

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3803

Appeal PA16-332

Ministry of Natural Resources and Forestry

January 11, 2018

**Summary:** The ministry received a request under the *Act* for information relating to an identified property site. The appellant, a third party who was deemed to have an interest in the records, appealed the ministry's decision to grant the requester partial access to them. The appellant claims that the records are exempt from disclosure pursuant to the mandatory exemption for third party commercial information at section 17(1) of the *Act*. In this order, the adjudicator finds that the records are not exempt under section 17(1) and upholds the ministry's decision to disclose the records, in part, to the requester.

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

**Orders and Investigation Reports Considered:** Orders PO-3459 and PO-3567.

### 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 access to records relating to a particular property site, specifically:

- Copies of all correspondence, including but not limited to emails and letters, between [named individual #1], [named individual #2], [specified company #1] and/or [specified company #2] and [the ministry] relating to the site from February 12, 2015 to March 10, 2016.

- Notes of any meetings between [named individual #1], [named individual #2], [specified company #1] and/or [specified company #2] and [the ministry] relating to the site from February 12, 2014 to March 10, 2016.

[2] Prior to issuing a decision on access, the ministry identified a number of responsive records and, in accordance with section 28 of the *Act*, notified an affected party who might be affected by the disclosure of six of the records (the affected party). In response, the affected party provided representations to the ministry, advising that he objects to the disclosure of the information contained in the responsive records.

[3] The ministry subsequently issued a decision letter to the requester granting partial access to the records, denying access to portions pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act*. In the index issued with the decision, the ministry identified two records as being not responsive to the request.

[4] The ministry also issued a decision letter to the affected party, advising of its decision to disclose the responsive records, in part, to the requester.

[5] The affected party, now the appellant, appealed the ministry's decision to disclose portions of five of the responsive records to the requester.

[6] During mediation, the ministry advised that it maintains its position that portions of the records should be disclosed to the requester.

[7] The appellant takes the position that the information at issue in this appeal should not be disclosed to the requester, and that the mandatory exemption for third party information at section 17(1) of the *Act* applies. The appellant states:

I propose that the documents be withheld from release under Freedom of information until such time as the Judicial Review applications have been disposed of and any subsequent appeal period has passed. Once this has occurred, and there is no longer any risk of impact to the current litigation, I will not oppose release of the reports.

[8] The requester advised that he wishes to pursue access to the information at issue in this appeal. The requester does not seek access to the information that was withheld under section 21(1) of the *Act*, nor does the requester contest that two of the records identified by the ministry are not responsive to the request. Accordingly, the sole issue to be decided in this appeal is whether the mandatory exemption for third party information at section 17(1) of the *Act* applies to the information at issue.

[9] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process. I began my inquiry by sending a Notice of Inquiry to the appellant, initially. The appellant provided representations in response, portions of which were shared with the other parties. I then sought and received representations from the ministry and the original requester, portions of which were shared with the appellant. The appellant provided reply representations in response.

[10] For the reasons that follow, in this order I find that the mandatory exemption for third party commercial information at section 17(1) of the *Act* does not apply to the records at issue and I uphold the ministry's decision to disclose them, in part, to the requester.

## **RECORDS:**

[11] The records at issue consist of four pages of handwritten notes of the District Manager (three records) and two email communications.

## **DISCUSSION:**

### **Does the mandatory exemption for third party information at section 17(1) apply to the records at issue?**

[12] The relevant portions of section 17(1) 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;

...

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

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

[14] 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

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<sup>1</sup> *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.*).

<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

[15] In light of my finding below, it is only necessary for me to address the third part of the section 17(1) test, the “harms” component.

### **Part 3: Harms**

[16] 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.<sup>3</sup>

[17] 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*.<sup>4</sup>

### ***Representations***

[18] In the circumstances of this appeal, the appellant takes the position that the exemptions in section 17(1)(a) (prejudice to competitive position) and (c) (undue loss or gain) apply.

