

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3488

Appeal PA14-139

Ministry of Natural Resources and Forestry

May 7, 2015

Summary: The Ministry of Natural Resources (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA)* for information with respect to populations of turtles. The ministry denied access to portions of the records, citing the discretionary species at risk exemption at section 21.1. The adjudicator did not uphold this exemption and ordered the ministry to disclose to the appellant the information in the records withheld under section 21.1.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 21.1(a); *Endangered Species Act, 2007*, section 9(1)(a).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 S.C.R. 23.

OVERVIEW:

[1] The Ministry of Natural Resources (MNR or the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for information with respect to populations of turtles. The requester subsequently narrowed his request to the following:

Produce a copy of any data collected or reports produced, including photographs or other visual evidence, by [the ministry] from 2008 to 2013 with respect to populations of wood turtles, snapping turtles, or Blandings turtles, including but not limited to any "tag and release" program, in the "38 Mile Road" area north of Chippewa Falls, Ontario and the area known as Bow Lake, Ontario, including the area of [details regarding four] townships...

[2] In response to the requester's request to expedite the process, the ministry issued two decisions. The first decision pertained to records identified as responsive to the request that did not require third party consultation. In this decision, the ministry decided to disclose the records in part, citing the mandatory exemption at section 21(1) (personal privacy), and the discretionary exemptions at sections 21.1 (species at risk) and 22 (information soon to be published) of the *Act* to deny access to the remaining information.

[3] The ministry also notified eight affected parties whose interest may be affected by the disclosure of the remainder of the records responsive to the request, in accordance with section 28(1) of the *Act*, seeking their views regarding disclosure of those records. Some of the affected parties responded by consenting to full or partial disclosure. The ministry then issued a second access decision to the requester and the affected parties advising of its decision to disclose the records in part, citing the exemptions at sections 21(1), 21.1 and 22 of the *Act* to deny access to some of the remaining information.

[4] The records themselves were not released to allow 30 days for the affected party to appeal, in accordance with section 50(1) of the *Act*. After the 30 day period expired, the records were partially disclosed to the requester as no appeals were filed by the affected parties.

[5] The requester (now the appellant) appealed both of the ministry's access decisions.

[6] During mediation, the appellant confirmed that he is not pursuing access to the records that were severed under sections 22 and 21(1) of the *Act*. Therefore, these exemptions are no longer at issue in this appeal. The appellant also confirmed that the fee is not an issue in this appeal.

[7] The appellant clarified that he is seeking access to the location information of the turtles in the records that was denied under section 21.1 of the *Act*. The appellant advised the mediator that he is raising section 23 of the *Act* as an issue in this appeal, as he believes that such records are matters of public interest.

[8] As mediation did not resolve the appeal, this file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[9] In this order, I do not uphold the ministry's decision that the information at issue is exempt under section 21.1.

RECORDS:

[10] The records at issue are reports, photographs, maps, charts, emails and other documents, as set out in the Appendix to this order, the ministry's Index of Records.

DISCUSSION:

Background:

[11] The ministry states that a limited partnership is proposing to construct a 36-turbine wind farm primarily on Crown land within two of the named townships, in the Bow Lake Area. It states:

A number of studies and information was gathered and submitted to the ministry as part of the process of determining which permits may be required and whether permits should be granted. Wood turtle was considered by the company during the planning stages for Bow Lake. The District was satisfied that all *Endangered Species Act* [the *ESA*] requirements were met, and no permit would be required. Habitat assessment, literature review and field surveys were conducted in September 2011 by [name]; minimal habitat was found and no species were observed. All of these reports were provided in the original request, and were shared with the requester. In addition to the request for information around the Bow Lake site, there was also a request for species location information on a river that has been surveyed rather extensively and is known to contain a fairly large, stable population of turtle[s.]

A. Does the discretionary species at risk exemption in section 21.1 apply to the records?

[12] The ministry relies on section 21.1(a) of *FIPPA*, which reads:

A head may refuse to disclose a record where the disclosure could reasonably be expected to lead to,

killing, harming, harassing, capturing or taking a living member of a species, contrary to clause 9(1)(a) of the *Endangered Species Act, 2007*;

[13] Clause 9(1)(a) of the *ESA*, referred to in section 21.1(a), reads:

No person shall,

kill, harm, harass, capture or take a living member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species.

