

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3878

Appeal PA16-304

Ministry of the Environment, Conservation and Parks

September 11, 2018

Summary: The ministry received a request under the *Act* for records relating to a specific wind turbine project. The ministry decided to disclose the records, in part, to the requester. The appellant, who was notified as an affected third party under section 28(1), appealed the ministry's decision. The appellant claimed that certain records were exempt from disclosure under section 17(1). In addition, the appellant claimed that some records were not responsive to the request. In this order, the adjudicator upholds the ministry's decision and dismisses the appeal. The adjudicator finds that all the records are responsive to the request and section 17(1) does not apply to exempt them from disclosure. The adjudicator orders the ministry to disclose the records to the requester.

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

OVERVIEW:

[1] The Ministry of the Environment and Climate Change (now the Ministry of the Environment, Conservation and Parks) (the ministry) received a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specific wind turbine project.

[2] After locating responsive records, the ministry notified parties whose interests may be affected by their disclosure (the affected parties) under section 28 of the *Act*. Some of the affected parties submitted representations, including the appellant in this appeal. The appellant claimed the application of the mandatory exemption in section

17(1) (third party information) to the information relating to it.

[3] The ministry issued a decision to the requester and the affected parties granting the requester partial access to the responsive records. The ministry withheld portions of the records under the exemptions in section 17(1) and 21(1) (personal privacy). With regard to the information relating to the appellant, the ministry advised the parties that it would disclose all of the information relating to it to the requester.

[4] The appellant appealed the ministry's decision to this office.

[5] During mediation, the appellant questioned the ministry's adherence to the notice requirements in section 28(1) of the *Act*. Specifically, the appellant questioned whether the ministry provided it with an opportunity to review all of the records in which it had an interest. The ministry stated it notified the appellant about the information contained in pages 000426, 000427, 000433, 000436 and 000438, but that 000433, 000436 and 000438 do not contain information relating to the appellant. These pages of the records are part of an acoustic assessment report. The ministry also advised it should have notified the appellant about pages 001433 to 001436 and 001438, which are part of a second acoustic assessment report. The ministry notified the appellant about these records and the appellant confirmed it would not pursue its section 28(1) notice concerns further.

[6] The appellant confirmed it continues to appeal the ministry's access decision. Specifically, the appellant claimed that pages 000426, 000427, 000433, 000436, 000438, 001433 to 001436 and 001438 are exempt from disclosure under section 17(1) of the *Act*. In addition, the appellant claimed that pages 000433, 000436 and 000438 are not responsive to the request.

[7] The ministry maintained its position that section 17(1) does not apply to the records at issue. In addition, the ministry confirmed that pages 000433, 000436 and 000438 are responsive to the original request. The requester confirmed their interest in pursuing access to the records at issue.

[8] The appeal was not resolved at mediation. Consequently, the appeal transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry into the issues under appeal. I began my inquiry by inviting the appellant and the ministry to submit representations in response to a Notice of Inquiry. Both the appellant and the ministry submitted representations. I then invited the appellant to submit representations in response to the ministry's representations, which were shared in accordance with Practice Direction Number 7 and the IPC's *Code of Procedure*. The appellant submitted representations.

[9] I also notified an additional affected party (the affected party) whose interests may be affected by the disclosure of information contained in pages 000433, 000436 and 000438 of the records. The affected party did not respond to my notification.

[10] In the discussion that follows, I uphold the ministry's decision and dismiss the

appeal. I order the ministry to disclose the records, in full, to the requester.

RECORDS:

[11] The records at issue consist of pages of two acoustic assessment report. Pages 000426, 000427, 000433, 000436 and 000438 are from one acoustic assessment report prepared in 2006. Pages 001433, 001434, 001435, 001436 and 001438 are from another acoustic assessment report prepared in 2005.

ISSUES:

- A. Are pages 000433, 000436 and 000438 responsive to the request?
- B. Does the mandatory exemption at section 17(1) apply to the records?

DISCUSSION:

Issue A: Are pages 000433, 000436 and 000438 responsive to the request?

[12] The appellant claims the information contained in pages 000433, 000436 and 000438 is not responsive to the request. The ministry submits that the 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.¹ To be considered responsive to the request, records must *reasonably relate* to the request.²

[15] The requester's original request reads as follows:

I am requesting *full disclosure* of *all* correspondence including emails, briefing notes, telephone conversations, letters, reports, assessments and analysis of/for the approval of the [identified wind turbine project]...
[Emphasis in original]

The time frame of the request was January 1, 2003 and November 1, 2006.

[16] The ministry submits that pages 000433, 000436 and 000438 are responsive to the original request. The ministry submits that the records are parts of larger reports or documents that clearly fit within one of the categories of records identified in the request. As a result, the ministry submits that pages 000433, 000436 and 000438 are responsive to the original request.

[17] The appellant submits that pages 000433, 000436 and 000438 contain technical data generated by measuring an unrelated turbine. The appellant submits the information in these records does not relate to the project that is the subject of this appeal.

