

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-3850

Appeal PA16-284

Ministry of the Environment and Climate Change

May 31, 2018

**Summary:** A developer appealed the ministry's decision to disclose records relating to its construction of a hydro-electric generating station. The developer claims that some of the records qualify for exemption under the third party information exemption under section 17(1). The adjudicator finds that the third party information exemption under section 17(1) does not apply and dismisses the appeal.

**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 to the Ministry of the Environment and Climate Change (the ministry or MOECC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a hydro-electric generating station project (project).

[2] The ministry located responsive records and notified the developer about the request under section 28(1). The ministry subsequently issued a decision letter granting the requester partial access to the records claiming a number of exemptions under the *Act*. However, the ministry did not withhold any portions of the records pursuant to the third party information exemption under section 17(1).

[3] The developer (now the third party appellant) appealed the ministry's decision to this office claiming that some of the records qualify for exemption under section 17(1).

[4] A mediator was assigned to the appeal to explore settlement with the parties. During mediation, the appellant agreed to narrow the scope of the appeal and reduce the number of records at issue. Also during mediation, the requester submitted that the public interest override in section 23 applies to the circumstances of this appeal.

[5] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeal process in which an adjudicator conducts an inquiry.

[6] During the inquiry the parties provided written representations to this office. In its representations, the third party appellant consented to disclosure of additional records to the requester.<sup>1</sup>

[7] In this order, I find that the third party information exemption under section 17(1) does not apply and order the ministry to disclose the records at issue to the requester.

## **RECORDS:**

[8] The records remaining at issue in this appeal consist of correspondence, emails and handwritten notes found at pages 713-721, 731-733, 877-879, 1138-1166, 1665-1667, 1922-1929, and 1931-1933.

<b>Record Number</b>	<b>Page Numbers</b>	<b>Record Description</b>
<b>1</b>	713-721	Letter from the appellant to ministry, dated June 23, 2014  In Appendix B attached to the non-confidential portions of its representations, the appellant indicates that this letter was provided in response to questions it received from the ministry
<b>2</b>	731-733	Timeline for Project prepared by the appellant
<b>3</b>	877-879	Email chain between the appellant and the ministry, April – June 2015  The appellant indicates in Appendix B that the subject-matter of these emails addresses the same issues addressed in Record 1 in addition to information regarding the start date for construction work.
<b>4</b>	1138-1166	Email chain between the appellant, the ministry and external stakeholders (Ministry of Natural Resources (MNR))

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<sup>1</sup> The third party consented to the disclosure of Records 108-111, 555-557, 560-561, 562, 729-730, 1192-1223, 1535-1539, 1782, 1838-1840, 1886, 1904, 1934-1939. Accordingly, these records are no longer at issue.

		and consultants), July-September 2014  The appellant describes the subject-matter of these emails as related to a Permit to Take Water (PTTW) application in Appendix B.
<b>5</b>	1665-1667	Handwritten meeting notes, April 8, 2015 and May 1, 2015
<b>6</b>	1922-1929	Email chain between the appellant, the ministry and external stakeholders (MNR and consultant), September 2012 –April 2014
<b>7</b>	1931-1933	Email chain between the appellant, the ministry and external stakeholders (MNR and consultant), October 2012-January 2014

## **DISCUSSION:**

[9] The sole issue in this appeal is whether the remaining records qualify for exemption under the third party information exemption under section 17(1). And if so, whether the public interest override at section 23 applies in the circumstances of this appeal.

[10] The third party appellant takes the position that the records qualify for exemption under sections 17(1)(a), (b) and (c), which read:

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;

[11] Section 17(1) is designed to protect the confidential “informational assets” of

businesses or other organizations that provide information to government institutions.<sup>2</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>3</sup>

[12] 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**

[13] The third party appellant submits that the records contain scientific, technical or commercial information related to its construction of the hydro-electric generating station. In its representations, the appellant states that the records relate to "... discussions, advice, questions and correspondence in anticipation of and preparation for the building of the [project]". The ministry does not dispute that the records contain scientific or technical information. However, the requester raises questions whether the specific information at issue contains scientific, technical or commercial information.

[14] Based on my review of the records, I am satisfied that they contain technical information.<sup>4</sup> I am satisfied that the records contain information prepared by engineering professionals and discuss issues related to the construction of the project. Accordingly, I find that the first part of the three-part test in section 17(1) has been met.

