

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3567

Appeal PA15-264

Ministry of Natural Resources and Forestry

January 11, 2016

Summary: The appellant appeals the ministry's decision to disclose two environmental assessments reports, in full, to the requester. The appellant claims that the reports are exempt from disclosure under the mandatory third party commercial information exemption in section 17(1) of the *Act*. The adjudicator finds that the records are not exempt under section 17(1) and upholds the ministry's decision to disclose the records to the requester. The appeal is dismissed.

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

Orders and Investigation Reports Considered: PO-3459

OVERVIEW:

[1] The Ministry of Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified location (the site), including:

- All copies and draft copies of any environmental impact statement reports relating to the site from July 25, 2014 to February 13, 2015
- All documents relating to the potential or actual re-evaluation or alteration of status or boundaries of the [named river] Wetland Complex from January 1, 2014 to February 12, 2015

[2] After locating responsive records, the ministry notified two affected parties

whose rights might be affected by the disclosure of the records pursuant to section 28 of the *Act*. Both parties submitted representations. After reviewing the affected parties' representations, the ministry issued a decision stating that it decided to grant the requester full access to the two responsive records.

[3] One of the affected parties, now the appellant, appealed the ministry's decision.

[4] During mediation, the appellant took the position that the information should not be disclosed to the requester pursuant to the mandatory third party commercial information exemption in section 17(1) of the *Act*. The requester confirmed that they continue to pursue access to the information at issue.

[5] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. The adjudicator who had carriage of this appeal sought representations from the appellant in response to a Notice of Inquiry. The appellant submitted representations.

[6] The appeal was then transferred to me. In this decision, I uphold the ministry's decision and dismiss the appeal. The ministry is ordered to disclose the records that remain at issue to the requester.

RECORDS:

[7] The two records are environmental assessment reports, the first prepared in December 2014 and the second prepared in February 2015, relating to the site.

DISCUSSION:

Does the mandatory exemption at section 17(1) of the *Act* apply to the records?

[8] The appellant takes issue with the ministry's decision to disclose the two records to the requester, in full, claiming that the records are exempt under section 17(1) of the *Act*. Section 17(1) states:

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;

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ As the records clearly do not contain information relating to a labour relations dispute, I will only consider whether section 17(1)(a), (b) or (c) apply to exempt the records from disclosure and not section 17(1)(d).

[9] For section 17(1) to apply, the party or parties resisting disclosure, in this case 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;
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.

Requirement 1: type of information

[10] The types of information listed in section 17(1) have been discussed in prior orders:

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.²

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences

¹ *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.) (*Boeing Co.*)

² Order PO-2010.

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.³

[11] The appellant did not address whether the records contain information contemplated by section 17(1) of the *Act*. However, based on my review of the records, I find that they contain scientific and/or technical information, specifically the results of the ecological surveys of the flora and fauna, the physical terrain and other ecological functions and features within the area surrounding the site.

Requirement 2: supplied in confidence

[12] The requirement that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁴

[13] 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.⁵

[14] In order to satisfy the “in confidence” component of part two, the appellant must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁶

[15] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.⁷

³ *Ibid.*

⁴ Order MO-1706.

⁵ Orders PO-2020 and PO-2043.

⁶ Order Po-2020.

⁷ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC), 298 DLR (4th), 99 Admin LR (4th) 68, 241 OAC 346.

[16] The appellant did not make representations on whether the records were supplied in confidence to the ministry.

[17] I have reviewed the records. The records do not indicate nor do they contain any provisions stating that they were prepared for the appellant in confidence or for the use of only the appellant or the ministry. While the appellant did not make representations on whether the records were supplied in confidence, he did provide me with a copy of a cover email he sent to the ministry with one of the records. In the cover email, the appellant states, "This is not for dissemination, distribution, duplication or other transmission in whole or in part without the permission of the undersigned". Although this statement suggests that the appellant believed that the records contained his proprietary information, the evidence before me is not sufficient to establish a finding that the records were supplied to the ministry in confidence.

[18] Therefore, I find that these records were not supplied to the ministry in confidence. This is sufficient to conclude that the records at issue are not exempt under section 17(1)(a), (b) or (c). However, for the sake of completeness, I will also address whether the "harms" contemplated by sections 17(1)(a), (b) or (c) could reasonably be expected to arise as a result of disclosure of the information at issue.

