

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3730

Appeal PA14-146

Ministry of Natural Resources and Forestry

May 3, 2017

Summary: The appellant made a request to the Ministry of Natural Resources and Forestry for records relating to specific applications made under the *Aggregate Resources Act*. The ministry granted partial access. It claimed the application of the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in section 19 (solicitor-client privilege) to withhold portions of the records. The ministry also advised the appellant that some records, or portions thereof, were not responsive to the request. In this order, the adjudicator upholds the ministry's decision, in part. She finds that the records that the ministry withheld as not responsive to the request are not responsive. She upholds the ministry's application of the exemption in section 19, in whole and its application of the exemption in section 17(1), in part. Lastly, the ministry's exercise of discretion is upheld. The adjudicator orders the ministry to disclose portions of records to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(c), 19(a) and 24.

Orders and Investigation Reports Considered: PO-1631, PO-1737 and MO-3326.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of Natural Resources and Forestry (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to all records relating to:

- Any applications made under the *Aggregate Resources Act* submitted to the ministry (Northwestern region) by three named companies on a specified date; and
- Any applications, including the name of the applicants, made under the *Aggregate Resources Act* submitted to the ministry (Northwestern region) on a specified date currently held as named potential aggregate sites.

[2] In addition, the requester stipulated that the search for records should include communications to and from the ministry's district offices in Thunder Bay and Nipigon and the Northwest Regional Planning Unit, as well as named individuals.

[3] The requester subsequently narrowed the scope of the request, advising the ministry that she was not seeking the actual applications.

[4] In response, the ministry located responsive records and notified five third parties (the affected parties) under section 28 of the *Act*, seeking their position on the disclosure of the records that may relate to them. Four of the affected parties made submissions to the ministry in response. The letter sent to the fifth affected party was returned to the ministry as undeliverable.

[5] The ministry then issued a decision letter to the requester, granting access to some records in full and some in part. The ministry claimed the application of the mandatory exemptions in sections 17(1) (third party information) and 21 (personal privacy), as well as the discretionary exemptions in sections 14 (law enforcement), 18 (economic and other interests) and 19 (solicitor-client privilege) to the information it withheld from the requester. The ministry also provided the requester with an index of records, which also indicated that portions of some records were deemed to be not responsive to the request.

[6] The requester (now the appellant) appealed the ministry's decision to this office. The four affected parties also appealed the ministry's decision.¹ During the mediation of the appeal, the appellant advised the mediator that she was not seeking the information withheld under sections 14, 18 or 21. The appellant also confirmed that she continued to seek the information withheld under sections 17(1) and 19, as well as information the ministry deemed to be not responsive to the request.

[7] The appeal file then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the file sought representations from the ministry, the appellant and one affected party to whom the records relate. Representations were received from only the ministry.

[8] The appellant notified this office that the ministry did not meet the burden of establishing that the information at issue is exempt under either section 17(1) or

¹ This resulted in four other appeal files being opened. However, the four affected parties subsequently withdrew these appeals and these files were closed.

section 19, or that any of the information is not responsive. The appellant then stated that she was not in a position to submit representations at that time.

[9] The affected party notified this office that it did not want the submission it made to the ministry at the time of the request to be considered or referenced in this order and that it was withdrawing those submissions.

[10] The file was then transferred to me for final disposition. For the reasons that follow, I uphold the ministry's decision, in part. I find that the records that the ministry withheld as not responsive to the request are not responsive. I uphold the ministry's application of the exemption in section 19, in whole and its application of the exemption in section 17(1), in part. Lastly, the ministry's exercise of discretion is upheld. I order the ministry to disclose portions of records to the appellant.

RECORDS:

[11] The records consist of the withheld portions of handwritten notes, a table, a map, briefing packages and memoranda, emails and their attachments and a draft environmental report.

ISSUES:

- A. What records are responsive to the request?
- B. Does the mandatory exemption in section 17(1) apply to the records?
- C. Does the discretionary exemption in section 19 apply to the records?
- D. Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Background

[12] The ministry provided background information in its representations. It states that this request relates to a proposed chromite mine development to be located in the Ring of Fire area of Ontario. The ministry goes on to state:

The majority of the planned and future infrastructure to support this development was proposed to be constructed on Crown land using Crown resources, such as aggregate. Availability of aggregate such as sand and gravel is limited; and extraction potential may be further limited by factors such as cultural significance and the function of lands as wildlife habitat.

