Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4245

Appeal PA19-00381

Ministry of the Environment, Conservation and Parks

March 17, 2022

Summary: The Ministry of the Environment, Conservation and Parks received a request under the *Freedom of Information and Protection of Privacy Act* for information about the sound levels at a wind farm operated by a wind energy company. After conducting two searches for responsive records, the ministry located responsive records and granted access to them in part, denying access to 18 pages of records on the basis of the mandatory third party information exemption in section 17(1).

The appellant appealed the ministry's access decision and during the mediation of the appeal, the ministry agreed to conduct a third search for responsive records.

In this order, the adjudicator partially upholds the ministry's decision that the 18 pages of records at issue are exempt by reason of section 17(1). She also orders the ministry to issue an interim access and fee estimate decision regarding its third search for records, without recourse to a time extension.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a) to (c), 26, 27(1) and 57(3).

Orders Considered: Orders PO-2293 and PO-2490.

OVERVIEW:

[1] In order to operate a wind farm, a company that produces renewable wind energy (the affected party in this appeal) was required to provide the Ministry of the Environment, Conservation and Parks (MOECP or the ministry) with an acoustic audit

report for the transformer substations at the wind farm. The acoustic audit report was required as a condition for the affected party to maintain its Renewable Energy Approval (REA) permit to operate the wind farm.[1]

[2] The ministry received an access request from the appellant under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) about the sound levels at the wind farm for specific dates or date ranges from 2016 to 2018. After discussions between the appellant and the ministry, the request was clarified. In the clarified request, the appellant sought access to:

1. All records in relation to the emissions (E-Audit [Emission Audit])

2. All records in relation to the emissions (I-Audit [Imission- Audit])

3. All records for Transformer Substation 1 (ST1) and Transformer Substation 2 (ST2)

4. All records for work performed at Transformer 2 (ST2)

5. All records, raw data and .wav files pertaining to Complaint Assessment Quantitative Screening for [the wind farm]
   Prepared for [named company]
   Prepared by [two named individuals]
   Submitted by [the affected party and/or second named company]

6. All records pertaining to Acoustic Recording Quantitative Screening Measurement Report prepared by EAPB[2] for [particular address]

7. All records related to email referenced on page 14 of the Acoustic Recording Quantitative Screening Measurement Report (prepared by the [MOECP] - EAPB) regarding: [particular address] (Include responses from proponent and/or [the second named company and a third named company])

[3] The ministry notified the companies named in the request and sought their views on the disclosure of the records identified by the ministry as possibly affecting their interests.

[4] In response to the appellant's access request, the ministry issued two access decisions to the appellant.

[5] The first access decision was in relation to the records that did not require third party notice. The ministry provided full access to 434 pages of records.[3]

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[1] The REAs were issued pursuant to the *Environmental Protection Act*, RSO 1990, c. E. 19, s. 47.5(2).
[2] The ministry's Environmental Assessment and Permissions Branch.
[3] The ministry did not charge the appellant a fee for access to the records it disclosed in the first access decision.

[6] The second access decision was in relation to the records that did require third party notice under section 28(1) of the *Act*. The ministry provided full access to 807 pages of records. The ministry withheld 18 pages of records pursuant to the mandatory section 17(1) third party information exemption and four pages of records as being non- responsive to the appellant's request.

[7] The appellant appealed the ministry's second access decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to seek resolution of the appeal.

[8] During the course of mediation, the appellant advised the mediator that she wished to pursue access at adjudication to the 18 pages of records withheld under section 17(1), but accepted the ministry's decision to withhold the four pages it deemed to be not responsive to the request.

[9] The appellant also took the position that the ministry had not located all the records responsive to her request. The ministry agreed to conduct a second search for records and subsequently advised that no additional responsive records had been located. The appellant continued to take the position that the ministry had not located all the records responsive to her request.

[10] The ministry agreed to conduct a third record search.

[11] Concurrently, however, the appellant advised that she wished to proceed to adjudication, without further delay, to pursue access to the records the ministry withheld under the section 17(1) of the *Act*. The appellant also wished the ministry to continue with its third record search.

[12] The ministry affirmed that it would continue its third record search even as the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. The ministry would not provide the mediator with an end date for the completion of this third record search that it indicated was then underway.

