

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4164

Appeal PA19-00250

Ministry of Natural Resources and Forestry

July 9, 2021

Summary: An affected third party appealed a Ministry of Natural Resources and Forestry (the ministry) decision to disclose information related to a specified environmental benefit permit for a specified property development. In this order, the adjudicator finds that section 17(1) of the *Freedom of Information and Protection of Privacy Act* does not apply to the information at issue. The ministry's decision to disclose the information is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 21(1); *Endangered Species Act, 2007*, SO 2007, c 6, sections 9, 10 and 17(2)(c).

Order Considered: Order PO-3789.

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 related to a specified environmental benefit permit for a specified property development. These types of permits are governed by the provisions of the *Endangered Species Act, 2007*¹ (the *ESA*).

¹ SO 2007, c 6.

[2] The requester subsequently clarified that the request was for access to the following information:

1. Any comments posted in relation to a specified environmental registry number (The requester was not interested in any personal identifying information, taking the position that this information was not responsive to the request. The requester advised that if there existed a summary of comments/documents it would be a satisfactory substitute for the individual comments).
2. Information gathering form related to a specified environmental registry number for a specified property development.
3. Completed application for overall benefit permit for a specified property development.
4. Copy of overall benefit permit issued regarding a specified environmental registry number for a specified property development.

[3] The ministry identified responsive records and after notifying some parties whose interests may be affected by disclosure, issued a decision granting partial access to the requested information. The ministry relied on sections 21(1) (personal privacy) and 21.1 (species at risk) of the *Act* to deny access to the portion it withheld.

[4] One of the notified affected parties, now the appellant, appealed the ministry's access decision. As set out below, the appellant took the position that some of the information that the ministry had decided to disclose qualified for exemption under section 17(1) (third party information) of the *Act*.

[5] During mediation, the ministry notified another affected party whose interests might also be affected by disclosure. Following the ministry's receipt and consideration of this affected party's response, the ministry issued a decision granting partial access to the responsive records pertaining to them. That affected party did not appeal the ministry's decision.

[6] Finally, in the course of mediation the requester advised the mediator that access was being sought to a particular document that the ministry identified as Record A0335615, being a Permit under section 17(2)(c) of the *Endangered Species Act, 2007*. The appellant consented to the partial disclosure of this record.

[7] Subsequently, the appellant consented to disclosure of other information at issue.

[8] Notwithstanding the additional disclosure, mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[9] As the requester did not appeal the ministry's decisions, information withheld by the ministry pursuant to sections 21(1) and 21.1 of the *Act* and the application of those

provisions, is not at issue in this appeal.

[10] The originally assigned adjudicator commenced her inquiry and representations were exchanged in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*.

[11] The appeal was then assigned to me to complete the inquiry.

[12] In this order, I uphold the ministry's decision to disclose the information at issue in this appeal to the requester.

RECORDS:

[13] At issue in this appeal is the ministry's decision to disclose certain information appearing on pages 42, 47, 49 and 50 of Record A0335588, which is a document entitled "Application for an overall benefit permit under clause 17(2)(c) of the *Endangered Species Act, 2007*" as well as certain information on pages 127 to 129, 133, 135 to 137 and 139 of Record A0335615, which is a document entitled "Permit under clause 17(2)(c) of the *Endangered Species Act, 2007*".

PRELIMINARY MATTER

[14] In its submissions, the ministry relies on Order PO-3789 and suggests that the determinations in that decision apply to the records at issue before me.

[15] In particular, the ministry submits that Order PO-3789 addressed previous versions of what is Record A0335588, in an appeal brought by the same appellant. The ministry explains:

In that case, it was found that the appellant's name was referred to in the records in relation to a business or professional capacity - rather than a personal capacity - since his name appeared in the context of seeking a permit under the *ESA*. At page 3, Adjudicator Flanagan held, "The records at issue all relate to the activities of a named corporation or its representatives." As such, this information was found not to comprise "personal information" under *FIPPA* and was ordered disclosed.

[16] The ministry submits that the same reasoning and outcome ought to apply to the portions which the appellant wishes to have withheld on pages 42, 47, 49, and 50 of Record A0335588. The ministry submits that, accordingly, there is no basis to withhold this information.

[17] In reply to the ministry's representations, the appellant challenges the findings in PO-3789, submits that the application and permit were a "personal effort" and argues that the individual signing the application did so personally and as the controlling mind of the corporation. The appellant adds that the appellant should not be bound by the

determinations in Order PO-3789 because the appellant's inability to provide submissions within the allotted time period, does not indicate consent to the outcome or agreement with that decision.

