (h) of the definition of that term in section 2(1) of the *Act.* I will consider the application of the mandatory exemption in section 21(1) to this information only.

[26] Regarding the rest of the information, once the appellant's name and email address have been removed, I find that the appellant cannot be identified from the information remaining. The record relates to the visibility of the pit entrance for drivers and does not in any way disclose information about the appellant. Further, I find the record does not contain recorded information about the appellant. I note that the appellant is a private individual who neither owns the pit or the lands occupied by the pit. As stated above, the information in the record relates to the pit which is regulated by the ministry. Accordingly, I find the remaining information at issue does not contain "personal information" within the meaning of section 2(1).

C. Does the mandatory personal privacy exemption in section 21(1) apply to the appellant's name and email address?

[27] Where a requester seeks the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21(1). In this case, it appears that only section 21(1)(f) is relevant, which states:

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

[28] The factor and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1). If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[7] Section 21(4) is not relevant in the circumstances and the original requester has not raised the issue of section 23.

[29] In the present appeal, none of the presumptions in section 21(3) apply to the information at issue and the original requester that may have wanted the information

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[7] *John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

did not provide representations supporting disclosure of the personal information at issue. In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) or a relevant unlisted consideration must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.[8] Therefore, disclosure of the appellant's name and email address would constitute an unjustified invasion of the appellant's personal privacy and is exempt under section 21(1). Accordingly, I uphold the ministry's decision to withhold the appellant's name and email address from disclosure.

D. Is the information exempt under section 17(1) of the *Act*?

Section 17(1): the exemption

[30] 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,
>
> (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;

[31] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[9] 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.[10]

[32] For section 17(1) to apply, the appellant 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;

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[8] Orders PO-2267 and PO-273.
[9] *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.).
[10] Orders PO-1805, PO-2018, PO-2184, MO-1706.

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

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

Part 1: Type of information

[33] The appellant submits that the record at issue contains both technical and commercial information as the information relates to data compiled in relation to the visibility of the pit entrance to approaching vehicles. The appellant states:

> The record describes an attached spreadsheet disclosing details of 3, 737 pits and quarries in Ontario across twenty data fields, laboriously constructed by the Appellant out of a private interest in aggregate matters. It was directed at quantifying the extent of grandfathering across Ontario pits and quarries, a task that had not been undertaken before because of the difficulty of accessing so large a number of physical records, many of which are in long-term storage or lost, together with the difficulty of ascribing designation dates to the operations. The latter required the extraction of designation dates from a complex succession of regulations and their assignment to many problematical site descriptions, resulting in the discovery of localities not designated under the ARA as a result of Ministry errors in drafting of the regulations. The spreadsheet contains information of a commercial nature in describing sizes and licensed tonnages of each facility, and has potential commercial impacts, in that legislative changes resulting from public awareness of the extent of grandfathering in the aggregate industry could lead to a tightening of the standards under which they operate and increased costs.

[34] The terms technical and commercial information has been defined in past 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].

[35] Based on my review of the records and the appellant's representations, I am unable to find that the records contain the type of information that is protected under section 17(1) of the *Act*. While I accept the appellant's submission that compiling the information in the records involved many hours of work, I am unable to find that the information at issue is technical data. I find that compiling the information and organizing the information in the manner in which he did does not render the information technical information. Further, I find that the information does not qualify as commercial information for the purposes of section 17(1). The information at issue does not relate to the buying or selling of aggregate nor does it relate to the buying and selling of pits. I find that the appellant has not established the criteria for part 1 of the test for the application of section 17(1). While all parts of the section 17(1) test must be met for the exemption to apply, for the sake of completeness, I will proceed to consider the other two parts of the test.

Part 2: supplied in confidence

Supplied

[36] 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.[11]

[37] 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.[12]

In confidence

[38] 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.[13]

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[11] Order MO-1706.
[12] Orders PO-2020, PO-2043.
[13] Order PO-2020.