[13] The appeal was moved to the adjudication stage, assigned to me and I decided to conduct an inquiry. I began by seeking the representations of the ministry and the affected party whose interests could be affected by disclosure of the 18 pages of records at issue.

[14] I also sought the representations of the ministry on the length of time it thought it should be allowed to complete the third search for records.

[15] In its representations, the ministry advised that it no longer was relying on the exemption at section 17(1) for the 18 pages of records at issue, because none of the harms listed in section 17(1) could reasonably be expected to result from disclosure.

[16] The affected party continued to maintain that the 18 pages of records at issue

were exempt by reason of section 17(1).

[17] As section 17(1) is a mandatory exemption, I continued the inquiry into its applicability and sent the appellant a copy of the ministry's and the affected party's representations, except for the confidential portions.[4]

[18] The appellant provided representations in response, which I shared with the affected party only, as these representations related specifically to the section 17(1) exemption. I then received reply representations from the affected party. These were shared with the appellant, who provided sur-reply representations.

[19] In this order, I partially uphold the ministry's decision that the 18 pages of records at issue are exempt by reason of section 17(1). I order the ministry to disclose the non- exempt information to the appellant.

[20] I also order the ministry to issue an interim access and fee estimate decision regarding its third search for records, without recourse to a time extension under section 27, treating the date of this order as the date of the request.

RECORDS:

[21] The records at issue total 18 pages and contain information relating to sound level measurements from wind turbine transformer substations around the wind farm. The affected party claims that the mandatory third party information exemption in section 17(1) of *FIPPA* applies to these records, which are described in the following table:

Page Numbers	Documents
577-578	Email chain involving ministry staff and the affected party
579-594	Letter from affected party to ministry attaching a report containing tables, drawings, maps, and photographs

ISSUES:

A. Does the mandatory third party information exemption at section 17(1) apply to the records?

B. What time extension is reasonable for the ministry to conduct the third search for records?

[4] The appellant's address was withheld from the ministry's representations. One paragraph was withheld from the affected party's representations as that paragraph may reveal some of the contents of the records.

DISCUSSION:

Issue A: Does the mandatory third party information exemption at section 17(1) apply to the records?

[22] The affected party relies on sections 17(1)(a) to (c) in support of its position that the records are exempt. These sections read:

> 17(1) 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; or

[23] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[24] 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.

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[5] *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.*).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: what types of information do the records contain?

Representations

[25] The ministry concedes that the records contain technical information related to transformer substations at the wind farm.

[26] The affected party submits that the records contain technical and commercial information. It states that the records consist of technical information relating to a sound level cumulative impact assessment at identified receptors, based on readings of the sound levels of the transformers around the wind farm. It states that this information was collected, calculated and prepared by an acoustic consulting and engineering firm with expertise in the field of noise measurement.

[27] The affected party states that the records also describe a commercial relationship with one of its suppliers.

[28] The appellant did not provide representations on part 1 of the test.

Analysis/Findings re part 1

[29] The types of information referred to by the ministry and the affected party in their representations are listed in section 17(1) and have been discussed in prior orders:

> *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]

[30] I agree with the ministry and the affected party and find that the records contain technical information related to measuring noise around the wind farm. This information was prepared by a professional engineer in the field of noise measurement.

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

[31] I also accept that a portion of the letter in the records contains commercial information regarding the buying of merchandise from a supplier by the affected party. Therefore, I agree with the affected party and find that this record also contains commercial information.

[32] As the records contain technical and commercial information, part 1 of the test under section 17(1) has been met.

Part 2: whether the information was supplied to the ministry in confidence

[33] This part of the test requires that the information must have been supplied to the ministry in confidence, either implicitly or explicitly.

Representations

[34] The ministry states that the records contain information that was supplied implicitly in confidence to the ministry. In support, it specifically refers to the confidentiality statement (referred to below) in the email footnotes accompanying the affected party's submission of information to the ministry.

[35] The affected party states that it supplied the records directly to the ministry via email as part of a discussion regarding the conformity of the transformer substation sound levels at the wind farm to the affected party's Renewable Energy Approval (REA) permit.

