Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3721

Appeal PA16-360

Ministry of the Environment and Climate Change

April 21, 2017

Summary: The requester sought access to an identified industrial wind project Stormwater Management Plan Report. After notifying a company whose interests may be affected by the disclosure the ministry decided to disclose the report to the requester. The company appealed the decision, claiming that the report qualified for exemption under section 17(1) (third party information) of the *Act*. In this order, the adjudicator does not uphold the application of section 17(1) to the report on the basis that the third part of the test under that exemption has not been met. The appeal is denied and the ministry's decision is upheld. The ministry is ordered to disclose the report to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17(1).

Orders considered: PO-2490, PO-2965 and PO-3545.

OVERVIEW:

[1] The Ministry of the Environment and Climate Change (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to an identified industrial wind project Stormwater Management Plan Report.

[2] After notifying a company whose interests may be affected by the disclosure of the responsive record (the third party) and receiving its position on disclosure, the

ministry issued its access decision, granting the requester full access to the responsive record.

[3] The third party (now the appellant) appealed the access decision, taking the position that the record qualified for exemption under section 17(1) (third party information) of the *Act*.

[4] During mediation the requester asserted that section 17(1) did not apply and that it was in the public interest that the responsive record be disclosed, thereby raising the possible application of the public interest override at section 23 of the *Act*.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced my inquiry by seeking representations from the ministry and the appellant on the facts and issues set out in a Notice of Inquiry. Both the ministry and the appellant provided representations in response. I determined that it was not necessary to seek representations from the requester.

[7] In this order, I find that section 17(1) does not apply and order the record at issue be disclosed to the requester.

RECORD:

[8] White Pines Wind Project Erosion and Sediment Control and Stormwater Management Plan Report, dated January 14, 2016.

DISCUSSION:

Does the mandatory exemption at section 17 apply to the record?

[9] The appellant takes the position that the record is exempt under section 17(1) and provides confidential[1] and non-confidential representations in support of its position. Although not specifically cited, the content of the appellant's representations give rise to the possible application of sections 17(1)(a) and (c) of the *Act*.

[10] Sections 17(1)(a) and (c) 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,

[1] Which cannot be set out in this order as that would reveal their content.

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency …

[11] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3]

[12] 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; 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) and/or (c) of section 17(1) will occur.

Part 1: type of information

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

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and

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[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[4]
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> *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.[5]
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> *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.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]

[14] The appellant submits that the information at issue is commercial information and in the confidential portion of its submissions asserts that it contains unique trade secrets.

[15] I have reviewed the information contained in the record, which is the result of technical studies. The record at issue contains studies and assessments that were undertaken on behalf of the appellant by an environmental consulting firm that has expertise in the process. The record at issue details the assessment and control of potential hydrological impacts associated with the construction and operational phases of the project. Accordingly, I find that the record contains technical information that falls within the scope of section 17(1). While the appellant alleged that the record contained trade secrets, it did not go the extra step to explain and identify specifically what those were. Accordingly, I am not satisfied that the information that the appellant says amounts to a trade secret, meets the definition of a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism", or otherwise meets the definition of a "trade secret" as contemplated by section 17(1). As I have found that the record contains technical information I need not also determine whether it contains commercial information.

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[4] Order PO-2010.
[5] Order PO-2010.
[6] Order PO-2010.
[7] Order P-1621.

Part 2: supplied in confidence

Supplied

[16] 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.[8]

[17] 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.[9]

In confidence

[18] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure 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.[10]

[19] Due to my determination on part 3 of the section 17(1) test below, I find that it is not necessary for me to make a finding with respect to whether the record was supplied in confidence by the appellant.

Part 3: harms

[20] 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.[11]

[21] 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.*[12]

[22] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need

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[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] Order PO-2020.
[11] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[12] Order PO-2435.

for "detailed and convincing" evidence to support the harms outlined in section 17(1).[13]

Representations on harms

[23] The ministry submits that the record at issue in this appeal is a report commissioned by the appellant on erosion, sediment control, and stormwater management.

[24] The ministry submits that in its decision letter to the appellant it decided to provide full access to the responsive record, stating that:

> The third part of the three-part test (harms) is not successful as [the company] has not provided sufficient evidence in its submissions to prove that the release of the record would constitute a reasonable expectation of harm, prejudice significantly the competitive position of the corporation, interfere significantly with the contractual or other negotiations of the Supplier, or result in the undue loss to the Supplier.

[25] In its representations in the appeal, the ministry confirms its position that the third party appellant had not met the harms requirements under subsection 17(1) to establish the application of the mandatory exemption.

[26] The appellant submits that the record at issue was supplied by the appellant to the ministry in the context of the appellant's Renewable Energy Approvals ("REA") application. The appellant provided confidential and non-confidential submissions with respect to the harms it may suffer if the information is disclosed.

