Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3507

Appeal PA14-78

Ministry of Natural Resources and Forestry

July 3, 2015

Summary: The appellant made a request for data collected by the ministry on temperatures in sand dunes which are potentially overwintering sites for Fowler's toads. The responsive records were handwritten notes and electronic data set information. The ministry withheld the records on the basis of the discretionary exemption in section 18(1)(b) (economic or other interests). During mediation, the appellant argued that there was a compelling public interest in the records at issue which overrides the purpose of the section 18(1)(b) exemption under section 23 of the *Act*. The adjudicator upholds the ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 18(1)(b) and 23.

Orders and Investigation Reports Considered: Order MO-2986.

OVERVIEW:

[1] The appellant submitted an access request to the Ministry of Natural Resources (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for data collected by the ministry "on temperatures in sand dunes which are potentially overwintering sites for Fowler's Toads". He cited two emails that he received from a ministry biologist and stated, in part:

> …From the text of the two messages, it is clear that the MNR collected data in 2011 (perhaps the winter starting in 2010 and ending in 2011, perhaps the winter starting in 2011 and ending in 2012, whichever it was) at Nickel Beach, Long Beach and Bay Beach. [The ministry biologist] has not provided access to this data and thus I would like to make a formal request to see the complete data that was collected, as well as the methods used to collect this data, under [the *Act*].

[2] The ministry located electronic data sets and handwritten notes that are responsive to the appellant's request. The ministry issued a decision which denied access to the records under the discretionary exemption in section 18(1)(b) of the *Act*, which allows an institution to refuse to disclose a record that contains information obtained through research by an employee of an institution where disclosure could reasonably be expected to deprive the employee of priority of publication.

[3] During mediation, the appellant advised the mediator that there is a public interest in disclosure of the requested records. As a result, the public interest override in section 23 of the *Act* is at issue in the appeal.

[4] During the inquiry into this appeal, the adjudicator sought and received representations from the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The appeal was then assigned to me to complete the order.

[5] In this order, I uphold the ministry's decision that section 18(1)(b) applies to the withheld information. I also find that the appellant has not established that there is a compelling public interest in the records that overrides the purpose of the section 18(1)(b) exemption.

RECORDS:

[6] The records at issue are electronic data sets and handwritten notes.

ISSUES:

A. Does the discretionary exemption at section 18(1)(b) apply to the records?

B. Did the institution exercise its discretion under section 18(1)(b)?

C. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 18(1)(b) exemption?

DISCUSSION:

A. Does the discretionary exemption at section 18(1)(b) apply to the records?

[7] The ministry claims that section 18(1)(b) applies to exempt the records from disclosure. This section states:

> A head may refuse to disclose a record that contains,
>
> > information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;

[8] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[1]

[9] For sections 18(1)(b) to apply, the institution 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.[2]

[10] For section 18(1)(b) to apply, the ministry must show that:

(i) the record contains information obtained through research of an employee of the institution, and

(ii) its disclosure could reasonably be expected to deprive the employee of priority of publication.

[11] The ministry submits that the records consist of 9 pages of field notes and 42 Excel files containing the thermal data collected through the winter of 2011/2012. The ministry provided an affidavit from the employee who affirms:

- She is a management biologist employed by the ministry whose duties include the monitoring, evaluations, field research and assessment of fish and wildlife populations and their habitat.

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[1] Toronto: Queen's Printer, 1980.

[2] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

- She is currently an MSc student at a university where she is studying reptile overwintering strategies, part-time.
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- She has authored and co-authored published articles listed in the Schedule attached to her affidavit.

- As part of her duties, she conducts research on wildlife in Ontario, including the Fowler's Toad.

- Due to the toad's physiology, it overwinters in sand dunes of sufficient thermal mass to maintain a non-freezing and non-flooding, moist environment for up to 8 months, depending on the length of winter.

- Winter sand dune thermal data and the following season's juvenile recruitment data were analyzed following a mild (2010 – 11), moderate (2004 – 05) and severe (2013 – 14) winter.