[36] The affected party states that the email chain in the records was furnished to the ministry with the following confidentiality statement:

> This email and its attachments may contain information that is privileged or confidential. If you are not the intended recipient and have received this email in error, please notify the sender, delete it and destroy all copies of this email. Unauthorized disclosure of its contents, use or copy is prohibited.

[37] The affected party states that it prepared the correspondence contained in the records with the help of an acoustics consultant so as to provide explanations and additional information to the ministry as requested. It states that the information at issue was never intended to be disclosed to the public and is not otherwise available to the public, and that it has been consistently treated in a confidential manner internally. It states:

> As part of the highly competitive renewable energy industry, [the affected party] zealously protects its confidential information, including information such as the granular technical information contained in the records.

[38] The affected party states that it takes specific measures to prevent its confidential information from becoming available to persons other than those it selects to have access, including the following:

- The information is stored on a private network drive protected by appropriate computer security controls.
- Access is limited to a subset of [its] employees who have been approved and must have access to this information in order to fulfill their job responsibilities.
- As a condition of employment, [the affected party] requires that all new employees sign a confidentiality agreement which prohibits disclosure of [its] confidential information to outside parties both during and after employment.
- [The affected party] requires all employees to comply with [its] information security and protection policy, which establishes best practices for protecting [its] confidential information and operating assets.
- [The affected party] requires all employees to complete mandatory training on cybersecurity and information protection.

[39] The appellant did not provide representations on part 2 of the test.

Analysis/Findings re part 2 of the test

Supplied

[40] 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]

[41] 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.[11]

[42] It is clear that the records, which are correspondence sent to the ministry by the affected party, were supplied to the ministry by the affected party.

In confidence

[43] 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]

[44] 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

[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.
[12] 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.[13]

[45] Based on my review of the records at issue and the ministry's and the affected party's representations, I find that the records were supplied to the ministry in confidence by the affected party.

[46] In support of this finding that the records were supplied in confidence, I rely on the confidentiality statement (set out above) in the emails from the affected party to the ministry that accompanied the other records at issue. As well, I rely on the specific measures that the affected party has taken to maintain the confidentiality of the records, including:

- storing the information on a private secured network drive,
- limiting access to the records to a limited number of approved employees, and
- requiring its employees to sign a confidentiality agreement and to comply with its information security and protection policy.

[47] I find that the affected party has demonstrated that the records at issue were:

- communicated to the ministry by the affected party on the basis that they were confidential and were to be kept confidential,
- treated consistently by the affected 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.

[48] Therefore, I am prepared to accept that part 2 of the test under section 17(1) has been met as the records were supplied by the affected party to the ministry with a reasonable expectation of confidentiality.

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

Part 3: whether there is a reasonable expectation harm with disclosure

[49] Under part 3 of the test, the affected party, as the party resisting disclosure, was required to provide detailed evidence to establish that, with disclosure of the records there is a reasonable expectation that one or more of the harms specified in paragraphs (a) to (c) of section 17(1) will occur.

Representations

[50] The ministry and the appellant both claim that the harms test in part 3 of the test under section 17(1) has not been met, whereas the affected party submits that this test has been met.

[51] The ministry states, regarding section 17(1)(a), that it is unable to determine how competitors, or another entity, could use the specific information at issue in the records in a manner that could reasonably be expected to prejudice significantly the competitive position of the affected party or another entity. The ministry also submits that it cannot determine how competitors, or another entity, could use the specific information at issue in a manner that could reasonably be expected to interfere significantly with the contractual or other negotiations of the affected party or another entity.

[52] The ministry states that the IPC has repeatedly held that the "competitive position" mentioned in section 17(1)(a)[14] does not include harm to a litigant's competitive position or the possibility of damages in civil litigation.[15]

[53] The ministry states that past IPC orders have found that section 17(1)(b) does not apply where a ministry has the authority to compel the supplying of information, even if the ministry would prefer to have the information supplied voluntarily.[16] The ministry submits that given its regulatory mandate and its authority under the the *Environmental Protection Act* (the *EPA*) to require that this information be provided by the affected party, disclosure of the records at issue could not reasonably be expected to 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. It states:

> In choosing to participate in activities regulated by the *EPA*, the [affected party][17] must adhere to the regulatory framework governing those activities. In this case, in order to engage in a wind project, the [affected party] is required to apply for and obtain a renewable energy approval

[14] The ministry mistakenly referred to section 17(1)(c) instead of section 17(1)(a). Section 17(1)(a) refers to a "competitive position."
[15] The ministry relies on Orders MO-1481, MO-1706, PO-1912, PO-2043, PO-2293, PO-1805, PO-2018, PO-2184, and PO-2490.
[16] The ministry relies on Orders PO-1666, PO-1803, PO-2629, PO-3459, and PO-3916.
[17] The ministry's representations refer to the "third party," but this is the same company referred to elsewhere in this order as the "affected party."