[18] Based on my review of the records, I find pages 000433, 000436 and 000438 are responsive to the request. As stated above, institutions should adopt a liberal interpretation of requests for access and any ambiguity should be resolved in the requester's favour. I reviewed the records at issue and find they clearly fit within the scope of the appellant's request. Pages 000433, 000436 and 000438 are appendices or attachments to larger reports or documents that clearly fit within one of the categories identified in the request. Furthermore, I find that the information contained in pages 000433, 000436 and 000438 *reasonably relates* and is relevant to the project identified in the request. Therefore, I find that pages 000433, 000436 and 000438 are responsive to the request and will consider whether they are exempt from disclosure, below.

[19] During mediation, the ministry advised the parties that pages 000433, 000436 and 000438 do not relate to the appellant and the ministry notified the appellant of these records in error. The ministry takes the position that pages 000433, 000436 and 000438 relate to another affected party. I notified the affected party of pages 000433, 000436 and 000438 during my inquiry into this appeal. The affected party did not respond to my notification. The appellant maintains pages 000433, 000436 and 000438 are exempt under section 17(1) of the *Act*. I will consider whether section 17(1) applies to these records, below.

[20] I note the appellant submits the request focuses on *correspondence*. As such,

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

the appellant submits none of the records at issue should be considered to be within the scope of the request. The appellant's interpretation of the request is not supported by a plain reading of the request itself. The requester clearly states they seek access to "all correspondence including emails, briefing notes, telephone conversations, letters, reports, assessments and analysis of/for the approval of the [identified wind turbine project]". While the requester may have identified *correspondence* first and as including other types of documents, such as reports or assessments, it is clear they seek access to correspondence as well as reports, assessments and analyses. I find the appellant has attempted to adopt an overly narrow interpretation of the request. In any case, I reviewed the records at issue and find that they are all responsive to the request.

[21] Accordingly, I find all the records at issue are responsive to the request and will now consider whether they are exempt under section 17(1) of the *Act*.

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

[22] The appellant claims the records at issue are exempt from disclosure under the mandatory exemption in section 17(1). As stated above, the ministry takes the position that pages 000433, 000436 and 000438 do not contain information relating to the appellant. As stated above, I notified the affected party about pages 000433, 000436 and 000438 and did not receive any response. In any case, the appellant maintains section 17(1) applies to pages 000433, 000436 and 000438. Given these circumstances and the fact that section 17(1) is a mandatory exemption, I will consider whether it applies to exempt pages 000433, 000436 and 000438 from disclosure.

[23] From a review of the appellant's representations, it appears that the appellant claims that sections 17(1)(a) and (c) apply to the records. The relevant parts of section 17(1) 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;

...

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

[24] Section 17(1) is designed to protect the confidential *informational assets* of businesses and other organizations that provide information to government

institutions.³ 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 should be exploited by a competitor in the marketplace.⁴

[25] The ministry did not apply section 17(1) to the records at issue. Therefore, for section 17(1) to apply, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) and/or (c) of section 17(1) will occur.

Requirement 1: type of information

[26] The appellant submits the records contain detailed technical information, including measurements and specifications, regarding noise emissions.

[27] Previous orders of this office have defined *technical information* as

... information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical art. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.⁵

[28] On my review of the records at issue, I am satisfied the information claimed to be exempt under section 17(1) contains technical information for the purposes of section 17(1) of the *Act*. The information contained in pages 000426, 000427, 000433, 000436, 000438, 001433, 001434, 001435, 001436 and 001438 clearly contains technical information as it relates to the wind turbine project. Therefore, I find the first requirement for the application of section 17(1) is satisfied.

³ *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.).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁵ Order PO-2010.

Requirement 2: supplied in confidence

[29] The requirement that it be shown that the information was *supplied* to the institution reflects the purpose of section 17(1) of protecting the informational assets of third parties.⁶

[30] 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.⁷

[31] In order to satisfy the *in confidence* component of part two, the party resisting disclosure must establish the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. The expectation of confidentiality must have an objective basis.⁸

[32] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, 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 in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.⁹

[33] The appellant asserts it supplied the information contained in the records to the ministry in confidence. The ministry also submits that the records were supplied explicitly in confidence.

[34] I find the appellant supplied the information contained in pages 000426, 000427, 001433, 001434, 001435, 001436 and 001438 to the ministry. Upon review, I am satisfied the appellant prepared the information contained in pages 000426, 000427, 001433, 001434, 001435, 001436 and 001438. In the case of pages 000433, 000436 and 000438, it appears the information contained in these pages was prepared by and/or supplied by the affected party. Furthermore, it appears that pages 000426, 000427, 000433, 000436, 000438, 001433, 001434, 001435, 001436 and 001438 are parts of two larger reports that were supplied to the ministry in confidence. Therefore, I find the second requirement for the application of section 17(1) is satisfied.

⁶ Order MO-1706.

⁷ Orders PO-2020 and PO-2043.

⁸ Order PO-2020.

⁹ Order PO-2043.