### **Part 2: supplied in confidence**

[15] 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.<sup>5</sup> Information may qualify as "supplied" if it was directly supplied to an institution by a

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<sup>2</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>3</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>4</sup> Technical information has been defined as 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. [Order PO-2010]

<sup>5</sup> Order MO-1706.

third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>6</sup>

[16] 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.<sup>7</sup>

[17] There is no dispute between the parties that the appellant supplied some of the records at issue to the ministry. I have reviewed the records and am satisfied that some of the records, such as correspondence and emails, were provided to the ministry by the appellant. However, it appears that this cannot be said for all of the records, as some of the emails were sent by the ministry to the appellant. There are also a few emails sent exclusively between ministry staff. In addition, it appears that the handwritten notes were prepared by a ministry staff member.

[18] In any event, the ministry and the requester disagree with the appellant's submission that it supplied the records to the ministry *in confidence*. In its submissions, the ministry indicates that none of the records remaining at issue were marked as containing confidential information. The appellant states that there is

... a reasonable implication that when [the proponent or the proponent's contractors] supply information to the MOECC, either directly or indirectly through another federal or provincial governmental department, that such supply would not be intended to be shared with the public, and would remain confidential as between [the proponent], [its contractors], the MOECC, and other related departments of government.

[19] The appellant goes on to state that the records were supplied in confidence because:

- the information was communicated to the institution on the basis that it was confidential and that it was to be kept confidential, and likely would not have been communicated in the same way if there had been no expectation of confidentiality; and
- it was information that was not otherwise disclosed or available from sources to which the public has access...

[20] The appellant argues that the above factors "lend in favour of an expectation of confidentiality".

[21] 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

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<sup>6</sup> Orders PO-2020 and PO-2043.

<sup>7</sup> Order PO-2020.

- 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.<sup>8</sup>

[22] I have reviewed the records along with the submissions of the parties and find that the appellant has failed to establish that there was a reasonable expectation of confidentiality, implicit or explicit, at the time it provided the information at issue to the ministry. In making my decision, I note that many of the records consist of email exchanges between the ministry and the appellant in which the ministry or appellant made an inquiry about a specific matter and requested a response. The responses requested by the ministry relate to an "inquiry" it received from a member of the community to which the appellant responded by way of a letter or an email. The responses requested by the appellant address issues related to a required permit process. In my view, the subject-matter of these emails does not support a conclusion that there was an implicit understanding that the issues discussed and responses obtained would not be discussed with the broader community. Instead, one would expect that issues relating to questions from the public and required permit process<sup>9</sup> would be made available to the public. Similarly, I find that the two technical drawings attached to Record 1 are the type of documents that are prepared for a purpose that would be shared with the community and in fact have already been disclosed to the requester.<sup>10</sup>

[23] Finally, I find that the appellant has failed to adduce sufficient evidence that the information at issue was communicated to the institution on the basis that it was confidential and that it was to be kept confidential. In arriving at that decision, I note that none of the records bear any markings which identify them being confidential to outside parties.

[24] Having regard to the above, I find that the appellant has failed to establish a reasonable basis to conclude that it supplied the records remaining at issue in confidence. Accordingly, part 2 of the three-part test in section 17(1) has not been met.

[25] Since all three parts of the section 17(1) test must be met in order for section

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<sup>8</sup> 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.

<sup>9</sup> I note that some of the issues discussed in the emails relating to the required permit and approval processes in this appeal were also discussed in a record at issue in another appeal. In Order PO-3841, Adjudicator Diane Smith did not agree with the appellant's submission that "there was an implicit understanding that the discussions around the specific issues and questions relating to obtaining the required permits and approvals in Record 53 would be confidential and not accessible to the public."

<sup>10</sup> The technical drawings are duplicated at Records 48 and 49 which were disclosed to the requester (Record 49 appears to contain some additional information than the copy attached to Record 1).

17(1) to apply, the exemption cannot apply here because part 2 has not been met. For the sake of completeness, I will go on to determine whether the harms test in section 17(1) has been met.

### **Part 3: harms**

[26] 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>11</sup>

[27] 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>12</sup>

[28] 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 for “detailed and convincing” evidence to support the harms outlined in section 17(1).<sup>13</sup>

### ***Sections 17(1)(a) and (c): prejudice to competitive position and undue loss or gain***

[29] The third party appellant submits that disclosure of the records to the requester would give rise to the harms in section 17(1)(a) and (c). In support of this position, the appellant makes the following arguments:

- Disclosure would significantly prejudice its competitive position by revealing sensitive and detailed technical and/or scientific drawings and information, or commercial and/or financial information to market competitors;
- Disclosure of the records could reasonably be expected to delay the project which would prevent the appellant from meeting its contractual obligations and result in a waste of resources expended to date to advance the project; and
- Disclosure would expose the appellant “to risk of undue financial loss for both a breach of contract and diminution of profits.”

[30] In its representations, the ministry submits that the appellant has failed to establish a connection between the information at issue and the harms contemplated in sections 17(1)(a) and (c).

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<sup>11</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>12</sup> Order PO-2435.