[14] "Species" is defined under subsection 2(1) of the *ESA* as follows:

"species" means a species, subspecies, variety or genetically or geographically distinct population of animal, plant or other organism, other than a bacterium or virus, that is native to Ontario.

[15] The ministry submits that:

...poaching is one of the most insidious threats facing wood turtles. Their life history characteristics (long-lived, delayed maturity, low recruitment) make them prone to decline with even slight changes in adult mortality rates. Reducing this threat is one of the protection and recovery objectives outlined in the *Recovery Strategy for the Wood Turtle in Ontario, 2010* ...While the populations within Sault Ste. Marie District have been fairly stable, warnings have been issued by local enforcement officers for possession of Species At Risk/non-Species At Risk turtles, as well one charge laid for the illegal possession of wood turtle within the district.

...Under the [*Ontario Government Response Statement for Wood Turtle*] there are three high priority actions that reduce wood turtle mortality, illegal collection and other human-related threats to the species. Sharing the specific location information of this population could reasonably be expected to result in the taking or harming of wood turtles contrary to subsection 9(1) of the *Endangered Species Act*...

[16] The appellant states that he wishes to know the size and location(s) of the wood turtle population in the Bow Lake Wind Farm area in order to determine whether the wind farm poses a serious and irreversible harm to wood turtles.

[17] The appellant submits that the ministry has taken a seemingly contradictory stance in its representations in:

- relying upon the submissions of the Approval Holder for the Bow Lake Wind Farm as satisfactory evidence that the development of that project poses no risk of harm to any species at risk, including the wood turtle, as there is no evidence that the species is present in the area; and
- in refusing to provide locational information on wood turtle populations in the same area in response to this request, on the basis that disclosing such information could potentially result in harm to the species.

[18] The appellant submits that the ministry can have no reasonable expectation that disclosure of the locational information requested would be contrary to section 9(1)(a), of the *ESA*. He also points out that the ministry concedes that wood turtle populations within an area covered by this request have been fairly stable and that only one charge has been laid to date for the illegal possession of a wood turtle within the district.

[19] The appellant states that the ministry's position on disclosure, namely that disclosure "would *potentially* be counterproductive," is contrary to the test set out in section 21.1 of *FIPPA*.

[20] The appellant also provided detailed representations disputing the accuracy of the study relied upon by the ministry that there was no evidence of any wood turtles within the project boundaries.

[21] In reply, the ministry states that it has severed information relating to wood turtles that are found on a site that is a specific distance¹ from the Bow Lake development and that due to the limited range of wood turtles, the turtles would not be impacted in any way by the Bow Lake Development. It states that there are no records relating to the location of wood turtles in the other sites within closer proximity of the development identified by the appellant as part of his request. The ministry states that with an endangered species, even the loss of a few individual members of the species can have a catastrophic effect on the survival of a local population. It further states that the loss of local populations can have an adverse effect of the species.

[22] In surreply, the appellant states that it is critical that the ministry clarify what geographic area it considered part of "the Bow Lake development" in order to conclude that the limited range of wood turtles will not put them in the path of the development and its related infrastructure.

¹ The ministry did not consent to the disclosure to the appellant of this specific distance from the Bow Lake Development as set out in its representations.

[23] Although asked, the ministry did not consent to the appellant being informed as to what the ministry considered the boundaries of “the Bow Lake Development” referred to in its representations.

Analysis/Findings

[24] As set out above, during mediation the appellant clarified that he is seeking access to the location information of wood turtles in the records that was denied under section 21.1 of the *Act*.

[25] The ministry is concerned about the viability of the wood turtle population and relies on section 21.1(a) of *FIPPA*, which refers to section 9(1)(a) of the *ESA*.

[26] The ministry was asked in the Notice of Inquiry the following:

Could disclosure reasonably be expected to be contrary to section 9(1)(a) of the *Endangered Species Act, 2007*? Please explain with reference to the information at issue in each record.