- Data to be used in this research article consists of: (a) wintering thermal data from sand dunes at Niagara beaches (3 wintering years that represent mild (2010-11), moderate (2004-05) and severe (2013-14)); (b) Fowler's toad population monitoring data (summer 2005; summer 2011; summer 2014)

- The winter dune temperature data that was requested (winter 2010-11) represents 1/3 of the temperature data that she needs to complete this paper. This data collection has taken over 10 years to reflect three levels of winter severity needed to finish this paper. If the data were disclosed, it would give a publication advantage to that individual on this topic.

- This research has value to the scientific community and to the provincial and federal governments to define future policies on habitat protection for the Fowler's toad.

[12] The affiant also affirmed that the data and analysis is for an article that she intends to coauthor and publish in a journal and states:

> Analysis will occur over the fall-winter with my first draft to be sent to collaborators by next April for their editing and review.

[13] The appellant argues that the ministry has not provided detailed and convincing evidence of the reasonable expectation of that the ministry biologist would be deprived of the priority of publication. The appellant provided a sworn oath that he would not seek to publish the data in a scientific journal and states the following:

> It is worthy of note that no journal worth publishing in would accept data that had been stolen from another researcher. Since the community of researchers who is knowledgeable of toad overwintering physiology and the Fowler's Toads is incredibly small it is a virtual certainty that if I, or anyone, attempted to publish this data on their own one of the reviewers (who serve in an editorial capacity in support of journals) would be Dr. David Green, [the ministry biologist's] proposed coauthor. Since he is well acquainted with both [the ministry biologist] and myself he would know that the data belonged to her and would simply block its publication. Thus the probability of [the ministry's biologist]'s data getting stolen such that she would lose priority of publication is essentially zero.

[14] The appellant also submitted a copy of an email from the ministry biologist to him which alludes to the fact that the data collected for the time period specified in the request is "not relevant".

[15] I find that the ministry has established that the records at issue contain information that was obtained by the ministry biologist when she was conducting research on behalf of the ministry. The appellant's representations do not dispute this fact.

[16] The parties to the appeal dispute the issue of whether disclosure of the records would deprive the ministry biologist of her priority of publication. I find that the appellant's sworn oath and submission that he would not publish the results of the research to be unhelpful. Prior decisions of this office have established that disclosure to the appellant is disclosure to the world. For instance, in Order MO-2986, Adjudicator Daphne Loukidelis considered whether the appellant's identity and intentions should be considered by the adjudicator in making her finding. She states:

> In Orders P-1537 and PO-2461, the sought-after records related to research facilities using animals and the provision of animal care, control and pound services, including inspections, respectively. In the latter decision, Senior Adjudicator John Higgins adopted the following reasoning of former Assistant Commissioner Tom Mitchinson in the former order:
>
> > My decision is not based on the identity of the appellant, but rather on the principle that disclosure of the records must be viewed as disclosure to the public generally. If disclosed, the information in the records would be potentially available to all individuals and groups involved in the animal rights movement, including those who may elect to use acts of harassment and violence to promote their cause.

> The senior adjudicator agreed with this reasoning and held that even if the concerns identified by the parties opposing disclosure of the information did not relate to the appellant, it was appropriate to consider the consequences of disclosure of the records into the public domain in the *particular circumstances of each appeal.* Accordingly, even though the nature of the relationship between the parties in this appeal may not suggest concern, I accept that disclosure of the records is tantamount to disclosure to the world.

[17] In the present appeal, while the appellant seeks to reassure the ministry that disclosure to him will not result in the harm set out in section 18(1)(b), it is evident to me that an order to disclose the research results would be disclosure to the world. Furthermore, I do not place much weight in the evidence presented in the email between the appellant and the ministry biologist. It is unclear to me from the email the context in which the statement was given by the ministry biologist. Instead, I prefer the ministry biologists' sworn affidavit where she sets out the details of her research and the intended use for the data collected.

