Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3937

Appeal PA15-414

Ministry of the Environment, Conservation and Parks

March 21, 2019

Summary: This is a third party appeal of a decision made by the Ministry of the Environment, Conservation and Parks (the ministry), in which it granted access to records relating to the cultural impact reporting required in the Renewable Energy Application for the White Pines Wind Project. During the inquiry of the appeal, the appellant claimed that some of the records were not responsive to the access request. In this order, the adjudicator upholds the ministry's access decision and dismisses the appellant's appeal. She finds that the records are responsive to the request, and are not exempt from disclosure under either sections 17(1)(a) or (c) of the *Freedom of Information and Protection of Privacy Act*. The ministry is ordered 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 and 24.

Orders and Investigation Reports Considered: PO-2490, PO-3545 and PO-3574.

OVERVIEW:

[1] This order disposes of the issues raised as a result of a third party appeal of an access decision made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) by the Ministry of the Environment, Conservation and Parks (the ministry). The access request was for the following information:

- All records relating to all aspects of the cultural heritage impact reporting by a named company, or any consultant for the company, regarding a Renewable Energy Application for the White Pines Wind Project;

- All records relating to the ministry's review of this heritage impact reporting; and
- All records relating to any financial or environmental constraints on the relocation or elimination of the wind turbines to prevent heritage impacts.

[2] After locating responsive records, the ministry notified a third party under section 28 of the *Act*. The third party submitted representations to the ministry on its views regarding the disclosure of the records to the requester. Upon review of the third party's representations, the ministry issued a decision letter to it, advising it of the ministry's intent to grant the requester partial access to the "information of interest." The ministry advised the third party that portions of the records would be withheld under the mandatory exemption in section 21(1) (personal privacy), as well as the discretionary exemption in section 22(a) (information published or available to the public) of the *Act*. The ministry also indicated it removed and marked all duplicate records and records unrelated to the request as "Duplicate," "Not Relevant" or "n.r."

[3] The third party, now the appellant, appealed the ministry's decision to this office, claiming that some of the records should be exempt under the mandatory exemption in section 17(1) (third party information) of the *Act*.

[4] During the mediation of the appeal, the appellant consented to the disclosure of some of the information contained within the responsive records. Subsequently, the ministry issued a decision letter to the requester granting her partial access to the responsive records. The ministry advised the requester that portions of the responsive records were withheld under sections 13(1) (advice or recommendations), 19(1) (solicitor-client privilege), 21(1) and 22(a). In addition, the ministry advised the requester that portions of the records were withheld as they are the subject matter of this appeal. The requester did not appeal the ministry's decision, but confirmed with the mediator that she continued to seek access to the information that is the subject matter of this appeal. The appellant confirmed that it did not consent to any further disclosure of records.

[5] The file was then transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeal initially sought and received representations from the appellant and the ministry. The adjudicator then shared the representations between the appellant and the ministry in accordance with the IPC's *Code of Procedure*, and sought supplementary representations on the application of section 17(1). Again, representations were received from both parties. The adjudicator then sought and received representations from the requester. The file was then transferred to me to continue the inquiry. I sought reply representations from the ministry and the appellant in response to the requester's representations, but did not receive reply representations from either of them.

[6] I note that in the appellant's representations, it consented to the disclosure of many of the records which were still at issue following mediation. Consequently, I will

order the ministry to disclose these records to the requester. The appellant also claimed in its representations that many of the records are not responsive to the access request. Although not raised during the mediation of the appeal, I will address the issue of the responsiveness of the records, below.

[7] For the reasons that follow, I find that the records are responsive to the request and I uphold the ministry's access decision. I find that the records are not exempt from disclosure under section 17(1), dismissing the appeal. The ministry is ordered to disclose the records to the requester.

