Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3789

Appeal PA17-112

Ministry of Natural Resources and Forestry

November 27, 2017

Summary: An affected third party appealed a Ministry of Natural Resources and Forestry (ministry) decision to disclose information exchanged between the ministry and a named corporation's representatives regarding regulatory approval for a proposed condominium development. Section 17(1) of the *Freedom of Information and Protection of Privacy Act* does not apply to the information at issue because it was not supplied in confidence and the affected party has not established a reasonable expectation of probable harm. The ministry's decision to disclose the information is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 21, definition of "personal information".

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 communications between the ministry and a named corporation or its representatives relating to a proposed condominium development in South Frontenac Township. The request specifically requested any communication regarding provisions of a Benefit Permit under section 17.2.C of the *Endangered Species Act (ESA)*.

[2] Before issuing its decision on access to the responsive records, the ministry invited an affected party to provide its views on disclosure of the records.

[3] The affected party provided the ministry with submissions which identified records it did not want disclosed.

[4] After considering the affected party's representations, the ministry decided to disclose the records in part, withholding some information under section 21 (personal privacy) and section 21.1 (species at risk) of the *Act.* Before disclosing the records, the ministry advised the affected party of its right to appeal the ministry's decision to this office. The affected party, now the appellant, appealed the ministry's decision.

[5] During mediation, the appellant maintained its position that several records should be withheld in their entirety.

[6] The requester continues to seek access to the records that are the subject of the appellant's appeal. The requester is not appealing the ministry's decision to withhold portions of the records under section 21 (personal privacy) and section 21.1 (species at risk) of the *Act*.

[7] As mediation did not resolve the outstanding issues, the file proceeded to adjudication, where an inquiry is conducted. During the inquiry I sought and received representations from the ministry and the appellant.

[8] The order upholds the ministry's decision to disclose the information at issue to the requester.

RECORDS:

[9] The information at issue comprises three completed form, a letter with covering email and a two-page record of email correspondence that the ministry proposes to disclose to the requester that the appellant objected to being disclosed. One name in the two-page email correspondence record the ministry withheld under section 21(1) of the *Act,* so that name is not at issue in this appeal. The records at issue are identified in the ministry's index of responsive records as A0290430, A0290527, A0290538, A0290540 and A0290542.

ISSUES:

Preliminary issue- Section 21 personal privacy exemption

[10] The appellant had previously argued in submissions made to the ministry that two names in Record A0290527 should be withheld under the personal privacy exemption (section 21). I therefore invited representations from the appellant and the ministry on whether section 21 applied to any of the information at issue in the records. However, the appellant did not address section 21 in its representations in the inquiry.

[11] The ministry submitted that the one name in Record A0290527 at issue in this appeal was not personal information, because the name appears in the context of seeking the ministry's input on an application related to the *ESA* and therefore relates to the individual in a business or professional capacity rather than a personal capacity.

[12] To qualify as personal information, information must be about an individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[1]

[13] I agree with the ministry's submission. The records at issue all relate to the activities of a named corporation or its representatives. The information at issue, where it contains information about named individuals, is about those individuals in a professional or business capacity. The information at issue does not contain personal information for the purposes of the *Act*, so the personal privacy exemption cannot apply.

[14] The remaining issue in this inquiry is whether the mandatory exemption at section 17 for third party information applies to the records.

DISCUSSION:

[15] 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;
> >
> > (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;

[16] Section 17(1) is designed to protect the confidential "informational assets" of

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[1] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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]

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

[18] I will first consider the second part of the test.

Part 2: supplied in confidence

Supplied

[19] 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]

[20] 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]

Submissions and analysis

[21] Neither party directly address the supplied requirement, instead focussing on the "in confidence" element that is the second half of the second part of the Section 17(1) test

[22] Nonetheless, I accept that some of the information at issue was supplied. This includes some information in records created by the ministry, because the ministry documents permit accurate inferences to be made about information supplied by the

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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.
[4] Order MO-1706.
[5] Orders PO-2020 and PO-2043.

appellant.

[23] Some information at issue, however, is clearly not supplied, because it was created by the ministry and does not reveal or permit the drawing of accurate inferences with respect to information supplied by the appellant. It is not necessary to specify in detail the information that is not supplied because of my findings regarding the "in confidence" component of the second part of the Section 17(1) test and the harms part of the test below.

In confidence

[24] In order to satisfy the "in confidence" component of the second part of the Section 17(1) test, the party 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.[6]

[25] 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]

Submissions

[26] The appellant submits that the information at issue was explicitly and implicitly supplied in confidence, stating:

> TH[e] information was not shared publically and we were exchanging with the noted institution to gain approvals of our proposed programme or method. No details were shared with any other parties other than the noted institution.
>
> Our OMB developmental approval clearly stated that the further approval was to be gained by us the developer from the noted institution only.

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[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) 134; 88 Admin LR (4th) 68; 241 OAC 346.

> This process, both explicitly and implicitly carried the full expectation of confidentiality.

