Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2491

Appeals PA-050251-1, PA-050228-1, PA-050278-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received three separate requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a commercial fishing agreement between the Province of Ontario as represented by the Ministry and two First Nation groups.

The Ministry denied access to the responsive record in all three requests pursuant to section 18 (economic and other interests) of the *Act*, and all of these decisions were appealed to this office. During the mediation process of the first request to be appealed, the Ministry raised section 15 (relations with other governments) of the *Act* as an additional discretionary exemption. However, in its representations, the Ministry did not refer to this exemption. Having reviewed the record at issue, I am not satisfied that section 15 applies and I will therefore not consider it further in this order. The appellant in that appeal added the possible application of the public interest override in section 23 of the *Act* and as a result I added section 23 as an issue in the appeal.

I began my inquiry by sending a Notice of Inquiry combining the three appeals to the Ministry as well as to the two identified First Nation groups as affected parties with an interest in the records. I received representations from the Ministry in two forms, a confidential and non-confidential version. I did not receive representations from the affected parties. I then sent a Notice of Inquiry to the three appellants and included a copy of the Ministry's non-confidential representations. All three appellants responded with representations.

RECORDS:

The record at issue is a commercial fishing agreement, executed in July of 2005, between two First Nation groups and the Province of Ontario, as represented by the Ministry. The document is 8 pages in length, with three attachments totaling an additional 10 pages.

DISCUSSION:

BACKGROUND

The Ministry manages the fishing waters of Ontario, on behalf of the province, by licence under the *Ontario Fishery Regulations* and the *Aboriginal Communal Fishing Licence Regulations* of the federal *Fisheries Act*, with the licence issuance process supported by the provincial *Fish and Wildlife Conservation Act*.

The Ministry has entered into negotiations with First Nations groups to ensure that the First Nations fish in a licensed manner. While the Ministry reports that the majority of First Nations have accepted Ontario Commercial Fishing Licenses (OCFL) and Aboriginal Communal Fishing Licenses, it also asserts that an increasing number of individual First Nation OCFL licence fishers have been refusing to accept their licence, asserting their Aboriginal treaty rights.

Both the Ministry and First Nations groups have continued to work towards agreements which are agreeable and sustainable by both sides while still protecting fishing resources.

With respect to this appeal, a three year commercial fishing agreement was reached between the province and the two First Nations in June, 2000. This agreement expired and has subsequently been replaced by a new agreement, which is the subject of this appeal.

ECONOMIC AND OTHER INTERESTS

The Ministry has claimed the application of the discretionary exemptions in section 18(1) (e) and (g) to exempt the fishing agreement which is the record at issue in this appeal.

Section 18(1) (e) and (g) state:

> A head may refuse to disclose a record that contains,
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Section 18(1)(e): positions, plans, procedures, criteria or instructions

In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions;

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations;

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution. [Order PO-2064]

Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].

Representations

In its representations, the Ministry argues that this agreement will be used to further future negotiations with First Nation groups:

> The Ministry is engaged with a number of First Nations with respect to fisheries. Existing agreements are up for renegotiations and efforts are underway with respect to negotiations to regulate other First Nation fisheries. Thus the latter two points of the test are met. While commercial fishing agreements are negotiated on a case by case basis, however as indicated above, there are continuum of types of agreements. The agreement reached with these First Nations sets out a potential bottom line for the Ministry in the continuum of agreements. Its terms and conditions will be referenced or considered by the Ministry in its negotiations of these other agreements. Release of the material will compromise the Ministry negotiating position with respect to commercial fishing agreements with this and other First Nations. Thus the first two parts of the test have been met.

In representations submitted on behalf of two of the appellants, it is pointed out that negotiations of the type which led to the agreement at issue in this appeal are often conducted in an open and inclusive public manner, suggesting that the Ministry, in most other cases, seeks public input as opposed to being concerned about negative issues that disclosure may cause. The appellant describes the Ministry's prior public consultation practice:

> [The Ministry] itself has demonstrated many times in the past, in good faith, public participation with respect to proposed changes in the management of Ontario's fisheries resource. For example, it is not unusual for outdoor clubs to be consulted through open house meetings, written submissions and via the Environmental Bill Registry.
>
> Also in support of public consultation, I refer you to [the Ministry's] publication – *'A New Ecological Framework for Recreational Fisheries Management in Ontario'*. Under Enhanced Stewardship, it states, "Stewardship of the resource is a key component of fisheries management…the [Ministry] will be encouraging more public involvement in fisheries management with a wide range of stakeholders."