RECORDS:

[8] As previously stated, the appellant has consented to disclose many of the records that remained at issue at the conclusion of mediation. The remaining records at issue in this appeal consist of project comments, the ministry's assessment of Renewable Energy Approval (REA) application submissions, REA status reports, emails, technical review questions and answers, maps, project backgrounders and a list of lands where leases were obtained. Remaining at issue are the following pages:

> 372, 434, 445-452, 457-464, 563, 583, 594-601, 607-615, 649, 681, 684, 779, 1238, 1239, 1948-1953, 1955-1957, 1979, 1998, 2027-2034, 2044-2047, 2220-2227, 2243, 2580-2589, 2595-2601, 2621-2630, 2633-2645, 2648-2649, 2650-2652, 2657-2664, 2667-2681, 2686-2701, 2706-2721, 2726-2732, 2734, 2741, 2752, 2762, 2786, 2792, 2810, 2814 and 2817.[1]

ISSUES:

A. Are the records responsive to the access request?

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

DISCUSSION:

Issue A: Are the records responsive to the access request?

[9] 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:

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[1] On my review of the records, I note that there is a substantial amount of duplication of content.

> (1) A person seeking access to a record shall,
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> > (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).

[10] 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]

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

Representations

[12] The appellant submits that many of the records at issue are "non-responsive to the requester's request," but does not elaborate. In other words, the appellant does not provide any reasons why the records are not responsive to the request.

[13] The ministry submits that the appellant has not specified why it takes the position that some of the records are not responsive to the request. Further, the ministry submits that the information contained in the records at issue is reasonably related to the request, which reflects what past orders of this office have found, and is, therefore responsive to the access request.

Analysis and findings

[14] The access request was for the following information:

- All records relating to all aspects of the cultural heritage impact reporting by a named company, or any consultant for the company, regarding a Renewable Energy Application for a particular wind project;

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[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.

- All records relating to the ministry's review of this heritage impact reporting; and
- All records relating to any financial or environmental constraints on the relocation or elimination of the wind turbines to prevent heritage impacts.

[15] I have reviewed the records at issue and the parties' representations. Upon my review of the records and, in the absence of evidence before me from the appellant that the records are not responsive to the request, I find that the records at issue are not only reasonably related to the access request, but are directly related to it. I will go on to determine if the records at issue are exempt from disclosure under section 17(1).

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

[16] The appellant is claiming the application of the mandatory exemptions in sections 17(1)(a) and 17(1)(c) to exempt the records at issue from disclosure.

[17] 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

[18] 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]

[19] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

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[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.

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

[20] The types of information listed in section 17(1) have been discussed in prior orders. For example:

> *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, 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]

Representations

[21] The appellant submits that it is in the business of developing wind energy projects and selling the energy harnessed from such projects. As part of the appellant's commercial venture, it submits, it generates and supplies information to various

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[6] Order PO-2010.
[7] Order PO-2010.
[8] Order PO-2010.
[9] Order P-1621.

institutions solely to facilitate its ultimate objective of selling energy from wind projects. In this case, the appellant argues, the records contain commercially sensitive information, including information about timelines.

[22] The ministry submits that the information contained in the records is the result of technical studies and environmental and cultural heritage assessments required to attain a Renewable Energy Approval (REA) from the ministry for the wind project, qualifying as "technical information" for the purposes of section 17(1). The ministry also agrees with the appellant that the information in the records broadly meets the definition of commercial information as contemplated in section 17(1).

[23] The requester submits that past orders of this office have found that commercial information relates solely to the buying, selling or exchange of merchandise or services, and that the adjective "solely" requires specificity; it cannot be expanded to a "broad" definition of commercial information. The appellant goes on to argue that the records relate to a cultural heritage impact assessment process, the purpose of which is not commercial, but is to conserve heritage by ensuring that projects are in compliance with Ontario's heritage legislative framework.

[24] The requester also argues that the ministry has not explained how all of the records are commercial information of the appellant, especially when these records were generated by both the appellant and the ministry. The requester states:

> Cultural heritage information – especially information gleaned from public records or the result of public consultation, and intended for public dissemination as part of a public planning process – is by definition, not proprietary.

[25] The requester further submits that in a previous appeal to this office, the institution did not consider any of the cultural heritage records responsive to the access request to be commercial information.

[26] Concerning whether the records contain "technical information," the requester submits that the records were produced as part of a statutory public process to protect cultural heritage, unlike a private environmental site assessment, which could reveal information about a property that could be damaging to an owner. The requester goes on to argue that a cultural heritage impact assessment (and by extension, records related to the production, review and final acceptance of that assessment) concerns human values, as opposed to mechanical things or scientifically measurable nature heritage, such as water levels. The requester further submits that the information in the records at issue does not qualify as technical information for the purposes of section 17(1) because it does not fall under the general categories of applied sciences or mechanical arts, nor does it describe the construction, operation or maintenance of a structure, process, equipment or thing.