[27] The ministry did not explain whether disclosure could reasonably be expected to be contrary to section 9(1)(a) of the *ESA* with reference to the information at issue in each record. Instead it provided general representations covering all of the records at issue.

[28] The test in section 21.1 is whether disclosure of the information at issue “could reasonably be expected to lead to” the harms set out in that section. This test was discussed in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,² where the Supreme Court of Canada stated that:

This Court in *Merck Frosst*³ adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this

² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII)

³ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 S.C.R. 23.

standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[29] Using this test of “reasonable expectation of probable harm”, I find that the ministry has not provided sufficient evidence that disclosure of the information at issue in the records could reasonably be expected to lead to the killing, harming, harassing, capturing or taking a living member of the wood turtle population. Most of the information is vague locational information referring to general, imprecise locations, such as:

- a river or a creek,
- a several kilometer stretch of a general location
- a kilometer or mile number

[30] Other information that has been severed from the records is about:

- positions where the weather was recorded
- codes or acronyms severed from email chains
- a description of the use of dogs in locating turtles
- a description of river and road terrains
- transmitter details
- information about a bird nesting sites or actual sightings of birds
- information describing other species
- information about camera locations
- information about vegetation
- information about where wood turtles were not found
- approximate location of a turtle sighted by a local person

with no indication as to how this relates to the actual location of wood turtles.

[31] The ministry also withheld charts, photographs, and maps, without providing representations as to how disclosure of these records could reasonably be expected to lead to the locating of wood turtles. Nor is it apparent to me that these documents reveal the specific location of wood turtle populations.

[32] Most of the information at issue in the records is quite dated, dating from 2006 to 2012. The ministry has not provided representations as to how disclosure of this information could now reasonably be expected to lead to the harms set out in section 21.1(a).

[33] For example, the ministry has claimed the application of the section 21.1(a) exemption to portions of a report dated February 25, 2010 at pages 1991 to 2085 of the records. It has not indicated why the disclosure of this information from several years ago could now be reasonably expected to lead to the harms set out in this exemption. The ministry has also not provided any indication as to what information in this report reveals "...the specific location information of wood turtles." Nor is this specific location information apparent to me from my review of the report.

[34] There are some Wood Turtle Capture or Re-Capture forms dated between 2006 and 2011 at pages 1629 to 1766 of the records. Where there is a location box on each form, some have been left blank, and some others just contain a one or two word description. There is also some limited information in these records that appears to me to reveal specific location co-ordinates of wood turtles. Examples of this information are found at pages 219 and 220, both of which are dated 2010, and at page 240 dated 2008. The relevancy of these pages of the records in now locating wood turtles is not apparent to me from my review of these pages of the records.

[35] In addition, even in the very limited number of pages where specific location information might be present, albeit dated; the ministry has not provided sufficient evidence for me to determine that a reasonable expectation of probable harm exists. The ministry has indicated that the wood turtle population in the Sault Ste. Marie area has been relatively stable. It did indicate that warnings have been issued by local enforcement officers for possession of Species at Risk/Non-Species at Risk turtles. It also stated that one charge has been laid for the illegal possession of wood turtles within the Sault Ste. Marie district.

[36] However in its representations, the ministry did not indicate how many warnings were issued, when these warnings were issued, or the exact species that these warnings pertain to. As well, although it states that there has been one charge relating to the illegal possession of a wood turtle within the Sault Ste. Marie district, it did not provide any further details of this charge, nor did it provide any details about the outcome of any proceedings resulting from this charge.

[37] Furthermore, I agree with the appellant that there appears to be a discrepancy in the ministry's representations as to whether the records actually reveal the specific location of wood turtles. The reply representations of the ministry indicate that it has severed information relating to wood turtles that are found on a site that is quite a specific distance away from the area in the appellant's request, the Bow Lake development. In addition, it states that due to the limited range of wood turtles, the turtles would not be impacted in any way by the Bow Lake Development. In the ministry's initial representations, it states during the planning stages for Bow Lake, the District was satisfied that all *ESA* requirements were met, and no permit would be required as no wood turtles were observed.