In 2012, the Ministry received applications for 120 aggregate permits along the proposed 340 kilometre north-south road corridor from a point near Nakina to the Ring of Fire area. The applications were later withdrawn prior to any decisions being made by the Ministry.

Issue A: What records are responsive to the request?

[13] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
 - ...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[14] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.²

[15] To be considered responsive to the request, records must *reasonably relate* to the request.³

[16] The ministry submits that portions of records A0190332, A0190333, A0190335, A0190336, A0190337, A0190338, A0190339, A0190340, A0190350, A0190356, A0190369, A0190370, A0190371, A0190402, A0190422, A0190636, A0190704, A0190891, A0190897, A0190898, A0190901, A0190905, A0190906, A0190907, A0190908, A0190944, A0191319, A0191322, A0191323, A0191324, A0191325, A0191370, A0191415 and A0193768 were determined to be unresponsive to the appellant's request. The ministry submits that these portions relate to general ministry business (for example, environment, development, land use planning, aboriginal consultation) and do not relate to the identified *Aggregate Resources Act* applications or to more general aggregate issues that may reasonably relate to those applications.

[17] By way of example, the ministry states that the unresponsive portions of the

² Orders P-134 and P-880.

³ Orders P-880 and PO-2661.

following records relate to:

- A0190332 – legal advice regarding a matter unrelated to the identified aggregate applications;
- A0190333 – rare plants; not aggregate matters; and
- A0190340 – ministry business matters unrelated to aggregates.

[18] I have reviewed the appellant's access request and all of the records listed above. Portions of these records have been withheld, as the ministry has deemed them to be not responsive to the request. I agree with the ministry. I find that the withheld portions involve ministry matters unrelated to the appellant's request and that they were properly withheld from the appellant. I will not consider them further in this order.

Issue B: Does the mandatory exemption in section 17(1) apply to the records?

[19] The ministry is claiming the application of section 17(1) to records A0189993, A0190500, A0190547, A0190553, A0190578, A0190579, A0190584, A0910666, A0190675, A0190684, A0190689, A0190693 and A0191415.

[20] Section 17(1) states, in part:

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;

...

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

[21] Section 17(1) is designed to protect the confidential informational assets of businesses or other organizations that provide information to government institutions.⁴ 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.⁵

⁴ *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.*).

⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[22] 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 1: type of information

[23] The type of information listed in section 17(1) has 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.⁶

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.⁷

Commercial information is information that relates solely to the buying or 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.⁸ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁹

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

⁶ Order PO-2010.

⁷ Order PO-2010.

⁸ *Ibid.*

⁹ Order P-1621.

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.¹⁰

[24] The ministry states that some of the records, such as the map, geographical coordinates and environmental report contain technical or scientific information. It then goes on to reference the submission the affected party provided to it at the time of the request, which I will not be considering or detailing in this order.

[25] The ministry goes on to argue that another record is a cheque from a consultant, which contains banking information, including the bank address and the transit and account numbers of its bank account. Similarly, the ministry submits, telephone and access codes for the teleconference system of the affected party's consultants were severed. The ministry argues that the type of information described above qualifies as commercial information.

[26] I have reviewed the information at issue that the ministry withheld under section 17(1) and I find that it qualifies as commercial, technical or scientific information under part one of the three-part test.

[27] In particular, I find that the bank account information in record A0190500 qualifies as the financial and/or commercial information of the consultant. In keeping with past orders of this office, I also find that the teleconference numbers and access codes in records A0190578, A0190579, A0190584 and A0191415 qualify as the commercial information of the same consultant.

[28] Other information the ministry withheld consists of a map and geographical coordinates.¹¹ I find that this information qualifies as the technical information of the affected party. In Order PO-1737, Adjudicator Laurel Cropley found that a map which was likely created by a cartographer (a professional in the applied sciences) qualified as technical information for the purposes of section 17(1). In making this finding, she stated:

Although not squarely falling within the definition referred to above, in my view, an area map is the diagrammatic representation of the natural or physical features of the area, created through the interpretation and drafting of information based on the collection of measurements by a professional in the field of applied sciences. As such, I find that it falls within the general framework established in the above definition.

[29] Applying Adjudicator Cropley's approach in Order PO-1737, I find that the map and the detailed geographical coordinates qualify as technical information for the purposes of section 17(1).

[30] Lastly, I find that the draft environmental report in record A0191415, which was

¹⁰ Order PO-2010.