Analysis and findings

[27] As previously stated, I have reviewed the records at issue. I find that they contain commercial, technical and scientific information for the purposes of part one of the test in section 17(1), as defined in previous orders of this office. In particular, I find that much of the information in the records relates solely to the buying and selling of services between the appellant and the province, as part of contractual obligations entered into, qualifying as commercial information. In addition, I note that the appeal the requester referred to in her representations and relies on to support her position that the records do not qualify as commercial information was resolved during the inquiry and did not result in an order from this office. In other words, there was no finding made regarding what type of information was contained in the records at issue in that appeal. Accordingly, it is not a relevant consideration in this appeal.

[28] Other information contained in the records, I find, qualifies as technical information for the purposes of part one of the test in section 17(1). I find that this information belongs to an organized field of knowledge that would fall under the general categories of mechanical arts, including engineering. In particular, I find that there is information in the records relating to the construction, design and operation, and specifications of wind turbines.

[29] In addition, I find that still other information contained in the records qualifies as scientific information for the purposes of part one of the test in section 17(1) because it belongs to an organized field of knowledge in the natural sciences, relating to the observation and testing of a specific conclusion undertaken by an expert in the field. In particular, the scientific information relates to the observation and assessment of water and archaeological issues.

[30] Having found that the records at issue contain commercial, technical and scientific information, I further find that part one of the three-part test in section 17(1) has been met. I will now determine whether part two of the three-part test has been met.

Part 2: 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.[10]

[32] 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

[10] Order MO-1706.

inferences with respect to information supplied by a third party.[11]

[33] 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.[12]

[34] 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.[13]

Representations

[35] The appellant submits that the records were directly supplied by it to the ministry in the course of ongoing correspondence, mainly in the form of in-person meetings, private letters, phone calls and emails, and that the supply of this information was done with a reasonable expectation of confidentiality. In addition, the appellant submits that information may qualify as supplied if its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the third party. In this case, the appellant argues, this consideration captures the internal correspondence, notes, summaries and reports circulating within the ministry, as well as the ministry's correspondence with other agencies and bodies.

[36] The appellant goes on to argue that its expectation that the records were supplied in confidence was both subjectively held[14] and objectively reasonable as evidenced by the fact that many of the records were marked "confidential," and while not all of the records were expressly marked as such, they were nonetheless supplied

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[11] Orders PO-2020 and PO-2043.
[12] Order PO-2020.
[13] 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.
[14] Relying on a decision of the Alberta Court of Appeal in *Imperial Oil Ltd. v. Calgary (City)*, 2014 ABCA 231.

to the ministry as part of a working relationship in which correspondence was expected to remain confidential.

[37] The appellant states:

> The [r]edacted [r]ecords were not supplied to the Ministry as part of the formal REA application requirements, but were supplied to address matters that arose through the course of the Project's development. There is an important distinction to be made between those documents required under the legislation to have a complete REA application (and are public documents) and those supplementary documents supplied to the Ministry as part of an ongoing dialogue between proponents and the Ministry to address other matters.

[38] The appellant goes on to argue that certain emails were sent from it to specific individuals at the ministry, and there were no expectation that these emails would be made publicly available. The appellant also submits that it has consistently acted with caution to protect the information at issue from disclosure, due to the complex and sensitive nature of the records.

[39] The ministry agrees with the appellant that the information at issue was supplied to it by the appellant or would reveal information that was supplied to it by the appellant as part of the appellant's REA application, and that the information that was supplied was done so with a reasonable expectation of confidentiality.

[40] The requester submits that she has already received many records as part of another process and that these records were marked as "confidential" by the appellant. The requester goes on to argue that the appellant has not distinguished between the records that have already been released as part of another process, and the records at issue in this appeal; thereby leaving the task to determine whether the records were supplied in confidence to the adjudicator.

Analysis and findings

[41] I find that there is information contained in the records that was supplied to the ministry by the appellant. In particular, I find that the appellant directly supplied maps, drawings, photographs, a particular type of commercial information, and answers to technical review questions that were posed by the ministry. In addition, I find that some of the information in the ministry's assessment of the appellant's REA application submission was supplied to the ministry by the appellant.