[39] 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; and
- prepared for a purpose that would not entail disclosure.[14]

[40] The appellant submits that he sent the email and attached graph to the ministry representative in relation to a prior discussion they had. On the issue of "in confidence", the appellant submits that he has not publicized the information but has:

> …striven to keep potentially controversial and sensitive information out of the public eye, implies private and confidential interactions involving an element of trust. The information of the appellant represents a unique construction of data and concepts not previously disclosed to the public or available thereto. Having expended considerable time and energy in generating the information, the appellant has wished to preserve the value that would be lost by unconstrained publication or use thereof, while maintaining priority and a lead in researching the issues.

[41] The ministry submits that the record was not supplied in confidence and states:

> The appellant submitted the record to a ministry employee in the context of the appellant's continued objection to an application for a site plan amendment that was under review by the ministry. By providing information in objection to an application, the appellant was implicitly asking the ministry to take such information into account in making its decision on whether to approve or refuse the proposed amendment.

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

> There is nothing in the record that suggests that it was supplied in confidence.

[42] Based on my review of the records at issue and the parties' representations, I find that the appellant supplied the information to the ministry through its representative. The appellant emailed the records to the ministry's representative to express his concerns about the pit entrance. The contents of the appellant's email support the ministry's position that the appellant was asking the ministry to take into consideration his graphed information in making its decision to approve or refuse the proposed amendment.

[43] Further, I find that the appellant did not have an expectation of confidentiality when he emailed the information to the ministry. I find that the appellant did not indicate in either the email or in the attachment that the information should be kept confidential. I also find that the appellant did not have an implicit expectation of confidentiality. The information was not submitted within the context of a private matter between the ministry and himself. Instead, the appellant was submitting this information within the context of a site plan amendment for a gravel pit. I do not accept the appellant's argument that he simply provided the information within the context of a private communication between himself and the ministry's representative.

[44] Accordingly, the appellant has not met part 2 of the test for the application of section 17(1).

Part 3: harms

[45] 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.[15]

[46] 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.[16]

[47] The appellant submits that the harms in sections 17(1)(b) and (c) are relevant in the circumstances. The appellant submits that he continues to do research in this area and would cease to supply the results of his research to the ministry in the event of disclosure. Further, the appellant submits that he expended considerable time and effort to research the information in the records and there is considerable value in the

[15] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[16] Order PO-2020.

information enclosed in the records. The appellant submits that the value of the information would "…diminish to a vanishing point with unconstrained publication or use of the information following disclosure."

[48] The ministry submits that the appellant has not provided detailed and convincing evidence of the harm in section 17(1)(b) or (c). The ministry states:

> The Records relates to data compiled in relation to the visibility of the pit entrance to approaching vehicles on the ARA applicant's lands. The ministry is not aware of, and cannot see based on the information available to it, a necessary connection between the information contained in this Record and harms to the appellant, particularly in light of the fact that the data relates to purported conditions on a property that does not belong to the appellant.

[49] Based on the representations of the parties, I find that the appellant has not established the harms in sections 17(1)(b) or (c). As the appellant himself has stated, he was in no way contractually obligated to provide the information to the ministry but instead did so voluntarily. I find the appellant's argument that he would no longer continue to provide similar information to the ministry to be unsupported by the evidence. In addition, I am unable to find that it is in the public's interest for this information to continue to be supplied to the ministry.

[50] Further, the appellant has not provided the necessary detailed and convincing evidence that disclosure of the information would result in undue loss to the appellant or undue gain to other individuals or organizations. The appellant has not provided sufficient evidence of the value of the information in the records.

[51] As the appellant has not met the requirements for the application of section 17(1), I find that the exemption does not apply and I dismiss the appeal.

ORDER:

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

2. I order the ministry's to disclose a copy the records (with the appellant's personal information removed) to the original requesters by providing them with a copy of the records by **November 19, 2012** but not before **November 12, 2012**.

Original signed by: October 12, 2012
Stephanie Haly
Adjudicator