[38] As well, it appears that the ministry has not considered the appropriate test under section 21.1. It should have considered whether disclosure could reasonably be expected to lead to the killing, harming, harassing, capturing or taking of wood turtles. Instead, it considered whether release of the information at issue would potentially be counterproductive when trying to fulfill the ministry's commitment to protect and recover this species.

[39] Accordingly, based on my review of the records, I find that the exemption in section 21.1(a) of *FIPPA* does not apply to exempt the information at issue in the records as I do not have sufficient evidence to find that disclosure could reasonably be expected to lead to the killing, harming, harassing, capturing or taking a living member of the wood turtle species, contrary to clause 9(1)(a) of the *ESA*. Therefore, I will order the information in the records withheld under section 21.1 disclosed.

ORDER:

1. I order the ministry to disclose to the appellant the information in the records withheld under section 21.1 by **May 29, 2015**.
2. To verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellant in accordance with provision 1 above.

Original Signed by: _____
Diane Smith
Adjudicator

_____ May 7, 2015

APPENDIX

INDEX OF RECORDS

The ministry has claimed the application of section 21.1 to the records remaining at issue, as listed in its index of records, as follows:

Record #	Page(s)	Subject	Disclosure
A0231041	15		Partial
A0231041	17 - 20		Partial
A0231043	33		Partial
A0231043	35 - 37		Partial
A0231043	40		Partial
A0231044	54		Partial
A0231044	56		Partial
A0231045	59	Detector Dog Report- Sault Ste. Marie Area- 2012	Partial
A0231046	60	Detector Dog Report- Sault Ste. Marie Area- 2013	Partial
A0231047	61	Sault Ste. Marie District -Field Work Results	Partial
A0231047	62		Partial
A0231053	67	Photo	Withheld
A0231070	82	Map	Withheld
A0231070	83 - 84		Withheld
A0231071	85	Map	Withheld
A0231071	86 - 90		Withheld
A0231095	143 - 144	Map	Withheld
A0231206	150	Sault Ste. Marie District Wotu Field Notes 2010	Partial
A0231206	151		Partial
A0231255	201		Partial
A0231255	202		Withheld
A0231255	203		Partial

A0231255	204	Map	Withheld
A0231255	205		Partial
A0231255	207	Map	Withheld
A0231255	208		Partial
A0231255	210		Partial
A0231255	211	Map	Withheld
A0231255	212		Partial
A0231255	214		Partial
A0231255	215 - 217		Partial
A0231255	218		Partial
A0231259	219	Wood Turtle & Permits	Partial
A0231260	220	Wood Turtle Located; Permits	Partial
A0231260	221		Partial
A0231261	222	Sault Ste. Marie District -Field Work Results	Partial

A0231261	223 - 224		Partial
A0231263	227	Sault Ste. Marie District -Field Work Results	Partial
A0231269	231 - 232		Partial
A0231282	237	Wood Turtle Activities That Damage/Destroy	Partial
A0231283	240	Wood Turtle	Withheld
A0231283	241		Withheld
A0231337	242	Wood Turtle	Withheld
A0231337	243		Withheld
A0231349	244	Wood Turtle	Withheld
A0231349	245		Withheld
A0231350	246	SAR	Partial
A0231447	295	Table	Partial

A0231447	296		Partial
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A0231450	299	Map	Withheld
A0231456	300	Map	Withheld
A0231460	313	Table	Partial
A0231687	1628	Transmitters For Wood Turtles	Withheld
A0231698	1629	2011 Algoma Wood Turtle Capture Form	Partial
A0231698	1631		Partial

A0231698	1633		Partial
A0231698	1635		Partial
A0231698	1637		Partial
A0231698	1639		Partial
A0231698	1643		Partial
A0231698	1645		Partial
A0231698	1647		Partial
A0231698	0649		Partial
A0231701	1651	2006 Wood Turtle Capture Form	Partial
A0231701	1659		Partial
A0231701	1661		Partial
A0231701	1663		Partial