Part 3: harms

[35] The party resisting disclosure must provide sufficient evidence to demonstrate a risk of harm well beyond the merely possible or speculative although it need not prove disclosure will, in fact, result in such harm. How much and what kind of evidence is needed will depend on the type of information at issue and the seriousness of the consequences.¹⁰

[36] The need for public accountability in the expenditure of public funds is an important reason behind the need for sufficient evidence to support the harms outlined in section 17(1).¹¹ 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*.¹²

[37] The appellant submits the disclosure of the information at issue could reasonably be expected to cause harm in the form of prejudice to its competitive position and undue loss to itself and therefore gain to its competitors. The appellant submits the technical information contained in the records would provide competitors with valuable information about the relative competitive position of its products. In addition, the appellant submits its competitors could use this information to inform their decisions about future research and development in developing competing products. Therefore, the appellant submits this would provide its competitors with an unfair advantage and lead to an undue gain in their competitor.

[38] The ministry submits the appellant did not provide sufficient evidence to demonstrate the records meet the requirements for exemption under section 17(1). With regard to section 17(1)(a), the ministry submits the appellant did not provide sufficient evidence that the records, if disclosed, could reasonably be expected to harm the appellant's competitive position. The ministry states it cannot determine how the appellant's competitors could use the specific information in the records at issue in a manner that could reasonably be expected to prejudice significantly the appellant's competitive position. In addition, the ministry submits the appellant did not provide sufficient evidence to demonstrate there is a reasonable basis to expect that disclosure of the records would interfere significantly with the appellant's contractual or other negotiations. The ministry states it cannot determine how the appellant's competitors could use the specific information at issue in a manner that could reasonably be expected to interfere significantly with the appellant's contractual or other negotiations.

[39] Similarly, with regard to section 17(1)(c), the ministry submits the appellant did not provide sufficient evidence to demonstrate the disclosure of the records could reasonably be expected to result in undue loss for the appellant or undue gain for its competitors.

¹⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

¹¹ Order PO-2435.

¹² Order PO-2435.

[40] The ministry concludes by stating that, in order for it to “responsibly and validly apply the exemption under section 17(1)”, the appellant must provide detailed evidence regarding the “proprietary and commercial consequences of releasing the information” at issue. The ministry submits the appellant did not connect the information at issue to the alleged potential harms in a convincing manner.

[41] The ministry’s representations were shared with the appellant. The appellant maintained its position that the records are exempt from disclosure under sections 17(1)(a) and/or (c).

[42] Based on my review of the records, I am not satisfied they qualify for exemption under section 17(1) of the *Act*. I find the appellant did not provide me with sufficient evidence to demonstrate a reasonable expectation that the harms enumerated in section 17(1) would result from the disclosure of these records. The appellant did not make any specific representations regarding the disclosure of pages 000426, 000427, 000433, 000436, 000438, 001433, 001434, 001435, 001436 and 001438. It did not refer to any specific pieces of information or portions of the records in its representations. I find the appellant’s representations are broad, vague and lack any specificity with regard to the harms that could reasonably be expected to result if the records at issue are disclosed.

[43] As stated above, the party claiming the application of an exemption bears the burden of proving it applies. In this case, the appellant’s representations do little more than repeat the harms in the *Act* and assert that the disclosure of the records could reasonably be expected to result in these harms. Overall, I find that the appellant’s arguments regarding the harms contemplated by section 17(1) of the *Act* are speculative and lacking in detail.

[44] In addition, and aside from there not being sufficient evidence from the appellant, I do not find anything on my review of the records themselves to substantiate the claim that disclosure could result in the harms contemplated by section 17(1). The records at issue contain technical data in relation to the sound power or noise emissions of the appellant’s product. Based on my review, it is unclear how the disclosure of the information at issue could reasonably result in significant prejudice to the appellant’s competitive position or would interfere significantly with its contractual or other negotiations. The appellant did not provide any evidence to explain how disclosure of the information at issue could reasonably be expected to result in the harms in section 17(1)(a). Similarly, it is not evident upon review of the records or the appellant’s representations that the disclosure of the records could reasonably be expected to result in undue loss to the appellant or undue gain to its competitor.

[45] I note the appellant states pages 000433, 000436 and 000438 contain information relating to another third party. I notified this additional third party and they did not respond to my notification. I reviewed pages 000433, 000436 and 000438 and, in the absence of any representations, I am not satisfied that section 17(1) applies to exempt them from disclosure.

[46] In conclusion, I find section 17(1) does not apply to pages 000426, 000427, 000433, 000436, 000438, 001433, 001434, 001435, 001436 and 001438 and will order the ministry to disclose them to the requester.

[47] I uphold the ministry's decision and dismiss the appeal.

ORDER:

I order the ministry to disclose pages 000426, 000427, 000433, 000436, 000438, 001433, 001434, 001435, 001436 and 001438 to the requester, in full, by **October 11, 2018**.

Original Signed by: _____
Justine Wai
Adjudicator

September 11, 2018 _____