> (REA) from the Director, and must construct and operate the wind facility in accordance with the REA and the conditions imposed under it.
>
> Condition E of the REA requires the [affected party] to carry out an acoustic audit related to the transformer substations at the wind facility and to submit an acoustic audit report to the ministry. This condition was included to require the [affected party] to gather accurate information so that the environmental noise impact and subsequent compliance with the *EPA*, the REA regulation, the ministry's Noise Guidelines for Wind Farms, and the REA could be verified.
>
> The records at issue contain the [affected party's] answers to technical questions posed by the ministry in respect of the acoustic audit results, including as-built coordinates and technical design details for the transformer substations, to assist the ministry with determining whether the wind facility is operating in compliance with legal and regulatory requirements. Accordingly, where the third party is required by law to provide the ministry with information such as that found in the records at issue for compliance purposes, it is the ministry's view that disclosure of this information cannot reasonably be expected to result in similar information no longer being so supplied.

[54] The ministry states that, regarding section 17(1)(c), it is unable to determine how competitors or any other entity could use the specific information in the records in a manner that could reasonably be expected to result in undue loss to the affected party or undue gain for its competitors or any other entity.

[55] The affected party provided both confidential and non-confidential representations on part 3 of the test under section 17(1). In its non-confidential representations, the affected party states that the correspondence contained in the records was prepared specifically for the use of the ministry to determine compliance with the REA scheme. It states:

> The measured acoustic data and information contained in the records is technical and complex. It is not presented in a way that can be easily interpreted by the general public. Measurements are taken at different locations and the measured values need to be analysed by professional engineers in order to assess compliance with the sound level limits defined in the relevant REA permit. Members of the public do not have the proper training nor possess the full knowledge to properly comprehend or use this information.
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> …Disclosure of the measured acoustic data contained in the records without knowledge of the Emission Reports present on [the affected party's] website, and without full understanding of the compliance assessment process could lead to an inference that the transformers at the [wind farm] are non-compliant with the requirements of [the affected

> party's] REA permit or cast doubt on [the affected party's] compliance with its REA permit. This inference would result in unfairly exposing [the affected party] to harms, including potential court actions based on incomplete, inaccurate and misleading technical data contained in the letter, that [the affected party] would have to defend at the expense of other business opportunities. Misinterpretations of the specific information contained in the records could also be used by [the affected party's] competitors to cast doubt on [its] compliance with its REA, resulting in loss of business to it. In the highly competitive energy industry, a perception of a lack of compliance with regulations could reasonably be expected to significantly prejudice [the affected party's] competitive position.

[56] The affected party acknowledges that it is required to provide the ministry with requested information to comply with the conditions of its REA permit; however, it submits that without the assurance that this confidential information will be kept confidential, fewer organizations will be likely to participate in the REA scheme at all. Given that the REA scheme is intended to promote successful renewable energy projects in the province, it submits that it is in the public interest for this program to continue with full industry participation.

[57] The appellant did not provide specific representations on section 17(1), including on the harms part of the test, other than to agree with the ministry that section 17(1) does not apply to exempt the records. The appellant's representations, instead, focus on how she believes that the affected party is not in compliance with the REA permit requirements.

[58] In reply, the affected party claims that the appellant is mistaken about the compliance issue and reiterates its submission as to how the records may be misnterpreted.

Analysis/Findings re part 3

[59] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[18]

[60] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[19] 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 records themselves and/or the surrounding circumstances. However, parties

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[18] *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616, *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.

[19] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), cited above.