<sup>13</sup> Order PO-2435.

[31] The requester's submissions question the appellant's claim that disclosure of the records could reasonably be expected to prejudice its competitive position or result in an undue loss or gain. In its representations, the requester states:

The Appellant has not provided any examples of why such disclosure could cause any harm.

a) If the contested records show the Proponent has addressed the public safety concerns, this would enhance the Proponent's reputation.

b) In the alternative, if the records show the Proponent has not addressed the public safety concerns, then it is in the public interest this be disclosed, so that the public can have a window into the subsequent government decision making.

Without evidence of why the claimed harms would result from disclosure, there is no justification any harm would occur, so I would submit that the test for harms fails.

### *Decision and Analysis*

[32] I find that the appellant has failed to adduce sufficient evidence to demonstrate that the harms contemplated in sections 17(1)(a) and (c) could reasonably result if the records were disclosed to the requester. In making my decision, I reviewed the submissions of the parties along with the records and am of the view that the appellant's evidence fails to establish a connection between the actual information at issue and the perceived harm. For instance, the appellant submits that disclosure of its letter and email correspondence to the ministry<sup>14</sup> which respond to an inquiry from the community could reasonably be expected to interfere and delay the project. However, the appellant did not provide specific arguments which established how disclosure of this information could result in a delay that could reasonably be expected to harm its competitive position or result in a loss or harm that was undue. Another example of where the appellant failed to provide sufficient evidence is its assertion that disclosure of records which contain information about project timelines and issues related to a required permit process<sup>15</sup> could reasonably be expected to give rise to the harms in sections 17(1)(a) and (c). However, the appellant failed to adduce evidence establishing a connection between the actual information at issue and the contemplated harms. In addition, the appellant's submissions failed to explain how disclosure of this type of information could be potentially used by competitors or stakeholders to result in the harms claimed.

[33] Having regard to the above, I find that sections 17(1)(a) and (c) have no application to this appeal.

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<sup>14</sup> Records 1 and 3.

<sup>15</sup> Records 2, 4, 6 and 7.



***Section 17(1)(b): similar information no longer supplied***

[34] The appellant also submits that disclosure of the records could reasonably result in similar information no longer being supplied to the ministry where it is in the public interest that similar information continue to be so supplied. In support of this position, the appellant states:

The open and frank sharing of information from market participants and regulated entities with the MOECC is clearly in the public interest as it assists the MOECC in its role as regulator. If such information is subject to release as a result of an FOI request it will discourage these entities from providing this information in the future.

[35] The ministry's representations state:

The records include the appellant's discussion about the project with the ministry, including news releases and responses to public inquiries.

The records also contain information about the appellant's Permit to Take Water application. This information is provided to benefit the appellant by assisting, clarifying, and expediting the approval of the permit.

The ministry therefore concludes that [disclosure of the records] would not affect whether similar information would be supplied to the ministry.

[36] The requester's submissions also raise questions about the applicability of the exemption at section 17(1)(b). In its representations, the requester takes the position that the information contained in the records is the type of information proponents of projects have to furnish if the project is to proceed with the ministry's approval.

[37] I have reviewed the records along with the submissions of the parties and find that there is insufficient evidence supporting the appellant's position that similar information would no longer be supplied to the ministry if the records are disclosed to the requester. The records before me contain information about timelines and permit issues along with the appellant's responses to inquiries received from the public. In my view, the information at issue was collected by the ministry in the discharge of its duties and responsibilities relating to the construction of the project. Accordingly, it would appear that a proponent who refuses to exchange such information would do so at its detriment. Given the nature of the information at issue I am satisfied that it is in the public interest that similar information continues to be supplied to institutions. In arriving at this conclusion, I considered the appellant's argument that it is in the public interest to guard against hampering the "free flow of information" between proponents and institutions. However, given the fact that the information at issue responds to public inquiries and a required water permit process, I find that the appellant's argument has no merit in the circumstances of this appeal.

[38] Having regard to the above, I find that section 17(1)(b) also has no application

to this appeal.

*Summary*

[39] As stated above, all parts of the three-part test under section 17(1) must be met for the third party information exemption to apply. I found that only the first part of the test was met. Accordingly, I find the records do not qualify for exemption under section 17(1).

[40] Given my decision, it is not necessary to determine whether the public interest override under section 23 applies in the circumstances of this appeal.

**ORDER:**

1. I uphold the ministry's decision and order it to provide copies of the records to the requester by **July 10, 2018** but **not** before **July 5, 2018**.
2. In order to verify compliance with order provision 1, I reserve the right to require a copy of the records disclosed to the requester to be provided to me.

Original Signed by: Jennifer James

May 31, 2018

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Jennifer James  
Adjudicator