[42] I also accept the appellant's position that the information it supplied to the ministry was done so "in confidence." In particular, I accept the position taken by the appellant that its expectation that the records were supplied in confidence was both subjectively held and objectively reasonable for the following reasons:

- the fact that many of the records were marked "confidential;"
- the records were supplied to the ministry as part of a working relationship in which correspondence was expected to remain confidential;
- there was no expectation that the information would be made publicly available; and
- the appellant acted with caution to protect the information at issue from disclosure.

[43] All of these circumstances lead me to conclude that the information I refer to above was supplied implicitly with a reasonably-held expectation of confidentiality between the appellant and the ministry. Consequently, I find that the second part of the three-part test has been met with respect to this information. I will go on to determine if the third part of the test has been met.

[44] Conversely, I find that some of the information in the records at issue was not supplied by the appellant to the ministry, not meeting the second part of the three-part test. In particular, I find that some of the information in the records was provided to the ministry, not by the appellant, but by county and municipal representatives. In addition, in the ministry's assessments of the REA application submissions, the list of required documentation (set out in the left-hand column of these records) was not supplied by the appellant to the ministry, but rather was set out by the ministry pursuant to Section 13 of O.Reg. 359/09 entitled *Renewable Energy Approvals under Part V.0.1 of the Act.* The Act referred to in this regulation is the *Environmental Protection Act*, R.S.O. 1990, c.E.19. Consequently, I find that this information was not supplied in confidence by the appellant to the ministry. As no other exemptions have been claimed with respect to this information, I will order the ministry to disclose it to the requester.

Part 3: harms

[45] The party resisting disclosure must provide detailed 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.[15]

[46] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the

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

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.*[16]

Representations

[47] The appellant submits that it is apparent that the disclosure of the records at issue can reasonably be expected to significantly prejudice its competitive position and interfere significantly with its contractual relationships, resulting in undue loss to it. The appellant further submits the following:

> [The appellant] is in the business of developing wind energy projects, both in Ontario and other jurisdictions. [It] currently has six wind projects underway in Ontario. There has been vocal resistance from anti-wind coalitions against wind energy projects in Ontario, as well as against [its] projects in particular. Despite the provincial government's promotion of sustainable energy sources to improve Ontario air quality by streamlining the approvals process for energy developers, anti-wind activists have gone out of their way to slow down or thwart wind energy projects. For example, there have been lawsuits filed against [the appellant], as well as landowners who have entered into commercial agreements with [the appellant] to host turbines and other infrastructure. There have also been numerous freedom of information requests, often repetitive and duplicate in nature, to obtain information about [the appellant's] wind energy projects that would significantly prejudice [it]. In summary, the harm to [the appellant] from the disclosure of these comments is not merely speculative. [It] has experienced firsthand the attempts made by anti-wind activists to delay and terminate its projects.

[48] The appellant goes on to argue that the records at issue contain commercially sensitive information that could be exploited by anti-wind activists to undermine and ultimately terminate the project. Further, the appellant submits that it and the project have already been the subject of two judicial reviews, and it is likely that anti-wind activists will continue to oppose the project, be it in the form of further litigation, regulatory proceedings or lobbying for a governmental investigation. The records, the appellant argues, could cause prejudice to it in future proceedings that are likely to arise as the development of the project progresses. The appellant then sets out a particular type of commercial information in the records, the disclosure of which could jeopardize the project. The submissions on this information meet this office's confidentiality criteria and, accordingly, will not be set out in this order, but were taken into consideration.

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[16] Order PO-2435.

[49] Lastly, the appellant submits that the disclosure of the information in the records will prejudice it in similar approvals and development processes in other jurisdictions, causing undue loss to it.

[50] The ministry submits that in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[17] the Supreme Court of Canada held that the threshold for all harms-based exemptions in access to information statutes using a "could reasonably be expected to" standard is a reasonable expectation of probable harm that is well beyond the merely possible or speculative. The ministry asserts that the appellant did not provide evidence of the harms under either section 17(1)(a) or (c) in that it did not provide evidence relating to the proprietary and commercial consequences of disclosing the records at issue.