Requirement 3: harms

[19] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁸

[20] 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 the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁹

[21] The appellant did not make direct submissions on whether any of the harms listed in section 17(1) could reasonably be expected to result from the disclosure of the records. The appellant states that he paid for the reports and submits that they contain his proprietary information and cannot be disclosed until the ministry has a chance to review, vet and discuss it. The appellant states that once the ministry has considered the reports and "formed an opinion", he is willing to release the February 2015 report to the requester.

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-54.

⁹ Order PO-2435.

[22] The appellant attached a copy of his response to the ministry's notification. In that submission, the appellant claimed that the December 2014 report should be destroyed as certain parties to the report, including the ministry and various other governmental departments, could be exposed to liability if it is misinterpreted. The appellant also submitted that it and the party that created the December 2014 report could be drawn into litigation if it were disclosed. With regard to the February 2015 report, the appellant advised the ministry that the report was based on a three-year study. The appellant submitted that the governing bodies with jurisdiction should have at least a year to review the report and weigh possible solutions for the subject property before releasing it. The appellant claims that, if the February 2015 report is disclosed prematurely, the costs accumulated, both in work and resources, would be lost immediately.

[23] In the circumstances of this appeal and with regard to the submissions of the appellant, I am not convinced that the disclosure of the two environmental assessment reports at issue could reasonably be expected to significantly prejudice the negotiation or competitive position of the appellant as contemplated by section 17(1)(a). I am also not persuaded that disclosure of the two reports could reasonably be expected to result in similar information no longer being supplied to the ministry where it is in the public interest that similar information continue to be so supplied as contemplated by section 17(1)(b). Further, I am not persuaded that disclosure of the environmental assessment reports could reasonably be expected to result in undue gain or undue loss as contemplated by section 17(1)(c).

[24] I understand that the appellant is concerned that it may be drawn into litigation if the reports at issue are misunderstood. Adjudicator Gillian Shaw considered a similar argument in Order PO-3459. However, Adjudicator Shaw dismissed a party's concern that the public disclosure of an environmental assessment report at issue in her appeal had the potential to create an erroneous impression that the party deposited contaminated fill at the property where, in fact, it contended that the contaminated fill came from others. In her decision, Adjudicator Shaw found that "if the [party] is of the view that the resulting report is misleading in some way, it should be a simple matter to convey updated correct information to the requester."¹⁰ I adopt Adjudicator Shaw's finding and apply it to the facts of the appeal before me. While I appreciate the appellant's concern that the reports at issue may be misinterpreted, I find that he should be able to correct any misunderstanding and provide updated information if required. In any case, I find that the appellant's concerns with regard to misinterpretation of the records could not reasonably be expected to result in the harms identified in sections 17(1)(a), (b) or (c) of the *Act*.

[25] In his representations, the appellant submitted that the disclosure of the records would result in the immediate loss of a number of years' worth of work and resources. However, the appellant did not provide me with any evidence demonstrating how the

¹⁰ Order PO-3459 at para. 43.

disclosure would result in such an undue loss, as contemplated by section 17(1)(c). Overall, I find that the appellant's arguments that the disclosure of the records could reasonably be expected to result in the harms contemplated by section 17(1) of the *Act* to be speculative and lacking in detail.

[26] In addition, and aside from there not being sufficient evidence from the appellant, I do not find anything on my review of the records themselves to substantiate the claim that disclosure could result in the harms contemplated by section 17(1). I also note that the records at issue are environmental assessment reports and my conclusion is consistent with past orders of this office.¹¹ Indeed, in none of those orders was the exemption of an environmental site assessment report at issue under section 17(1), or its municipal equivalent section 10(1), upheld. The ministry's decision to disclose the records to the requester, in full, is consistent with those orders. Accordingly, based on my review of the records and the appellant's representations, I find that he, that is, the party bearing the onus of proof, failed to establish a reasonable expectation of harm and I conclude that such harm cannot be inferred in the circumstances. As a result, I find that part three of the test for exemption under section 17(1) has not been met.

[27] In conclusion, I find that the records do not qualify for exemption under section 17(1) of the *Act*. As no other exemptions were claimed and no mandatory exemptions apply to the records, I will order the ministry to disclose them to the requester and dismiss the appeal.

ORDER:

1. I uphold the ministry's access decision and dismiss the appeal.
2. I order the ministry to disclose the records to the requester by **February 16, 2016** but not before **February 11, 2016**.
3. In order 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 requester in accordance with provision 2 above.

Original Signed by: _____

Justine Wai
Adjudicator

January 11, 2016

¹¹ See Orders MO-1263, MO-1503, MO-0974, MO-2922, PO-2558 and PO-3459.