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.*[20]

[61] The records are email correspondence and attachments regarding the affected party's compliance with the REA permit under the *EPA*. Besides two pages of emails, the records include a seven-page letter from the affected party to the ministry, which includes a number of tables and attaches an additional table and some photographs and drawings.

[62] The records at issue contain the affected party's required answers to technical questions posed by the ministry to assist the ministry with determining whether the wind facility is operating in compliance with the legal and regulatory requirements of the REA permit.

[63] The affected party's only reference to specific information in the records is found in the affected party's confidential portion of its initial representations at paragraph 29. The information referred to is the commercial information in the records about a supplier of the affected party and contains details about the affected party's and the supplier's relationship. This information is found in the letter from the affected party to the ministry in the last sentence at the bottom of page 579 and the first six sentences at the top of page 580.

[64] For the following reasons, I find that part 3 of the test under section 17(1) has been met for a portion of the records that specifically refer to the information in paragraph 29 of the affected party's confidential representations.

[65] Based on my review of this portion of the records and the affected party's confidential representations, I find that disclosure of this information in pages 579 and 580 of the records could reasonably be expected to interfere significantly with the affected party's contractual negotiations under section 17(1)(a). The affected party has provided me with the detailed evidence in its confidential representations as to how the harms set out in section 17(1)(a) could reasonably be expected to occur if this information is disclosed. Therefore, I find that part 3 of the test has been met for this information and that section 17(1)(a) applies to it. I will order it withheld.

[66] However, I find that the remaining information in the records at issue does not meet part 3 of the test under section 17(1)(a) to (c). I do not accept the affected party's submission that the harms in part 3 could reasonably be expected to result from the disclosure of the remaining information at issue in the records on the basis that it is incomplete or is complex or could be subject to misinterpretation, thereby resulting in loss of business to the affected party or it being subject to possible court actions.

[67] This information details noise level compliance data for transformers at the wind farm and is required to be provided by all wind farm operators in order for third parties to obtain and maintain REA permits to operate wind farms. I do not agree that this

[20] Order PO-2435.

information not being fully understood on its own without clarification from publicly available information is so damaging to the affected party such that disclosure could reasonably be expected to result in the harms set out in section 17(1).

[68] As specified by the ministry, as a participant in activities regulated by the *EPA*, the affected party is required to apply for and obtain a REA permit to operate the wind farm. The REA permit requires the affected party, as an operator of the wind farm, to carry out an acoustic audit related to the transformer substations at this facility and to submit an acoustic audit report to the ministry. The records contains the information required by the ministry about the acoustic audit results conducted by the affected party at the wind farm.

[69] The affected party is concerned that the information in the records may be incomplete and misunderstood if disclosed. However, as indicated by the affected party itself, the information can be clarified with reference to its publicly available information or by the affected party providing an explanation of what the information in the records means, if requested to do so. Therefore, any incomplete information in the records can be so clarified.

[70] With respect to the affected party's concern that it may be subject to civil lawsuits, previous IPC orders have found that section 17(1)(a) was not intended to protect a litigant's position in civil litigation.[21]

[71] In Order PO-2490, the adjudicator found that section 17(1) was not intended to protect a litigant's competitive position in civil litigation. He noted that previous orders of the IPC 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)*.[22]

[72] The adjudicator relied on the finding in Order PO-2293, where former Assistant Commissioner Tom Mitchinson stated:

> Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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* [Orders PO-1805, PO-2018, PO-2184, and MO-1706]. [Emphasis added.]

[73] I find too that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government

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[21] See Orders PO-2490, PO-3937, *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*) (*Boeing*) [2005] O.J. No. 2851 (Div. Ct.).
[22] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.

institution, and is not designed to protect a litigant's position in civil litigation, as is claimed by the affected party.

[74] As noted above, only paragraph 29 of the affected party's representations specifically identifies any of the information in the records at issue. The affected party has not provided other representations specific to particular portions of the records at issue. Above, I found that the information referred to in paragraph 29 of the affected party's representations (found at the last sentence at the bottom of page 579 and the first six sentences at the top of page 580) is exempt under section 17(1). However, based on my review of the remaining information in the records and the parties' representations, I find that the affected party has not established a risk of harm under sections 17(1)(a) and (c) that could reasonably be expected to occur from disclosure of the remaining information at issue in the records.