The other appellant made reference to promises made by the Ministry to be open about the negotiations which took place:

> On June 13, 2005, the Hon. Minister David Ramsey committed in the Parliament that his people negotiating this agreement would meet with local community and area fishing clubs in regards to the negotiations taking place. When this meeting was called on July 12, 2005, it took six or seven [Ministry] personnel to tell the group that an agreement had been reached and was on the Minister's desk to be signed, but they could not reveal any details, with the exception that a brief public summary would be made available in two to three weeks. This summary is still not available nine months later.

Findings

I have carefully examined the record at issue and the representations of the parties and have determined that section 18(1)(e) is not applicable to the agreement. It is clear that the negotiations which led to this agreement have concluded and that the record is in fact a final agreement.

In Order PO-2034, Adjudicator Laurel Cropley stated the following:

> Previous orders of the Commissioner's office have defined "plan" as "…a formulated and especially detailed method by which a thing is to be done; a design or scheme"
>
> In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding.

In Order PO-2034, Adjudicator Cropley also quotes from page 323 of the Williams Commission Report as helpful in understanding the Legislature's intent in including this section of the *Act*:

> [T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other government. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.

As stated above, the record at issue is a final agreement. As such, I am satisfied that it cannot be characterized as a pre-determined course of action or way of proceeding. In addition, disclosure of the final agreement cannot be said to disclose the government's bargaining strategy or the

instructions given to the officials who carried out the negotiations. The Ministry undoubtedly had a strategy going into the negotiations and elements of that strategy may be reflected in the agreement that was eventually signed with the First Nations. However, as with most negotiated accords, the agreement in this case represents the culmination of the negotiations and will reflect the give and take of the negotiation process. I am therefore satisfied that the agreement does not contain positions, plans, procedures, criteria or instructions to be applied to negotiations and that the first two parts of the test under section 18(1)(e) have not been met.

With respect to parts 3 and 4 of the test, it is my view that future agreements may have similar issues and discussions, but they will result from separate and distinct negotiations and culminate in separate and distinct agreements, and accordingly, I also find that the Ministry has failed to satisfy these parts of the test under section 18(1)(e).

I find support for this approach in Order 87 of this office. Former Commissioner Sidney B. Linden reviewed the application of section 18(1)(e) to completed negotiations and stated that:

> Turning to the exemption claim under subsection 18(1)(e), this subsection refers to "positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario" (emphasis added). In my view, the exemption is not available to prevent the release of these types of records in situations where they have been applied to negotiations between the government and third parties (emphasis added). Furthermore, to interpret the phrase "or to be carried on by or on behalf of an institution of the Government of Ontario" to mean any possible future negotiations including those that have not been presently commenced or even contemplated, is in my view, too wide. My conclusion is therefore that in the circumstances of this appeal, negotiations between the institution and Toyota have been completed and any positions, plans, procedures, criteria or instructions applied to these negotiations are no longer exempt from disclosure under subsection 18(1)(e).

With respect to the argument that the disclosure of the agreement will affect a "continuum of agreements" underway with other parties, I am not satisfied that disclosure of this completed agreement could have an adverse affect on other similar negotiations. As noted above, inferences may be drawn from the agreement about the government strategy for agreements negotiated with other First Nations. However, each such negotiation will have its own set of unique circumstances leading to distinctly different agreements. Any such negative impact on future negotiations is speculative at best. In any event, I have concluded that the ministry has failed to demonstrate that the completed agreement contains "positions, plans, procedures, criteria or instructions", and that therefore, parts one and two of the test under section 18(1)(e) have not been met. I therefore find that section 18(1)(e) does not exempt the records at issue from disclosure.

Section 18(1)(g): proposed plans, policies or projects

In order for section 18(1)(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or

   (ii) undue financial benefit or loss to a person.

[Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

For section 18(1)(g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

In its representations, the Ministry states that it is continuing to work towards a fully regulated fishery. Commercial Fishing Agreements and Aboriginal Commercial Fishing Licences will be key tools in these efforts. The Ministry further states:

> All of these agreements will require renegotiation over the next 12 months. In addition to renegotiation of existing agreements, the Ministry is continuing in its efforts to ensure that all aboriginal fisheries are regulated within the provincial scheme. There is no special funding available to the Ministry for First Nation commercial fishing agreements. All commitments thereby come from existing program budgets of pressure funding which impacts other program areas. As a flat line funded Ministry MNR is under significant financial pressure to deliver core programs in the face of increasing operating costs.