[18] In sum, I find that the ministry has established that its employee intends to publish the research in a journal article and that disclosure of even a portion of the research would deprive her of the priority of publication. Accordingly, I find that section 18(1)(b) applies to exempt the records from disclosure, subject to my finding on the ministry's exercise of discretion.

B. Did the institution exercise its discretion under section 18(1)(b)?

[19] The section 18(1)(b) 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.

[20] 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.

[21] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[3] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[22] The ministry submits that, in exercising its discretion to apply the section 18(1)(b) exemption, it considered that the records at issue fell squarely within the purpose of the exemption. Furthermore, the ministry submits that there is no compelling or broader public interest in prematurely releasing the records. It states:

> There has been no media interest in the research or public controversy or issues around the Fowler's toad. The information will be presented and analyzed when the Biologist's paper will be published in approximately the next two years.

[23] The appellant submits that the ministry erred in exercising its discretion as it has done so in bad faith having failed to consider:

- the fact that public disclosure of the research would increase public confidence in the operation of the institution and
- a principle of the *Act* is that information should be made available to the public.

[24] Based on my review of the parties' submission, I find that the ministry properly exercised its discretion to apply section 18(1)(b) to exempt the records. I find the considerations argued by the appellant should not have been given greater weight nor preferred over the ministry's considerations it listed in its representations. I find that the ministry properly considered the following:

- the interests sought to be protected by the section 18(1)(b) exemption;
- the nature of the information and the extent to which it is significant to the employee's research;

[25] It is evident that the ministry considered the principle that the information should be made available to the public in its acknowledgement that its employee will be publishing the results of her research in the near future.

[26] I find that the ministry properly exercised its discretion to apply section 18(1)(b) and did not exercise it in bad faith.

C. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 18(1)(b) exemption?

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[3] Order MO-1573.

[27] The appellant submits that there is a public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1)(b) exemption. Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[28] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[29] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[4]

Compelling public interest

[30] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[5] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[6]

[31] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[7]

[32] Any public interest in *non*-disclosure that may exist also must be considered.[8] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[9]

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[4] Order P-244.
[5] Orders P-984 and PO-2607.
[6] Orders P-984 and PO-2556.
[7] Order P-984.
[8] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[9] Orders PO-2072-F, PO-2098-R and PO-3197.

[33] The appellant submits that the Fowler's Toads are an endangered species and both the animal and its habitat is protected by the *Species at Risk Act* (*SARA*) and the *Endangered Species Act* (*ESA*). He goes on to state:

> Any specific information that better illustrates the habitat of an endangered species, is then, by definition, in the public interest, as it pertains directly to the enforcement and application of both federal and provincial legislation. The relevant records provide critical information regarding the overwintering habitat of an endangered species.
>
> The best information the MNR has on record to date regarding overwintering habitat suggests that sand dunes 2m deep are needed to provide adequate overwintering habitat (Yagi, 2008; report in preparation cited by COSEWIC, 2010).
>
> Thus only sand dunes of this size (2m) are currently fully protected, with respect to overwintering habitat, by the *SARA* and the *ESA*…If the records in question show that the years in which the winter is milder that frost does not penetrate as deeply, a very reasonable expectation, then smaller sand dunes will also be protected as endangered species habitat under the *SARA* and *ESA*. Since there are more small sand dunes than big sand dunes this means that more habitat will be protected, in terms of surface area, should the records in question be made public by MNR. The MNR arguments illustrate that at some future point, they intend to permit [the ministry biologist] to publish this data. Their estimate for publication is "in approximately the next two years".

[34] The appellant submits that the ministry's lack of disclosure of the research could potentially affect the public's knowledge and decisions around the purchase and sale of property in the region. The appellant submits that the ministry is aware of this public interest and states:

> The Town of Fort Erie, in partnership with the Molinaro Group, attempted to build a condominium at Bay Beach, one of the locations where the data that the responsive records in question contain was collected. The sand accumulation at Bay Beach may or may not be enough for Fowler's Toads to overwinter successfully…In order to get permission to build the condos on endangered species habit the Town of Fort Erie and the Molinaro Group were required to complete a benefit use permit proposal. This proposal was commented on heavily by members of the general public, rousing strong interest and attention. The exact number of comments [is] known by the MNR. I believe it is more than one hundred comments and is perhaps the most highly commented on benefit use proposal ever

> granted by the MNR. This in itself illustrates the compelling public interest that exists regarding the records.