[75] The affected party has also argued that disclosure of the information at issue in the records could result in similar information no longer being supplied to the ministry. The affected party has not indicated what specific information in the records is of concern to other renewable energy provider organizations such that the harms in section 17(1)(b) could result.

[76] The information at issue in the records was provided by the affected party in order to comply with the terms of the REA permit granted to it by the ministry. I do not accept the affected party's argument that fewer organizations will be likely to participate in the REA scheme where it is in the public interest that similar information continue to be so supplied. I find that section 17(1)(b) also does not apply, because the information at issue is information that wind energy operators are required to provide to maintain their REA permit to operate a wind farm.

[77] Accordingly, I find that disclosure of the records, other than the last sentence at the bottom of page 579 and the first six sentences at the top of page 580, could not reasonably be expected to result in any of the harms set out in section 17(1)(a) to (c) as claimed by the affected party. Therefore, I will order the records at pages 577 to 594 disclosed, except for the identified portions of pages 579 and 580 that I have found exempt under section 17(1).

Issue B: What time extension is reasonable for the ministry to conduct the third search for records?

[78] As set out above, in response to the appellant's request, the ministry conducted a search for records and located over 1,200 pages of records and provided the appellant with access decisions for these records. It then conducted a second search and did not locate any additional records.

[79] During the mediation stage of this appeal, the ministry agreed to conduct a third search for responsive records, but did not provide the mediator with an end date for the completion of this third record search that it indicated was then underway.

[80] Therefore, the issue as to what length of time extension is reasonable for the ministry to conduct and complete the third search for responsive records was added as an issue to this appeal, and to issue an access decision for any further records it locates

[81] Time extensions are governed by section 27(1) of the *Act,* which states:

> A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
>
> > (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
> >
> > (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

[82] Section 26, which is referred to in section 27, reads:

> Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,
>
> > (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
> >
> > (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

[83] Factors that may be considered in determining the reasonableness of the time extension include:

> Section 27(1)(a):
>
> - the number of records requested;
> - the number of records the institution must search through to locate the requested record(s);
> - whether meeting the time limit would unreasonably interfere with the operations of the institution;
>
> Section 27(1)(b):

- whether consultations outside the institution are necessary to comply with the request and if so, whether such consultations could not reasonably be completed within the time limit.

Representations

[84] During the mediation stage of this appeal, the ministry agreed that it would continue its third record search for responsive records even as the appeal was transferred to the adjudication stage of the appeal process.

[85] In providing representations on the time extension for the third search, the ministry was asked to provide a written summary of all steps taken thus far and those it thought would be necessary for it to conduct the third search. In particular, in relation to the third search, the ministry was asked to provide representations on:

1. What records is it searching for in the third search?

2. Please provide details of any searches carried out and still to be carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches?

3. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

4. Do responsive records exist which are not in the institution's possession? Did the institution search for those records? Please explain.

[86] The ministry provided its representations on May 3, 2021 and stated that it anticipated it would take an additional seven months to get to the point of issuing a final access decision. The ministry proposed to issue this final access decision no later than December 10, 2021. When contacted in January and February 2022 by the IPC, the ministry indicated that it had not been working on completing the search since it provided its representations on May 3, 2021.

[87] Therefore, the December 10, 2021 date had passed and the ministry was not in a position to issue a final access and fee decision. Although asked, the ministry did not respond as to when it now expected to complete its search and issue an access decision.

[88] In its May 3, 2021 representations, the ministry provided the following reasons for its proposed seven-month time extension. The ministry explained that in its original searches (the first and second searches) it tried to combine the appellant's seven parts of the request, but this led to it missing records in its searches. The ministry states that it is now proposing to fulfil each part of the request individually in a secondary search of the five program areas and locations, which include the Hamilton District Office,

Niagara District Office, West Central Regional Office and the Client Services and Permissions Branch and will include multiple staff in each region or branch office.

[89] The ministry states that it has completed a search for a representative sample of records through these five program areas and locations to ascertain how much time and resources would be required to locate, compile and review the records. It states that in this search for a sample of records, it located electronic records in shared drives, emails, and personal drives of environmental officers involved in the wind farm.

[90] The ministry states that approximately 29,000 pages of records and the 654 sound recordings (making up 202 hours of audio files) that it located in its representative sample search will require a review to see if they are responsive to the request.