The Ministry also points to a previous order of this office with regard to a very similar record:

> In Order P-772, the Commission found that the predecessor agreement was part of a project or initiative of the ministry to resolve the fishery or at least part of the fishery issues with a number of First nations and that draft agreements reflecting the Ontario's Government's negotiation strategy with four First Nations regarding fishing rights, harvest quotas, and conservation constitutes a "planned

> undertaking" and therefore a project under this provision. It is the position of the Ministry that logic dictates that a similar conclusion applies to this agreement and that the first part of the test has been met.
>
> …

With respect to the harm that would result from the disclosure of the agreement, the Ministry made the following representations:

> The Ministry's negotiations with the First Nations are extremely sensitive in nature and the level of trust which has developed between the parties has only been achieved at great effort over time. Disclosure of the draft agreements would undermine this relationship and would likely result in the breakdown of these negotiations.
>
> …
>
> The failure of these negotiations and/or negotiations with other First Nations would likely result in undue loss to members of the various First Nations. Without the enactment of binding agreements, (1) there would continue to exist uncertainty about the rights of aboriginal peoples to fish in the designated areas, (2) individuals would continue to run the risk of being charged under the Ontario Fishery Regulations and (3) it would be difficult for commercial fishing ventures operated by native persons to obtain sources of financing.
>
> …
>
> Disclosure of this agreement could reasonably be expected to be injurious to the financial interest of the Government of Ontario or the ability of the government of Ontario to manage the economy of Ontario. Disclosure could prejudice the economic interests of the government in that information relates to positions, plans, procedures, criteria or instructions to be applied to negotiations carried on or to be carried on by the Government of Ontario. Commercial fishing agreements are negotiated on a case by case basis. Release of the material will compromise the MNR negotiating position with respect to commercial fishing agreements with this and other First Nations.

Findings

Having reviewed the representations of the parties, and the order referred to by the Ministry, I do not agree with the Ministry's position. It is important to note that the records dealt with by former Assistant Commissioner Glasberg in Order P-772 were not a final agreement but were in fact draft agreements in which the negotiations were still ongoing. Assistant Commissioner Glasberg specifically stated:

> In order for the first part of the section 18(1)(g) test to be satisfied, the undertaking in question must be a **proposed project** and not one that has already been completed. On the basis that the relevant negotiations are ongoing and have not yet been completed, I find that they collectively fall within the definition of a proposed project for the purposes of the Act. [Emphasis in original]

In the representations quoted above, the Ministry refers to the potential breakdown of negotiations with the two First Nations should the draft agreement be disclosed. However, as has been noted, the record in this appeal is a final agreement. No negotiations between the signatories in terms of completing this agreement are therefore currently ongoing. Disclosure of this record would not constitute premature disclosure since the terms of the agreement have already been reached. Unlike the records in Order P-772, the record in this appeal is neither a "proposed project" nor a "planned undertaking".

In any event, the Ministry's representations fall short of the detailed and convincing evidence necessary to establish the section 18(1)(g) harms. With regard to the test requiring undue financial benefit or loss to a person, the Ministry appears to be relying on the fact that negotiations are currently ongoing, which they are not. The Ministry also suggests that the agreements will require further negotiations within 12 months, but the record itself lists a termination date several years off, as is the projected date for review of the agreement.

In detailing the harms that would result from disclosure of the agreement, the Ministry submits that disclosure would lead to the termination of negotiations with other First Nations, which would result in economic harm to those First Nations and the government of Ontario. However, the Ministry provides no evidence, beyond conjecture, that disclosure could reasonably be expected to have this effect. In fact, it is equally plausible to argue that disclosure of a finalized agreement might inform and provide guidance to other negotiations with First Nations, leading to the successful completion of those negotiations.

Therefore, I am not persuaded that disclosing this agreement could reasonably be expected to result in the "premature disclosure of a pending policy decision" or "undue financial loss or benefit", as required in order to satisfy the requirements of section 18(1)(g).

Having found that the agreement which is the record at issue does not qualify for exemption under section 18(1)(e) or (g), I do not need to discuss the section 18(2) exceptions nor is it necessary for me to consider the possible application of the public interest override found at section 23 of *the Act*.

ORDER:

1. I order the Ministry to disclose the record to the appellants by **September 5, 2006** but not before **August 31, 2006**.

2. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the appellant.

Original signed by: July 31, 2006
Brian Beamish
Assistant Commissioner