[51] With respect to the appellant's claim that there have been numerous freedom of information requests intended to delay and terminate the appellant's projects, the ministry takes the position that the requester has a right of access to the records in the custody or under the control of the ministry unless the record or part of the record falls within one of the exemptions under sections 12 to 22 of the *Act*.

[52] Concerning the appellant's reference to ongoing litigation, the ministry submits:

> In the present case, the appellant has not expressed concerns regarding the impact that disclosure may have on its competitive position or negotiations, or whether disclosure may result in an undue loss or lead to undue gain for one of its competitors. The commercial realities the appellant describes pertain to the lawsuits that the requester or "anti-wind activists" may bring to delay or terminate its projects. The assertion that disclosure of the information at issue may possibly result in the delay or termination of its projects provide only general, vague and speculative statements regarding the impact that disclosure would have on the appellant's competitive position in the wind energy industry.

[53] Further, the ministry notes that past orders of this office have held that the reference to a competitive position in section 17(1)(a) was not intended to include a litigant's competitive position in civil litigation,[18] nor does litigation qualify as a suitable venue for "competition" as contemplated by section 17(1). In addition, the ministry submits, this office has consistently found that the possibility of damages resulting from legal proceedings cannot be characterized as "undue" or "unfair."[19] The ministry goes on to argue:

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[17] See note 15.
[18] See, for example, Orders PO-2490, PO-2293, PO-2184, PO-2018 and PO-1805.
[19] See, for example, Orders PO-2043, PO-1912 and MO-1481.

> In the present case, the appellant contends that the requester may pursue legal claims against the approval of the Project. The appellant has briefly listed the various legal proceedings with "anti-wind activists" that it believes lack merit. However, the appellant's complaint in this regard is more appropriately made before the Environmental Review Tribunal or the appropriate adjudicative body that has the jurisdiction to hear the matter. The Ministry maintains that the history between the appellant and "anti-wind activists" is insufficient to discharge the burden on the appellant to establish a reasonable connection between disclosure of the information at issue to the requester and the contemplated harms. The mere fact that members of the public have concerns with regard to the appellant's wind farm projects does not in and of itself establish a reasonable expectation of harm.[20]

[54] For all of these reasons, the ministry argues, the third part of the three-part test has not been met, and the records should be disclosed to the requester.

[55] The requester submits that the appellant has made various allegations about "anti-wind activists" that are false. The requester submits the following information concerning the background to her access request:

- she participated in the REA process within the permitted public role, with a view to providing valid public input;
- her purpose was to ensure the protection of Prince Edward County's cultural heritage, not to delay or thwart the process;
- her requests under the *Act* were not duplicate or repetitive in nature;
- any information she received under the *Act* or other legal means was not used to undermine or terminate the project, but rather to shine a light on the REA process as it concerns cultural heritage impact assessments for the project; and
- the litigation the appellant referred to is a legitimate avenue to challenge government process and was the only means available to pursue cultural heritage issues after an REA has been granted.[21]

[56] The requester further submits that whatever harm the appellant alleges is now moot, given that the White Pines Wind Project was cancelled by the provincial

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[20] See Orders PO-3545 and PO-3574.
[21] The requester also states that the legal proceeding she refers to has concluded.

government on July 25, 2018 (retroactive to July 10, 2018).[22]

[57] She goes on to argue:

> This harm was self-inflicted in that the possibility of failing to secure regulator approval for turbines on the basis of both cultural heritage and natural heritage reasons in a Project Area of such outstanding cultural and natural heritage value should have been obvious to the proponent before it entered into a FIT contract . . . The harm was not caused by prior FOI releases to me of cultural heritage impact records.

[58] Finally, the requester submits that the appellant's claim that the information in the records will prejudice it in similar approvals and development processes in other jurisdictions is far-fetched and unfounded, given that the information is specific to Ontario's REA process.

Analysis and findings

[59] I find that the appellant has not provided sufficient evidence to establish the harms contemplated in either sections 17(1)(a) or (c) and, therefore has not met the third part of the three-part test with respect to the remaining information at issue. Consequently, I find that none of the records at issue are exempt from disclosure under section 17(1).

[60] With respect to section 17(1)(a), the appellant's position is that the its competitive position will be significantly prejudiced and its contractual relationships interfered with, should the records be disclosed, because they could be used by anti-wind activists to delay, shut down or thwart wind energy projects by way of litigation or by making freedom of information requests.