[91] The ministry states that the number of records from the relevant individuals that needed to be searched was extensive, because:

- This request relates to the topic of wind farms which can generate a great deal of interest,
- The [name] wind farm file spans multiple years, and
- The request is for all records in the requested seven specific categories of records.

[92] The ministry has estimated that it will take approximately 29 hours to locate all of the responsive records related to the seven-part access request. In addition to 29 hours to search for records, the program areas and locations have estimated that it will take approximately five minutes per 200-page batch of records to complete the search and compile the records. As the volume of records is estimated to be 29,000 pages, the ministry estimates that it will take 12 hours just to compile the records for review.

[93] The ministry estimates that the required staff would have a maximum of two hours a day to dedicate to the searching and pulling of records in order to avoid unreasonably interfering with the ministry's operations. Considering the estimated 41 hours to search and compile the records, the ministry submits that it will take at least 21 days to retrieve all the records if there are no technical issues or delays with staff computer systems.

[94] The ministry states that the over 600 audio recordings that are responsive to the request in this appeal are sound recordings near wind turbines, and in past files of this type, audio recordings have captured conversations that were held in the vicinity of the recording. As such, the ministry will need to listen to the recordings to ensure they contain no personal information.

[95] In addition to the timeline for retrieving and reviewing records, the ministry states that a large portion of the records responsive to this request was supplied to the

ministry by third parties in relation to wind farms. Therefore, the ministry states that it will be required to consult affected third parties, as required under section 28 of *FIPPA*, which will further delay the ministry's response.

[96] In response to the ministry's May 3, 2021 representations, the appellant states that she has been burdened for more than two years by the institutional delays from the ministry, and she proposed that the ministry organize the release of all documents no later than October 15, 2021 and the audio files by December 10, 2021. As I noted above, the ministry has not accomplished this, though it said in its representations that it would do so by the December 10, 2021 date.

Analysis/Findings

[97] Despite the ministry indicating in its representations a specific date for issuing a final access and fee decision for its third search, and committing to continuing the search during the adjudication stage of the appeal, the ministry has not done so.

[98] What the ministry has done is complete a search for a representative sample of records. It should therefore be in a position to issue a fee estimate along with an interim access decision in respect of records it expects to locate in its third search.

[99] Under section 57(3) of *FIPPA*, an institution must provide a fee estimate where the fee is more than $25. Where the fee is $100 or more, which in this case the fee for records responsive to the third search will be, the ministry may choose to do all the work necessary to respond to the request at the outset. If so, it must issue a final access decision.

[100] Alternatively, where the fee is $100 or more, the ministry may choose *not* to do all of the work necessary to respond to the request, initially. Instead, the fee estimate may be based on a review of a representative sample of the records and/or the advice of knowledgeable institution staff that are familiar with the type and content of the records. In this case, it must issue an interim access decision, together with a fee estimate.[23]

[101] Because the fee will be more than $100, the ministry may also require the appellant to pay a deposit equal to 50% of the estimate before it takes any further steps to respond to the request (see section 7 of Regulation 460).[24]

[102] The purpose of the fee estimate, interim access decision and deposit process is to provide a requester, in this case the appellant, with sufficient information to make an informed decision as to whether or not to pay the fee and pursue access.[25] The fee

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[23] Order MO-1699.

[24] In circumstances where the institution requires an extension of time to respond to the access request and it has decided to issue an interim access decision, it is advisable to set out the number of additional days that the institution will require and the reasons for the time extension in the interim access decision [Order PO-2634].

[25] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.[26] As well, the purpose of the fee estimate is to protect the institution from expending undue time and resources on processing a request that may ultimately be abandoned.[27]

[103] Given the scope of the third search and the very large number of potentially responsive records, I find that the ministry should not be put in a position to now expend significant ministry resources to locate and review all of the responsive records in order to issue a final access and fee decision. It would be unreasonable in the circumstances to require the ministry to complete the third search for records and then have the appellant decide not to pay the fee or pursue access. Conversely, it would be also unreasonable for the appellant to wait any longer to obtain information about what records are anticipated to be located by the third search and the estimated fee to locate these records.