[35] In addition, the appellant notes that the Fort Erie Beach Development Project was a local effort to develop the public lands at Bay Beach by constructing condominiums. This development would have been built on habitat that may or may not be overwintering habitat for Fowler's toads. The appellant submits:

> This project was cancelled on December 31st, 2013, by the developers, the MNR had not released the data which [the ministry biologist] collected the winter of 2011 – 2012 nor included it in any updates or amendments to the benefit use plan issued to Molinaro. All parties involved, the officers of the Town of Fort Erie, the members of the Molinaro Group and all thirty thousand citizens of Fort Erie (those in favour and those opposed to the project) have a vested interest in the data and need to see it without further delay.

[36] Finally, the appellant provided the links from the Town of Fort Erie's website referencing stories about the Fort Erie Beach Development, as well as blog entries relating to the Fowler's toads at the beach in question.

[37] Based on my review of the appellant's representations, I find that there is an interest in the information at issue in the records which I have found exempt under section 18(1)(b). In my view, the public interest in the records lies in protecting the toad's habitat from destruction by development. I find that there also exists a private interest in the disclosure of the records, represented by the proponents of the Bay Beach development and any property owner with lands adjacent to the beaches. The appellant appears to argue that both of these interests combine to create the compelling public interest in the records at issue.

[38] However, I question whether disclosure of the information at issue would actually address the public interest identified by the appellant. The records consist of the notes taken by the biologist in conducting her research, including where stakes were placed geographically and then the raw data sets from that research. It is not clear to me that the data sets without the biologist's analysis would prove beneficial to understanding whether smaller sand dunes are able to be used by the toads for their overwintering. I find that the biologist's analysis of the data in the eventual journal article would prove more useful to this understanding. Accordingly, I find that disclosure of the information at issue would not serve the purpose of enlightening the public about the ministry's ability to protect the Fowler's toads' habitat.

[39] I must also consider whether there is a compelling public interest now that the Fort Erie Beach Development project has been cancelled. I understand that when the project was in the process of seeking a benefit use proposal and the benefit use plan,

the issue of whether the sand dunes at Bay Beach should be protected for the Fowler's toad was a compelling issue. However, it is not evident to me that this issue is still of public interest to the residents of Fort Erie.

[40] Also, I find that the ministry has measures in place to deal with issues surrounding the concerns raised by the public over the development of land which may affect a habitat of a species at risk. The public interest identified by the appellant is squarely within the ministry's mandate and it is not evident to me that the public's interest in protecting the overwintering habitat for the Fowler's Toads is not being addressed by the ministry.

[41] Finally, I note from the ministry biologist's affidavit that she will soon likely publish the results of her research in a journal. She affirms:

> Analysis will occur over the fall-winter with my first draft to be sent to collaborators by next April for their editing and review. A second or third draft will be sent to the journal for acceptance by next summer (2015).

[42] Even factoring time in for the peer review and the journal acceptance of the ministry employee's article, I find that, based on the ministry biologists affidavit, the date of publication for the information at issue must be imminent. I find this weighs against a finding that there is a compelling public interest in the disclosure of the information at issue.

[43] Accordingly, having considered the appellant's representations and the circumstances in this appeal, I find that there is not a compelling public interest in the research data which is at issue in this appeal and as such I find that section 23 does not apply to override the exemption in section 18(1)(b) of the *Act*. I find that the information at issue would not serve the purpose of informing the public interest as identified by the appellant and the public interest identified is not compelling.

ORDER:

I uphold the ministry's decision to deny access to the records at issue.

Original Signed By: July 3, 2015
Stephanie Haly
Adjudicator