[19] The appellant submits that the matter of the lands discussed in the records is currently before the Superior Court of Justice in two parallel applications for Judicial Review which challenge a decision made by the ministry. The appellant takes the position that many different parties including their legal, planning, environmental and political/government relations consultant would be affected by the “premature release of reports in question” and the “release of the subject matter in question.” The appellant claims that the release of “any reports past and present...or any discussion content past or present, will have an impact on the current court process and has the potential to prejudice the positions of some of the parties involved in the current litigation...” and that as a result, section 17(1)(a) applies.

[20] The appellant further submits that “release of the part reports and discussion content at the present time has the potential to alter the course of the current litigation causing loss or gain to the parties involved....” He argues that should “the information

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

<sup>4</sup> Order PO-2435.

in these reports, or discussion content be misrepresented or misconstrued, this will surely prolong the litigation involving extended costs and subsequent loss to all the parties" and that, as a result, section 17(1)(c) applies.

[21] The appellant submits that the reports reveal a process involving proprietary solutions to remediate environmentally impacted lands and that this process has not yet been released to the litigants in the previously mentioned Judicial Reviews. He states that disclosure of this process may prejudice the parties to the litigation and interfere with the ongoing court process.

[22] The appellant concludes his representations by proposing that:

...the discussion document reports be withheld from release under [the Act] until such time as the Judicial Review applications have been disposed of and any subsequent appeal period has passed. Once this has occurred, and there is no longer any risk to the current litigation, by impact of the current discussion documents being considered for release, I will not oppose release of the reports.

[23] In its representations, the ministry provides some context to the appeal. It states that the request at issue relates to records about a former smelter site that the appellant is proposing to redevelop. It submits that the subject site was originally the location of an aluminium scrap smelter, which is no longer operating. It explains that a slag heap from the earlier operations was left on the property and contains contaminants from the smelting process. The ministry states that the appellant, who has an option to purchase the property, is attempting to redevelop the property. The ministry further submits that this request is a follow-up to an earlier request for related records submitted by the same requester, which was also subsequently appealed by the appellant. The ministry states that in the previous appeal, this office upheld the ministry's access decision in Order PO-3567.

[24] The ministry argues that the harms set out in sections 17(1)(a) and/or (c) have not been established. The ministry submits that the appellant has not provided "detailed or any evidence or even explanation that release of the information would alter the course of the litigation resulting in an undue loss or gain or any other undue loss." It also claims that the appellant has not provided any evidence to demonstrate that disclosure of the information at issue would prejudice his position in the judicial review application.

[25] The requester argues that the appellant "has failed to provided any evidence, let alone detailed and convincing evidence, about the potential for the harms set out in subsections 17(1)(a) and (c)." He submits that "[i]nstead, the appellant relies on a series of speculative assertions in his representations, each of which is unsupported by evidence." He further submits that "[t]hese speculative assertions are not sufficient to discharge the appellant's burden of proof."

[26] The requester notes that the appellant's primary argument about potential harm

is based on an ongoing court proceeding relating to the site but submits that the appellant "does not appear to be, and does not claim to be, a party to that litigation."

[27] Specifically addressing the appellant's arguments on the application of the exemptions, the requester submits that the "reports" that the appellant refers to in his representations were previously disclosed to him and are not at issue in this appeal. With respect to the appellant's claims regarding section 17(1)(a), the requester submits that section 17(1)(a) does not apply to a litigant's competitive position in civil litigation or related processes such as negotiation,<sup>5</sup> and that the appellant has provided no evidence from any of the parties to that litigation explaining how their interests may be prejudiced by the disclosure of the information at issue.

[28] With respect to the appellant's claims regarding section 17(1)(c), the requester submits that they are "pure speculation about the motives of a third party and [are] entirely unsupported by any evidence." Specifically, the requester submits that the potential for the information in the records to be used "to strengthen or weaken litigation against a third party does not expose that third party or the appellant to an undue loss" as the outcome of litigation cannot be characterized as such. He also submits that the appellant's argument that the information contained in the records could be misrepresented or misconstrued cannot be said to constitute harm under either of sections 17(1)(a) or (c).