[104] In its representations, the ministry has provided extensive details as to the searches it has undertaken to locate a representative sample of records of approximately 29,000 pages of records and the 654 sound recordings (making up 202 hours of audio files). It has also provided details as to what it estimates is the time it will require to locate and prepare the records from its third search for records for disclosure.

[105] Given the very large volume of audio and other records that are likely to be responsive to the appellant's seven-part access request, I accept that it will take a significant amount of time and ministry resources for the ministry to complete the third search and issue a final access and fee decision. However, since the appellant may reduce the scope of her request after getting the fee estimate, I will not make any order at this time about whether a time extension for issuing that final access decision is appropriate.

[106] In this appeal, the ministry is now in a position to issue an interim access and fee estimate decision for its third search for records. This will allow the appellant to review the ministry's interim access and fee estimate decision and make an informed decision as to whether or not to pay the fee deposit and pursue access.

[107] Therefore, I find that in the circumstances of this appeal, it would be appropriate for the ministry to issue an interim access and fee estimate decision, and I will order that it do so. The appellant will then need to review the fee estimate and interim access decision, and decide whether to pursue access and pay the deposit. It is at this stage that the appellant may decide to narrow her request in order to reduce fees.

[108] As I noted above, an interim access decision is based on a review of a representative sample of the requested records and/or the advice of an individual who

[26] Order MO-1520-I.
[27] Orders MO-1699 and PO-2634.

is familiar with the type and content of the records.[28] An interim access decision must be accompanied by a fee estimate and must contain the following elements:[29]

- a description of the records,
- an indication of what exemptions or other provisions the institution might rely on to refuse access,
- an estimate of the extent to which access is likely to be granted,
- name and position of the institution decision-maker,
- a statement that the decision may be appealed, and
- a statement that the requester may ask the institution to waive all or part of the fee.[30]

[109] Once the appellant has received the fee estimate, (and paid a deposit if requested), the ministry must complete its search and issue a final access and fee decision.

[110] Accordingly, I will order the ministry to issue an interim access and fee estimate decision.

[111] As noted above, this interim access and fee estimate decision must be sufficiently detailed and include information about the records the ministry has located in the representative sample and those it anticipates locating in completing the third search. An index of records located by the ministry thus far in its representative sample would be helpful in allowing the appellant to make a decision in pursuing access. The ministry should also provide the appellant with details of exemptions or exclusions that may apply.

[112] If the appellant does not appeal this interim access and fee estimate decision, the appellant will be required to pay a deposit equal to 50% of the fee estimate amount set out in this decision before the ministry takes any further steps to respond to the request.

[113] This will avoid the ministry expending any further time and resources on processing the third search for records after issuing the interim access and fee estimate decision, which may ultimately not be pursued by the appellant. As well, the appellant may decide to change the scope of the request after the ministry issues its fee estimate and interim access decision.

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[28] An interim access decision is not a final decision on access, and the institution should make this clear to the requester.
[29] This office may review an institution's interim access decision and determine whether it contains the necessary elements. This office will not determine whether or not the exemptions or other provisions the institution cites actually apply to the records until the institution issues a final access decision.
[30] Orders 81, MO-1479, MO-1614 and PO-2634.

[114] In conclusion, as the ministry has already undertaken all of the necessary work to issue an interim access and fee estimate decision concerning its third search for records, I will order it to issue this decision without recourse to a time extension under section 27 of *FIPPA*. Therefore, I will not, in this order, grant the ministry a time extension to complete its third search for records and issue a final access decision. This will prevent the ministry from allocating resources to further pursue a search for records that the appellant may no longer want access to. As well, the appellant will not be waiting any longer for information about the types and quantity of records expected to be located as a result of the ministry's third search for responsive records.

ORDER:

1. I order the ministry to deny access to the last sentence at the bottom of page 579 and the first six sentences at the top of page 580 of the records.

2. I order the ministry to disclose to the appellant by **April 25, 2022** but not before **April 19, 2022** the remaining portions of pages 577 to 594 of the records.

3. I order the ministry to issue an interim access and fee estimate decision regarding its third search for records to the appellant, without recourse to a time extension under section 27, treating the date of this order as the date of the request.

Original Signed by: March 17, 2022

Diane Smith
Adjudicator