¹¹ I note that this information is duplicated in several of the records.

prepared by a consultant for the affected party, qualifies as scientific information for the purposes of section 17(1). This report was authored by an expert consultant and contains information in the field of natural sciences and relates to the testing of a specific conclusion. Consequently, I find that it qualifies as scientific information for the purposes of section 17(1)

Part two: supplied in confidence

[31] 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.¹² 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.¹³

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

[33] 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; and
- Prepared for a purpose that would not entail disclosure.¹⁵

[34] The ministry submits that the records at issue were supplied directly to it by the affected party, that this information has never been made publicly available and that the affected party did not consent to the disclosure of the records.

[35] Based on the ministry's representations and my review of the records, I am satisfied that the map, the geographical coordinates, the environmental report, the cheque and the teleconference information was supplied to the ministry by the affected party or the consultant on the affected party's behalf. I am also satisfied that this

¹² Order MO-1706.

¹³ Orders PO-2020 and PO-2043.

¹⁴ Order PO-2020.

¹⁵ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

information was supplied to the ministry in confidence.

Part three: harms

[36] 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.¹⁶

[37] 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 the harms in the *Act*.¹⁷

[38] The ministry relies solely on the submission the affected party made to it at the time the appellant made the request. As previously stated, the affected party withdrew those submissions and advised this office that it did not want them to be considered or referenced. Consequently, I have no evidence before me from the parties regarding the potential for harm should the records be disclosed. Accordingly, my findings regarding the potential for harm are based solely on my review of the records.

[39] With respect to the consultant's bank account information, I find that it is exempt under section 17(1). I am satisfied that disclosure of this banking information could reasonably be expected to result in undue loss to the consultant. I find that the banking information on its face provides clear and convincing evidence of a reasonable expectation that disclosure of it to the appellant may lead to the kind of harm to the consultant that is contemplated by section 17(1)(c) of the *Act*. This finding is in keeping with past orders of this office.

[40] Similarly, I find that the consultant's teleconference number and access code are also exempt from disclosure under section 17(1)(c). I am satisfied that disclosure of these numbers could allow persons to use teleconference facilities without authorization which could reasonably be expected to result in undue loss to the consultant. This finding too is in keeping with past orders of this office.

[41] The remaining information at issue consists of the map, the geographical coordinates and the draft environmental report. On my review of these records, I am unable to conclude that their disclosure could reasonably be expected to result in any of the harms enumerated in section 17(1). Given the specific circumstances of this appeal, I find that there is nothing on the face of these records that would lead me to conclude that their disclosure could result in harm to the affected party. Consequently, I find that

¹⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁷ Order PO-2435.

the portions of records A0189993, A0190547, A0190553, A0190666, A0190675, A0190684, A0190689, A0190693 and A0191415 containing the map, the geographical coordinates and the draft environmental report are not exempt under section 17(1). As the ministry has not claimed any other exemptions with respect to this information, I order the ministry to disclose these portions to the appellant.

Issue C: Does the discretionary exemption in section 19 apply to the records?

[42] The ministry is claiming the application of the discretionary exemption in section 19(a) to records A0190330, A0190340, A0190370, A0190414, A0190415, A0190421 and A0190913.

[43] Section 19(a) of the *Act* states as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

[44] Section 19 contains two branches as described below. Branch 1 arises from the common-law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The ministry must establish that at least one branch applies.

[45] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common-law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for Branch 1 to apply, the ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue.¹⁸

[46] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.¹⁹ The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.²⁰

[47] The privilege applies to a continuum of communications between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.²¹

[48] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either

¹⁸ Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.).

¹⁹ *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

²⁰ Orders PO-2441, MO-2166 and MO-1925.

²¹ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

expressly or by implication.²²

[49] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege and voluntarily demonstrates an intention to waive the privilege. An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.²³

[50] Generally, disclosure to outsiders of privileged information constitutes a waiver of privilege.²⁴

[51] The ministry submits that solicitor-client privilege applies to governments as well as to individuals and corporations.²⁵ In addition, the ministry argues that communications need not occur directly between the solicitor and the client to fall within the framework of the solicitor-client relationship and, on that basis, be protected by solicitor-client privilege provided that the communications are intended to be confidential and are related to the seeking, formulating, or giving of legal advice. The ministry states:

For example, in PO-1631 a confidential communication from one Ministry official to another containing instructions to seek advice from counsel on a particular issue was found to qualify for exemption under the solicitor-client communication privilege in section 19 of the *Act*.