[29] Although the appellant was invited to submit reply representations, in reply he reiterated portions of his representations submitted at first instance essentially verbatim.

### ***Analysis and findings***

[30] Having considered the representations of the parties, as well as the information contained in the records themselves, I find that the records do not qualify for exemption under either of sections 17(1)(a) or (c) of the *Act*.

[31] Having reviewed his representations carefully, I do not accept that the appellant, as the party resisting disclosure, has provided sufficient evidence to support a conclusion that the disclosure of the records at issue could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization as contemplated by section 17(1)(a). The appellant's arguments with respect to the possible application of section 17(1)(a) are speculative in nature, suggesting that disclosure of the information contained in the records might negatively impact a court process to which the appellant refers to in his representations. However, in his representations he neither sets out a competitive position and explains how it could be significantly prejudiced nor describes any contractual or other negotiations and explains how they might be significantly interfered with.

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<sup>5</sup> Orders PO-2490 and PO-3154.

[32] I do not accept that the appellant has provided sufficient evidence to support a conclusion that the disclosure of the records at issue could reasonably be expected to result in an undue loss or gain to any person, group, committee or financial institution or agency as contemplated by section 17(1)(c). The appellant's arguments with respect to section 17(1)(c) suggest that he is of the view that disclosure of the information at issue "has the potential to alter the course of the current litigation" because it could be "misrepresented or misconstrued" resulting in prolonging the litigation. However, he provides no evidence to support his claim that such result could reasonably be expected to occur or, if it did, it could reasonably be expected to give rise to "an undue loss or gain" as set out in section 17(1)(c).

[33] In Order PO-3459, Adjudicator Gillian Shaw dismissed a party's concern that the public disclosure of an environmental report had the potential to create an erroneous impression finding that "if the [party] is of the view that the resulting report is misleading in some way, it should be a simple matter to convey updated correct information to the request." I concur with Adjudicator Shaw's reasoning in Order PO-3459 and find that even if the appellant's alleged effect of disclosure could be said to be reasonably expected to occur, he could correct any misunderstanding or provide updated information if required.

[34] Further to my finding that insufficient evidence was provided to support a claim that either section 17(1)(a) or (c) apply, I do not find anything in my review of the records themselves to substantiate such claim. As indicated above, the records at issue are four pages of handwritten notes of the District Manager and two email chains.<sup>6</sup> Having reviewed them closely, in my view they do not appear to contain any information that could be described as revealing a "proprietary process" as suggested by the appellant, nor do they reveal anything that might substantiate the claim that their disclosure could reasonably be expected to result in any of the harms contemplated by section 17(1)(a) or (c).

[35] Accordingly, based on my review of the records and the appellant's representations, I find that he, as the party bearing the onus of proof, has failed to provide sufficient evidence to establish a reasonable expectation of harm. I also find that such harm cannot be inferred from the records themselves. As a result, part three of the test for exemption under section 17(1) has not been established.

[36] As all three parts of the three-part test must be established for the exemption at section 17(1) to apply, I find that the records at issue do not qualify for exemption under that section. Therefore, I uphold the ministry's decision to grant partial access to the records, withholding portions of them pursuant to the mandatory personal privacy exemption at section 21(1).

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<sup>6</sup> Although the appellant refers to "reports" several times in his representations, there are no records that can be described as "reports" before me in this appeal.

**ORDER:**

1. I uphold the ministry's access decision.
2. I order the ministry to disclose the records, with severances made to the portions that contain personal information, to the requester by **February 15, 2018** but not before **February 10, 2018**.
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the requester in accordance with provision 2 above.

Original Signed By \_\_\_\_\_  
Catherine Corban  
Adjudicator

January 11, 2018 \_\_\_\_\_