[18] I have reviewed Order PO-3789 in which Adjudicator Flanagan makes the following determinations at paragraphs 10 to 13 of his decision:

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

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

To qualify as personal information, information must be about an individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

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

[19] In my view, the same considerations apply with equal force in the appeal before me. The appellant argues that although he signed the form personally, he did so as the "controlling mind of the corporation". This actually supports a finding that the records at issue all relate to the activities of a corporation or its representatives. Accordingly, the information at issue set out above, where it contains information about named individuals, is about these individuals in a professional or business capacity. This information at issue does not contain information that qualifies as personal information for the purposes of the *Act*, so the personal privacy exemption in section 21(1) cannot

² Adjudicator Flanagan references Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

apply. Finally, in the circumstances of this appeal, I am not satisfied that this is the type of information that falls within the scope of section 17(1) of the *Act*. Accordingly, this information does not qualify for exemption and I uphold the ministry's decision to disclose it to the requester.

[20] I will now address the remainder of the information at issue.

DISCUSSION:

[21] The appellant takes the position that the information that he objects to disclose is scientific information that qualifies for exemption under section 17(1) of the *Act*.

[22] Section 17(1) states in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

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

[23] Section 17(1) is designed to protect the confidential "informational assets" of businesses or 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 could be exploited by a competitor in the marketplace.⁴

[24] For sections 17(1)(a), (b) and/or (c) 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

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.) (*Boeing Co.*).

⁴ 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 information must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1: type of information

[25] The appellant asserts that the withheld information at issue is scientific information. This type of information has been defined as follows in Order PO-2010:

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.

The ministry's representations

[26] As set out in the background above, the ministry relied on section 21.1 (species at risk) to withhold certain information. The requester did not challenge the application of section 21.1 to that information. Accordingly, that information is not at issue.

[27] The ministry submits that certain portions of the remaining information at issue do not fall within the scope of the definition of scientific information. It asserts that the last two portions on page 127 of Record A033615 are almost identical to the language contained in sections 9 and 10 of the *Endangered Species Act, 2007 (ESA)*. The ministry adds that although there is a quantification of the affected habitat added to it, the same is true for the portion found on page 128.⁵

[28] The ministry further states that the following withheld information would not qualify as being the result of scientific observation or testing:

- the last portion on page 50 of Record A0335588, which is simply the date on which the application form was submitted,
- the portions on page 129 of Record A0335615 which are general in nature and comprise definitions of certain terms which are used throughout the Record,

⁵ The ministry notes that this information is also found on page 133, but the appellant did not object to disclosing that information. For the purpose of the analysis that follows I will treat the information on page 128 as if the appellant objected to its disclosure.

- the last two portions on page 135 (at paragraphs 5.3 and 5.5 of the permit) which are simply snippets of information.

[29] The ministry takes no position on whether the few remaining portions of withheld information at issue found on pages 135, 136 and 137 of Record A0335615 qualifies as “scientific” information.⁶

The appellant’s representations

[30] The appellant explains that the information at issue consists of a species survey and observation information compiled and completed by an expert in the field of Biology and Natural Sciences. The appellant submits that disclosure of the withheld information would reveal scientific information pertaining to species at risk. That said, in reply, the appellant acknowledges and agrees that the information in the bullet points listed in the ministry’s representations above, does not qualify as scientific information.

The original requester’s representations

[31] The original requester submits that it provided scientific information proving the existence of species at risk through a Peer Review of the developer’s Environmental Impact Assessment. The original requester adds that this information was shared publicly.

Analysis and finding

[32] Based on the appellant’s acknowledgement and the nature of the information, I am satisfied that the last portion on page 50 of Record A0335588 (which is simply the date on which the application form was submitted), the upper portion on page 127, the portions on page 129 (which are general in nature and comprise definitions of certain terms which are used throughout the record), last two portions on page 135 (at paragraphs 5.3 and 5.5 of the permit) and the portion on page 139 of Record A0335615 does not qualify as scientific information under section 17(1) of the *Act*. As no other exemptions were claimed to apply to this information, I uphold the ministry’s decision to disclose this information to the requester.

[33] Assuming, but without deciding, that the remaining withheld portions of both records at issue may contain information that qualifies as scientific information as defined at section 17(1) of the *Act*, I now turn to consider part 2 of the section 17(1) test.

⁶ For clarity, the ministry explains that these few remaining portions are the second and fifth portions in dispute on page 135 (i.e., at paragraphs 4.3 and 5.2 of the permit), the second portion in dispute on page 136 (at paragraph 7.3 of the permit), and the third and fourth portions on page 137 (at clauses d) and e) of paragraph 7.6 of the permit).

Part 2: supplied in confidence

Supplied

[34] 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.⁷

[35] 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.⁸

In confidence

[36] In order to satisfy the “in confidence” component of the second part of the section 17(1) test, the party resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁹

[37] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.¹⁰

The appellant’s representations

[38] The appellant submits that all the information was supplied to the ministry in confidence. The appellant submits that the permit process by design is confidential and the subject application contains strategic and locational habitat information regarding species at risk, which was all intended to be confidential. The appellant states that the information would never have been submitted if there was a risk of its disclosure. The appellant asserts that the ministry was not to disclose its information to anyone.

