

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3706

Appeal PA15-290

Ministry of Natural Resources and Forestry

March 10, 2017

Summary: The requester submitted a request under the *Freedom of Information and Protection of Privacy Act* to the Ministry of Natural Resources and Forestry regarding the proposed expansion of an hydroelectric generating station. The company who submitted the proposal objected to the release of a record the ministry decided to disclose to the requester claiming that the record qualifies for exemption under the third party information exemption under section 17(1). The company appealed the ministry's decision to disclose the record. This order upholds the ministry's decision and, as a result, the appeal is dismissed and the ministry is ordered to disclose the record to the requester.

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

OVERVIEW:

[1] A requester submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Natural Resources and Forestry (the ministry) for records relating to a company's proposal to expand an existing hydroelectric project.

[2] The ministry located responsive records and, under section 28(1) of the *Act*, notified the company who submitted the proposal.

[3] The company objected to the release of one record, an email its lawyer sent to the ministry. The ministry issued a decision letter granting the requester access to the

email. The company (now appellant) appealed the ministry's decision to this office claiming that the record contains third party information and qualifies for exemption under section 17(1).

[4] The mediator had discussions with the parties but a settlement could not be reached. At the end of mediation, the requester confirmed that it continues to seek access to the email and the appellant confirmed its objection to its release.

[5] The matter was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry, the appellant provided submissions in support of its position that the email qualifies for exemption under section 17(1). The ministry and requester also provided representations to this office in support of their position that the email should be disclosed to the requester.

[6] In this order, I find that the third party information exemption under section 17(1) does not apply to the email in question. Accordingly, the appeal is dismissed and the ministry is ordered to disclose the email to the requester.

RECORDS:

[7] The record at issue is an email, dated February 2, 2015 from the appellant's counsel to the ministry. The email was duplicated three times in email chains and thus was originally identified as three separate records during the request stage.

DISCUSSION:

[8] The sole issue in this appeal is whether the email qualifies for exemption under sections 17(1)(a) and (c). These sections state:

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; or

(b) result in undue loss or gain to any person, group, committee or financial institution or agency.

[9] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹ Although one of the central purposes of the *Act* is to shed light on the operations of

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.*).

government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²

[10] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 3: harms

[11] 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.³

[12] 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*.⁴

Sections 17(1)(a) and (b): interfere significantly with negotiations and undue loss

[13] The appellant submits that the information at issue “consists of a proposal made expressly on a ‘without prejudice basis’ from its counsel to the ministry”. The appellant also advises that the email contains “legal information” that is not known by the public.

[14] The appellant submits that the disclosure of this information would significantly interfere with its negotiations with the ministry or result in undue loss. The appellant requested that most of its submissions in support of this position be withheld from the requester. However, in the non-confidential portions of its representations, the appellant advised that disclosure of the email would “delay” its negotiations with the ministry which would “negatively” impact its “bottom line in connection with the

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁴ Order PO-2435.

proposed hydroelectric project". The appellant also submits that disclosure of the email would likely result in members of the public putting pressure on the ministry to resolve the dispute to the appellant's detriment.

[15] The ministry's representations state:

[The appellant feels] that the public is unable to grasp the complex legal issues discussed in the E-mail thus [its] release would negatively affect the public's understanding and perception of the issue.

[The appellant also feels] that misinforming the public will undermine the negotiations between [the ministry and the appellant] as the public will exert undue pressure upon the parties with respect to their negotiation positions ...

[16] The ministry submits that any decision it makes "...will be based on the evidence and applicable law not public pressure". The ministry also submits that the appellant failed to provide sufficient evidence to support "the contention that the public is unable to understand the issues or how the public's understanding or perception would be negatively affected".

[17] The requester agrees with the ministry's position and states that "[t]here has been much local opposition to this project".

Decision and Analysis

[18] I have reviewed the confidential and non-confidential portions of the appellant's submissions and I find that I have not been provided with sufficient evidence to demonstrate that disclosure of the email could reasonably be expected to result in the harms contemplated in sections 17(1)(a) and (c).

[19] There is no dispute between the parties that when the email was sent to the ministry, there existed a legal dispute between the ministry and the appellant. However, the email was sent to the ministry over two years ago and it appears that the proposal set out in the email was not pursued. The appellant takes the position that disclosing the email to the requester now could reasonably be expected to significantly interfere with the appellant's ongoing negotiations with the ministry which would result in an undue loss. In support of that position, the appellant submits that significant delays in resolving the legal dispute would occur if the email is disclosed as its content would generate greater public interest and debate in the matter.

[20] In my view, I have not been provided with sufficient evidence demonstrating that disclosure of the email would significantly interfere with the negotiation process. The appellant's evidence is speculative and falls short of demonstrating that the identified harms could reasonably be expected to result from disclosure.

[21] Even if disclosure of the email generates greater public interest and debate, I

am not clear how this would result in an *undue* loss suffered by the appellant. Clearly one of the tenets of freedom of information legislation is public accountability and transparency of government decision-making.

[22] For the reasons above, I find that the appellant's evidence fails to demonstrate that the harms contemplated in sections 17(1)(a) and (c) apply in the circumstances of this appeal. Accordingly, I find that the third part of the three-part test in section 17(1) has not been met.

[23] As all three-parts of the test must be met for section 17(1) to apply, it is not necessary that I also determine whether parts 1 and 2 of the test also apply in the circumstances of this appeal. Accordingly, the ministry's decision is upheld and the appeal is dismissed.

ORDER:

1. I order the ministry to disclose the record to the requester by **April 18, 2017** but not before **April 11, 2017**.
2. In order to verify compliance with order provision 1, I reserve the right to require a copy of the record disclosed by the ministry to be provided by me.

Original Signed By: _____

Jennifer James
Adjudicator

March 10, 2017