[27] The appellant submits:

> As [the appellant] is currently involved in several ongoing litigation matters for the Project at both the Environmental Review Tribunal and multiple Judicial Reviews at the Divisional Court, any and all information disclosed through this Freedom of Information request, may be used against [the appellant] in a negative manner. …

[28] The appellant further submits that it is in the business of developing wind energy projects and selling the energy harnessed from such projects and that:

> … [The appellant] currently has six wind projects underway in Ontario. There has been vocal resistance from anti-wind coalitions against wind energy projects in Ontario, as well as against [the appellant's] projects in particular. Despite the provincial government's promotion of sustainable energy sources to improve Ontario air quality by streamlining the

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[13] Order PO-2435.

> approvals process for energy developers, anti-wind activists have gone out of their way to slow down or thwart wind energy projects. For example, there have been lawsuits filed against [the appellant], as well as landowners who have entered into commercial agreements with [the appellant] to host turbines and other infrastructure. There have also been numerous freedom of information requests, often repetitive and duplicate in nature, to obtain information about [the appellant's] wind energy projects that would significantly prejudice [the appellant]. In summary, the harm to [the appellant] from the disclosure of these comments is not merely speculative. [The appellant] has experienced firsthand the attempts made by anti-wind activists to delay and terminate its projects.

[29] The appellant submits that the decision to disclose or not disclose information relating to a commercial venture should be approached with a view to the commercial realities of the relevant industry[14] and:

> The requested record contains commercially sensitive information that could be exploited by anti-wind activists to undermine and ultimately terminate the Project. As [the appellant] is in the business of developing wind energy projects, disclosure in this case presents a legitimate risk to the viability of the Project.
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> [The appellant] and the Project has already been the subject of multiple judicial reviews. The Project's REA approvals have also been the subject of appeals to the Environmental Review Tribunal and the Divisional Court. It is likely that anti-wind activists will continue to oppose the Project, be it in the form of further litigation, regulatory proceedings, or lobbying for a governmental investigation. Disclosing the requested record could prejudice [the appellant] in ongoing and future proceedings that are likely to arise as the development of the Project progresses and, in effect, such disclosure represents a real risk of harm to [the appellant].
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> …
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> Finally, the information from the requested records will prejudice [the appellant] in similar approvals and development processes in other jurisdictions. The undue losses to and prejudice against the [appellant] that will result from disclosure of the requested records extends beyond any approval and development processes in Ontario, but rather, has far-reaching adverse consequences for [the appellant].

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[14] The appellant cites Order PO-2965 in support of this submission.

Analysis and findings

[30] In Order PO-3545, Assistant Commissioner Sherri Liang addressed similar arguments of harm to a wind farm proponent that were alleged to arise from the disclosure of information at issue in that appeal. She wrote:

> The third party's assertion that, in light of previous litigation, access to information requests and ERT appeals, the information at issue "could be exploited by anti-wind activists", does not establish a reasonable expectation of harm. The fact that stakeholders and members of the public have expressed concern over the third party's wind farm projects does not in and of itself establish a reasonable expectation of harm. I fail to see how the specific information in these records could reasonably be expected to be used in a manner leading to the harms described in section 17(1). …

[31] The impact of disclosure on a litigant's competitive position was addressed by former Senior Adjudicator John Higgins in Order PO-2490 where he wrote:

> In my opinion, the reference to "competitive position" in section 17(1)(a) of the *Act* was not intended to include a litigant's competitive position in civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts.

[32] I agree with this analysis above. I find that the appellant's argument about the use of the information in the record in another forum in and of itself does not result in a finding that information is exempt under the *Act*, nor that the harms in section 17(1)(a) or (c) would result. Furthermore, I find that the appellant has failed to provide me with sufficient evidence to establish exactly how the record could be used to cause the alleged harm to litigation or ongoing or future proceedings, if it is disclosed.

[33] Furthermore, a stormwater plan would be by its nature site specific. In my view, the fact that the project may be subject to increased scrutiny does not qualify as harm that is "undue". The appellant has provided very little specific reference to the particular information in this record, nor how the disclosure would result in significant prejudice or interference, or undue loss or gain. I am also not satisfied that the disclosure of general information contained in the record could result in revealing any trade secrets or could reasonably be expected to prejudice significantly the appellant's competitive position or interfere significantly with the contractual or other negotiations of a person, group of

persons, or organization. Although competitors might have a professional interest in the manner in which this assessment is conducted, I have not been provided with sufficient evidence to satisfy me that the harms in sections 17(1)(a) or (c) would result from disclosure of this information. I find, based on the evidence before me, that even if disclosure may provide competitors with some information which they may use in their reports in the future (of which I am not convinced), this would not, in and of itself, significantly prejudice the appellant's competitive position or result in undue loss or gain.

[34] Because I have found that the third part of the test under section 17(1) has not been satisfied, I conclude that the record is not exempt under that exemption. As no other exemptions have been claimed for the record, and no mandatory exemptions apply to it I will order that it be disclosed to the requester. As I have found that the record is not exempt under section 17(1), it is not necessary for me to determine if there exists a public interest in its disclosure under section 23.

ORDER:

1. I order the ministry to disclose the record to the requester by providing the requester with a copy by **May 29, 2017** but not before **May 23, 2017**.

2. In order to verify compliance with Order Provision 1, I reserve the right to require the ministry to provide me with a copy of the record as disclosed to the appellant.

Original Signed by: April 21, 2017

Steven Faughnan
Adjudicator