[52] With respect to the records at issue, the ministry submits that the argument set out above applies. In particular, the ministry states that the portions of these records that have been severed refer to seeking legal advice and to solicitor-client communications. Although the communications are not directly between the solicitor and the client, the ministry argues, these internal ministry communications referring to seeking legal advice from particular counsel fall squarely within the scope of common law solicitor-client privilege and subsection 19(a) of the *Act*.

[53] I have reviewed the records, which were partially disclosed to the appellant. In each record a small portion was withheld under section 19. While I acknowledge that the withheld portions do not contain direct communications between ministry staff and legal counsel, I note that this office has previously applied section 19 where disclosure would reveal the content of the communications between a solicitor and client, or where the internal communications contain instructions to seek legal advice on a

²² *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

²³ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

²⁴ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

²⁵ *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)*, [1997] OJ no.

1465 at para. 15.

particular issue.²⁶

[54] On my review of the withheld information and the ministry's representations, I find that the exchange of information in the communications is either in the context of planning to seek legal advice from legal counsel, or indirectly or directly revealing the content of communications with legal counsel. Therefore, I find that the withheld information consists of communications which, if disclosed, would reveal the content of solicitor-client communications between the ministry and its legal counsel.

[55] Additionally, the appellant has not alleged, nor have I any evidence before me that the ministry waived its privilege. Consequently, I find that this information is exempt under section 19(a), despite the fact that this information was not prepared by or for counsel directly and also subject to my findings regarding the ministry's exercise of discretion.

Issue D: Did the ministry exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[56] The section 19 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, this office may determine whether the institution failed to do so.

[57] In addition, this office may find that the institution erred in exercising its discretion where for example:

- It does so in bad faith;
- It takes into account irrelevant considerations; or
- It fails to take into account relevant considerations.

[58] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁷ This office may not, however, substitute its own discretion for that of an institution.²⁸

[59] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant and additional unlisted considerations may be relevant:²⁹

- The purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right to their own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected;

²⁶ See, for example, Orders PO-2087-I, PO-1631 and MO-3326.

²⁷ Order MO-1573.

²⁸ See section 54(2).

²⁹ Orders P-244 and MO-1573.

- The wording of the exemption and the interests it seeks to protect;
- Whether the requester is seeking his own personal information;
- Whether the requester has a sympathetic or compelling need to receive the information;
- Whether the requester is an individual or an organization;
- The relationship between the requester and any affected persons;
- Whether disclosure will increase public confidence in the operation of the institution;
- The nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- The age of the information; and
- The historic practice of the institution with respect to similar information.

[60] The ministry submits that it properly exercised its discretion. It states that it attempted to balance the purpose of the exemption in section 19, which is that public servants must be able to freely and openly communicate with legal counsel to gain appropriate access to legal advice, with any public interest in the disclosure of the withheld information. The ministry also states that as part of exercising its discretion, it considered individual parts of the records and disclosed as much of these records as possible, withholding only those portions that it concluded were exempt under section 19.

[61] Based on the ministry's representations, I am satisfied that it properly exercised its discretion because it took into account relevant considerations and did not take into account irrelevant considerations. I find that the ministry considered the appellant's position and circumstances, balanced against the importance of solicitor-client privilege in weighing against disclosure of the information at issue. I also note that the ministry disclosed as much of these records as possible, and only withheld portions of them from the appellant.

[62] Therefore, under all the circumstances, I am satisfied that the ministry appropriately exercised its discretion under section 19 to the portions of the records that I have found to be exempt from disclosure.

[63] In sum, I uphold the ministry's decision in part. I find that the records that the ministry withheld as not responsive to the request are, indeed, not responsive. I uphold the ministry's application of the exemption in section 19 in whole, and its application of the exemption in section 17(1) in part. Lastly, the ministry's exercise of discretion is upheld.

ORDER:

1. I order the ministry to disclose the map, the geographical coordinates and the draft environmental report to the appellant by **June 8, 2017** but not before **June 2, 2017**. This information is located in records A0189993, A0190547, A0190553, A190666, A190675, A190684, A190689, A190693 and A0191415.
2. I reserve the right to require the ministry to provide this office with copies of the records I have ordered disclosed.

Original Signed by: _____

Cathy Hamilton
Adjudicator

_____ May 3, 2017