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

¹⁰ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

The ministry's representations

[39] The ministry submits that the information at issue was not supplied on an explicitly confidential basis but makes no representations on whether the information was supplied to it on an implicitly confidential basis, except as it relates to information that has been made public. The ministry submits that:

With respect to the information which was made public through the posting on the Environmental Registry, it is the ministry's position that a reasonable expectation of confidentiality on the part of the appellant would be inconsistent with the ministry's practice of posting decisions relating to permits on the Registry. In any event, information that is already in the public domain does not qualify for exemption under subs. 17(1).

[40] The ministry explains that it posted notice of the decision to issue the permit under the *ESA* on the Environmental Registry¹¹. The ministry states that the posting outlines the requirements contained in the permit for the effect of minimizing adverse effects on the species at risk, and the requirements imposed for the purpose of providing an overall benefit to each of the species. It summarized some of the requirements of the permit included in the posting as follows:

- Road signage to reduce mortality, as well as the installation of exclusion fencing and maintaining and monitoring an existing ecopassage;
- Constructing and monitoring two nest boxes to contribute to habitat enhancement, harm reduction and increased reproductive success for Gray Ratsnakes;
- Improving basking habitat opportunities for Blanding's Turtles by anchoring and maintaining two basking logs within a wetland, and ensuring development is prohibited and human activities are restricted by installing fencing;
- Dedicating approximately half of an island which is .31 hectares in size as turtle refuge by providing suitable substrate to support nesting habitat and increase reproductive success of Blanding's Turtles;
- Requiring reporting including observations of possible road mortality.

[41] The ministry submits that because it has already been made public, the withheld portion on page 133 and many of the portions at issue on pages 135, 136 and 137 of Record A0335615 ought not to be withheld from disclosure.

¹¹ The contents of this posting, which is public, can be found using the Registry Number.

[42] The ministry further submits that, after applying the reasoning in Order PO-3789 and considering what is publicly available, the only remaining information at issue appears on portions of pages 128, 135, 136 and 137 of Record A0335615.

The original requester's representations

[43] The original requester submits that the best quality scientific information on the location of species at risk was provided and this information was instrumental in the ministry's request that the property developer apply for an Overall Benefit Permit. Other than removing the specific location where species at risk have been found, there is no justifiable reason that any remaining scientific information should be withheld.

[44] The original requester submits that Order PO-3789 stands as a precedent for finding that that this type of information should not be considered confidential.

The appellant's reply representations

[45] In reply, the appellant submits that "there is a wide gap between generalizations made on the Environmental Registry and specific information provided in the Benefit Permit - here as record A0335615". The appellant adds:

I do not believe that simply due to there being generalizations regarding the permit posted on the Environmental Registry, that the specific information contained in the Application - record A0335588, and in the Permit - record A0335615, makes this information any less confidential.

Analysis and finding

[46] As set out at paragraphs 22 and 23 of Order PO-3789, Adjudicator Flanagan accepted that some of the information at issue in the appeal before him, involving the same appellant, was supplied, but not all. He concluded that it was not necessary to specify in detail the information that was not supplied because of his findings regarding the "in confidence" component of Part 2 of the section 17(1) test and his conclusion on harms.

[47] With respect to the appellant's assertions of confidentiality in the appeal before him, Adjudicator Flanagan wrote the following at paragraphs 30 to 33 of his decision:

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

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

I recognize that the appellant understood their relationship with the ministry to be iterative, involving the exchange of ideas and incomplete

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

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

[48] I draw the same conclusion in the appeal before me. The records at issue consist of an application for a permit submitted to a regulatory agency and a permit issued by that agency. There is no explicit expression of confidentiality on the records at issue, and no evidence of an assurance by the ministry that the information was not to be disclosed. I also accept the ministry's position that a reasonable expectation of confidentiality on the part of the appellant would be inconsistent with the ministry's practice of posting decisions relating to permits on the Registry, which did occur in the case before me.

[49] Furthermore, I do not accept the appellant's assertion that an application would not have been submitted if there was a risk of disclosure. The application is a necessary step to obtaining a permit. If the appellant wished to develop the property, there was no way to avoid it.

[50] In this context, I am not satisfied that that there is an objective basis to conclude that the information that meets the supplied requirement was supplied implicitly in confidence.

Summary

[51] As I have found that the information at issue was not supplied in confidence, I do not need to consider Part 3 of the section 17(1) test above.

[52] Accordingly, based on my conclusion that part 2 of the section 17(1) test has not been satisfied I find that section 17(1) does not apply to the remaining information at issue and uphold the ministry's decision to disclose it to the requester.

ORDER:

1. I uphold the ministry's decision to disclose the information at issue in this appeal.
2. I order the ministry to disclose the information at issue in this appeal to the requester by **August 16, 2021** but not before **August 9, 2021**.
3. The ministry is to provide me with a copy of the records as disclosed to the requester in accordance with paragraph 2 of this order.
4. The appeal is dismissed.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ July 9, 2021