A0231701	1665		Partial
A0231701	1667		Partial
A0231701	1673		Partial
A0231701	1675		Partial
A0231701	1677		Partial
A0231701	1679		Partial
A0231701	1681		Partial
A0231701	1683		Partial
A0231701	1685		Partial
A0231701	1687		Partial
A0231701	1689		Partial
A0231701	1691		Partial
A0231701	1693		Partial

A0231701	1695		Partial
A0231704	1697	2008 Algoma Wood Turtle Capture Form	Partial
A0231704	1699		Partial
A0231706	1701	2008 Wood Turtle Re-Capture Form	Partial

A0231706	1702 - 1707		Partial
A0231706	1709 - 1726		Partial
A0231707	1727	2008 Algoma Wood Turtle Capture Form	Partial
A0231707	1729		Partial
A0231707	1732		Partial
A0231708	1733	2008 Algoma Wood Turtle Recapture Form	Partial
A0231708	1734- 1735		Partial
A0231708	1737		Partial
A0231716	1738	2008 Wood Turtle Recapture Form	Partial
A0231716	1739 - 1745		Partial

A0231716	1747 - 1766		Partial
A0231040	1775	Friday Field Work	Consult- Partial ⁴
A0231040	1776		Consult- Partial
A0231040	1777		Consult- Partial
A0231203	1778	Outstanding Potential Habitat And Evaluation Criteria	Consult- Partial
A0231203	1779 - 1780		Consult- Partial
A0231204	1783		Consult- Partial
A0231205	1788		Consult- Partial

A0231205	1790		Consult- Partial
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⁴ Consult-Partial or Consult-Withheld, means that the ministry consulted with third parties on these records.

A0231258	1791	Wood Turtle Sightings	Consult-Partial
A0231264	1793	Attn: [name]; A Question About The Wood Turtle Site	Consult-Partial
A0231264	1794		Consult-Partial
A0231270	1882	Contact Number	Consult-Partial
A0231270	1883 - 1885		Consult-Partial
A0231271	1886	Wood Turtle Sighting	Consult-Partial
A0231329	1892	Hsp Species At Risk Data	Consult-Partial
A0231332	1894	Wood Turtle	Consult-Partial
A0231332	1895		Consult-Partial

A0231332	1896	Map	Consult-Withheld
A0231348	1898 - 1899		Consult-Partial
A0231351	1901	Turtle Zone Incursions	Consult-Partial
A0231352	1903	Revisions	Consult-Partial
A0231352	1904 - 1905		Consult-Withheld
A0234677	1950		Consult-Partial

A0231257	1993		Consult-Partial
A0231257	1994		Consult-Partial
A0231257	2000 - 2007		Consult-Withheld

A0231257	2008		Consult-Partial
A0231257	2009		Consult-Partial
A0231257	2010		Consult-Withheld
A0231257	2014		Consult-Partial

A0231257	2015-2019		Consult-Withheld
A0231257	2020 - 2021		Consult-Partial
A0231257	2024		Consult-Partial
A0231257	2025		Consult-Withheld
A0231257	2026		Consult-Partial
A0231257	2027		Consult-Withheld
A0231257	2028		Consult-Partial
A0231257	2029		Consult-Partial
A0231257	2031		Consult-Partial
A0231257	2032 - 2034		Consult-Withheld
A0231257	2035		Consult-Partial

A0231257	2037		Consult-Partial
A0231257	2040 - 2042		Consult-Partial
A0231257	2043		Consult-Partial

A0231257	2044 - 2049		Consult- Partial
A0231257	2050 - 2051		Consult- Partial
A0231257	2052		Consult- Partial
A0231257	2056 - 2063		Consult- Partial
A0231257	2065 - 2068		Consult- Partial
A0231257	2069		Consult- Partial
A0231257	2070 - 2071		Consult- Withheld
A0231257	2072 - 2073		Consult- Partial

A0231257	2075		Consult- Partial
A0231257	2077		Consult- Partial
A0231257	2078		Consult- Withheld
A0231257	2079		Consult- Partial