[61] With respect to litigation between the appellant and anti-wind activists, I find that Order PO-2490 is instructional. In that order, Adjudicator John Higgins found that section 17(1)(a) was not intended to include a litigant's competitive position in civil litigation. He noted that previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and that the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[23]

[62] Concerning the fact that access requests under the *Act* have been made for records relating to this project, I accept the ministry's position that individuals have a

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[22] Pursuant to the *White Pines Wind Project Termination Act, 2018*, S.O. 2018, c.10, Sched. 2.
[23] [2005] O.J. No. 2851 (Div. Ct.).

right of access under the *Act*, subject to the exemptions listed in the *Act*. Further, the appellant has not explained how freedom of information requests would be reasonably be expected to prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations.

[63] Further, I find that the appellant has not provided sufficient evidence as to how "anti-wind" activists could use the information contained in the records to delay, shut down or thwart wind energy projects, other than by way of litigation or by making freedom of information requests. The appellant's assertion that, in light of previous litigation, access to information requests and regulatory proceedings, the information at issue could be exploited by anti-wind activists, does not establish a reasonable expectation of harm. The fact that stakeholders and members of the public have expressed concern over the third party's wind farm projects does not in and of itself establish a reasonable expectation of harm. In my view, the appellant has not established how the specific information in these records could reasonably be expected to be used in a manner leading to the harms described in section 17(1).[24]

[64] In addition, the project that is the subject matter of this access request has been terminated by the current provincial government. I find that given the project no longer exists, there is no competitive position to be prejudiced and no negotiation to be interfered with as regards this particular project. As a result, I find that section 17(1)(a) does not apply to exempt the records from disclosure.

[65] Turning to the possible application of section 17(1)(c), the appellant's position is that the disclosure of the information at issue will prejudice it in similar approvals and development processes in other jurisdictions, causing undue loss to it. I accept the arguments of both the ministry and requester that the appellant's argument regarding section 17(1)(c) is vague and speculative. The appellant has failed to establish how records relating to a specific project, which has been cancelled could be used in other processes in other jurisdictions to cause it undue loss. Consequently, I find that section 17(1)(c) does not apply to exempt the records from disclosure.

[66] In sum, I uphold the ministry's access decision and dismiss the appellant's third party appeal. I find that the records are responsive to the request, and are not exempt from disclosure under either sections 17(1)(a) or (c) of the *Act*. The ministry is ordered to disclose the records, listed below, to the requester.

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[24] A similar finding was made in Orders PO-3545 and PO-3574.

ORDER:

1 I order the ministry to disclose records 371, 372, 418, 419, 434, 435, 445 to 464, 494, 509, 541 to 544, 555, 556, 557, 563, 564, 583, 584, 594 to 615, 649, 650, 658, 661 to 665, 681, 684, 685, 693, 779, 780, 1238, 1239, 1773, 1778, 1780, 1947 to 1953, 1954, 1955 to 1957, 1979 to 1994, 1998 to 2014, 2018, 2020, 2023, 2024, 2027 to 2034, 2035, 2039, 2044 to 2047, 2048 to 2055, 2133, 2220 to 2227, 2228 to 2236, 2243 to 2245, 2331, 2362 to 2378, 2415, 2420, 2425 to 2428, 2438, 2439, 2451, 2462 to 2465, 2467, 2470, 2500, 2528 to 2532, 2540, 2541, 2549 to 2554, 2558, 2560, 2564, 2566, 2570, 2573, 2580 to 2589, 2595 to 2601, 2602, 2604, 2606 to 2608, 2621 to 2630, 2633 to 2645, 2648, 2649, 2650 to 2652, 2657 to 2733, 2734, 2735, 2741, 2742, 2752, 2753, 2762, 2763, 2786, 2792, 2793, 2807, 2810, 2812, 2814, 2815, 2817, 2825 to 2834, 2956, 2957, 2970, 2974, 3487, 3488, 3490 and 3494 to the requester by **April 29, 2019** but not before **April 23, 2019**.

2 I reserve the right to require the ministry to provide this office with copies of the records it discloses to the requester.

Original signed by: March 21, 2019

Cathy Hamilton
Adjudicator