[27] The appellant further describes its relationship with the ministry as collaborative, confidential and private, involving exchanges of incomplete and confidential information in order to seek a complete solution.

[28] The ministry submits that the appellant did not submit evidence to the ministry to show that it had a reasonable expectation of confidentiality when it supplied information to it. It says the records exchanged were part of an application process subject to the ministry's regulatory authority, which is a process in which an applicant typically would not expect confidentiality. The ministry submits there is nothing in the records to suggest the appellant or its representatives indicated the information contained in the records was provided in confidence or that the ministry provided the appellant an assurance of confidentiality. The ministry concludes that the appellant does not meet the second part of the Section 17(1) test.

Analysis

[29] I have reviewed the records at issue and the parties' representations.

[30] Despite the appellant's representations to the contrary, there is no explicit evidence of confidentiality in the records at issue. There are no statements regarding confidentiality in any of the records.

[31] I am also not satisfied that the appellant's assertion of implicit confidentiality rests on reasonable or objective grounds, considering all the circumstances, including the specific factors listed above.

[32] I recognize that the appellant understood their relationship with the ministry to be iterative, involving the exchange of ideas and incomplete information. However, as the ministry describes, the context for the exchange of information was an application for a regulatory approval, specifically an application for a Benefit Permit under section 17.2.C of the *ESA*. The ministry's evidence is that it did not consider the information was supplied in confidence. In the context of the ministry providing comments on a possible regulatory approval, it is reasonable to assume that its exchanges on the appellant's application would have general application to future applicants for the same type of regulatory approval sought. This supports the ministry's position that their exchanges with the appellant were not implicitly confidential.

[33] There is nothing in the context of the exchange between the ministry and the appellant's representatives that suggest that the exchange was implicitly in confidence. The only support for confidentiality is that the information has not previously been made public and the appellant's assertion of confidentiality. In this context, I am not satisfied that that there is an objective basis to conclude that the information that meets the supplied requirement was supplied implicitly in confidence.

Summary

[34] As I have found that the information at issue was not supplied in confidence, I do not need to consider the other two parts of the section 17(1) test above. However, as the appellant raises a number of arguments regarding harm, I will briefly consider the third part of the test, namely whether disclosure of the information at issue could reasonably be expected to result in any of the harms set out in section 17(1).

Part 3: harms

[35] The party resisting disclosure must provide evidence about the potential for harm. In two decisions of the Supreme Court of Canada, the Court described the exception as requiring a reasonable expectation of probable harm from disclosure of the information.[8] As the Court noted, the wording of a provision requiring a "reasonable expectation of harm" tries to mark out a middle ground between that which is probable and that which is merely possible. The appellant must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground. The inquiry is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences." [9]

[36] The ministry's position is that the appellant has not established that the harms test is met for any of the records at issue.

[37] In the present appeal, the appellant raises various harms arguments, without explicitly linking any of them to the categories of harms set out in section 17(1).

[38] Some of the harms the appellant raises allege harm to the ministry from disclosure of the records. However, as the ministry consents to disclosure of the records, I have not considered these alleged harms as a basis to withhold the records.

[39] I will consider the remaining harm arguments of the appellant in turn.

[40] The main thrust of the appellant's harm arguments is that the information at issue is incomplete and therefore inaccurate and this could lead to uninformed opposition to the approval of the appellant's application, as individuals take steps based on the incomplete information. The appellant says that the public will get fully complete information when the application process is complete. I cannot see the link between this argument and any of the harms listed in section 17(1). I also find this argument

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[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII) and *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII) ("Merck Frosst").

[9] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), at para. 40.

speculative and lacking in support.[10] While the information in issue may be from the earlier stages of an iterative process, that does not mean its disclosure will cause harm. This is particularly the case here where the context is a regulatory approval as opposed to a commercial negotiation, where disclosure of information before an agreement is reached might conceivably affect an appellant's competitive position.

[41] I also reject the appellant's argument that disclosure will interfere with the appellant's negotiations because of the non-commercial context of the information. I note also that the ministry, with whom the appellant is said to be negotiating, is already in possession of the information at issue.

[42] The appellant also submits that it will take the ministry longer to deliberate on solutions and therefore further delay the completion of the development, with financial consequences. This argument is also speculative. The appellant has not established how disclosure of the information at issue would give rise to delay by the ministry, or that such a delay raises a reasonable expectation of probable harm of a type listed in section 17(1).

[43] In summary, I do not find that any of the harms set out in section 17(1) have been established by the appellant.

[44] I am satisfied that section 17(1) does not apply to the information at issue and uphold the ministry's decision to disclose it to the requester.

ORDER:

1. I uphold the ministry's decision to disclose the information at issue to the requester.

2. I order the ministry to disclose the information at issue to the requester by **January 5, 2018** but not before **December 29, 2017**.

Original Signed by: November 27, 2017

Hamish Flanagan
Adjudicator

[10] See, for example Order MO-2274, which found that incomplete or inaccurate information did not substantiate any of the section 17(1) harms.