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

ORDER PO-2645

Appeal PA07-110

Ministry of Agriculture, Food and Rural Affairs

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NATURE OF THE APPEAL:

The Ministry of Agriculture, Food and Rural Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a Nutrient Management Strategy filed by the owners of a farm.

The Ministry located the requested record. It then notified two affected parties pursuant to section 28 of the *Act* that it had received a request for this record and invited them to provide representations as to whether it should be disclosed. The first affected party is the farm owners. The second affected party is an individual named in the Nutrient Management Strategy.

The Ministry invited the two affected parties to provide representations as to whether the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act* might apply to the record or a part of the record.

Only the farm owners responded to the notice issued by the Ministry. In their response letter, the farm owners state that they oppose disclosure of the Nutrient Management Strategy and submit that sections 17(1)(a), (b) and (c) and sections 21(2)(h) and (i) of the *Act* apply to this record.

After considering the farm owners' representations, the Ministry issued decision letters to both the requester and the two affected parties, stating that it had decided to disclose the Nutrient Management Strategy in full to the requester.

The farm owners (now the appellants) appealed the Ministry's decision to this office, which appointed a mediator to assist the parties in resolving the issues in the appeal. This appeal was not settled in mediation and was moved to the adjudication stage of the appeal process.

At the outset, I reviewed the record at issue (the Nutrient Management Strategy) and noted that it was prepared by a consulting company. I concluded that both the consulting company and the other individual notified by the Ministry were affected parties in this appeal.

I decided to start my adjudication of this appeal by issuing a Notice of Inquiry to the appellants, the Ministry and the two affected parties. I invited these parties to submit written representations on all issues set out in the Notice of Inquiry. I received representations from the appellants and the Ministry but not from the affected parties. After reviewing these representations, I concluded that it was unnecessary to seek representations from the requester.

RECORDS:

The record at issue is a Nutrient Management Strategy.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in

section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

To qualify as personal information, the information must be about the 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 [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

In their representations, the appellants do not specifically address whether any of the information in the Nutrient Management Strategy constitutes their personal information. However, they claim that "the personal information supplied by ourselves was confidential" which indicates that they believe that at least some of the information in this record is their personal information.

The Ministry submits that the Nutrient Management Strategy does not contain any personal information. It asserts that this record contains business information relating to "entities operating farm-based businesses or consulting services." To support its submissions on this point, it cites Order PO-2295, in which former Assistant Commissioner Tom Mitchinson found that the information in a Nutrient Management Plan relating to the property owners of a farm constituted business information rather than personal information.

I have carefully reviewed the Nutrient Management Strategy at issue in this appeal and agree with the Ministry that it contains business information rather than personal information. This record contains information relating to several individuals and companies, including:

- The farm owners for whom the Nutrient Management Strategy was prepared
- An individual (farm owner) named in the Nutrient Management Strategy who received outgoing transfers of manure from the farm owners
- The consulting company which prepared the Nutrient Management Strategy
- Two engineering firms

In determining whether information relating to an individual is "personal information," the appropriate approach is to look at the *capacity* in which the individual is acting and the *context* in which their name appears. This was enunciated in Order PO-2225, in which former Assistant Commissioner Mitchinson considered the definition of "personal information" and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. Assistant Commissioner Mitchinson posed two questions that help to illuminate this distinction:

> … the first question to ask in a case such as this is: *"in what context do the names of the individuals appear"*? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> ....
>
> The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"*? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

Former Assistant Commissioner Mitchinson asked himself the same two questions in Order PO-2295, for the purpose of assessing whether the information in a Nutrient Management Plan (NMP) relating to the property owners of a farm constituted business or personal information. With respect to the first question *("In what context do the names of the individuals appear?"*), he found that the names of the farm owners appeared in a business context:

> The property owners are clearly engaged in business activity. The building they are seeking approval to construct is a 3000-hog finishing barn, which would appear to me to represent a significant commercial undertaking. There is nothing inherently personal about the context in which the NMP was prepared or used …
>
> I acknowledge that the property owners may be engaged in what they characterize as a "family farm" operation, but this does not alter my finding. Fundamentally, both large and small farming operations can be said to be operating in the same "business arena", albeit on a different scale …

With respect to the second question posed in Order PO-2225 *("Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?"*), he found that there was nothing present in the circumstances of that case that would allow the information in the NMP to "cross over" into the personal realm. As a result, he concluded that the NMP contained business information rather than personal information relating to the farm owners:

> The fact that the property owners operate a large hog finishing farm speaks to a business not a personal arrangement and, in my view, there is nothing in the NMP or the circumstances of this appeal to bring what is essentially a business activity into the personal realm.
>
> Accordingly, I find that the NMP does not contain the "personal information" of the property owners. Because only "personal information" can qualify for

> exemption under section 21 of the *Act*, I find that this exemption has no application in the circumstances of this appeal.

I agree with former Assistant Commissioner Mitchinson's reasoning and will apply it in the circumstances of the appeal before me. In my view, the information in the Nutrient Management Strategy relating to the appellants appears in a business rather than a personal context. The appellants are deriving income from a business operation. There is nothing in the Nutrient Management Strategy relating to the appellants that is inherently personal in nature, or that would allow it to "cross over" into the personal realm. I find, therefore that the information relating to the appellants in the Nutrient Management Strategy is business information relating to them, not personal information.

The same reasoning applies to the information relating to the individual (also a farm owner) who received manure from the appellants; the consulting company which prepared the Nutrient Management Strategy; and the two engineering firms. I find that this information is business information, not personal information.

The appellants submit that disclosure of the Nutrient Management Strategy would constitute an unjustified invasion of both their personal privacy and the privacy of the individual to whom they sent the manure. In particular, they cite the factors in sections 21(2)(h) (supplied in confidence) and 21(2)(i) (unfair damage to reputation).

However, the personal privacy exemption in section 21(1) of the *Act* only applies to "personal information." Given that I have found that the information in the Nutrient Management Strategy is business rather then personal information, section 21(1) cannot apply in the circumstances of this appeal.

THIRD PARTY INFORMATION

The appellants claim that the mandatory exemption in section 17(1) of the *Act* applies to the information relating to them in the Nutrient Management Strategy. Although this record also contains a small amount of information relating to other businesses, it is evident on the face of the record that section 17(1) does not apply to this information.

Section 17(1) states:

> 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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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, MO-1706].

Section 53 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third parties who rely on the exemption provided by section 17(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record (Order P-203).

In the circumstances of this appeal, the Ministry has decided to disclose the Nutrient Management Strategy, but the appellants have appealed that decision. Consequently, the onus is on the appellants to prove that the section 17(1) exemption applies to the information in the record at issue.

For section 17(1) to apply, the appellants 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.

The Ministry submits that the appellants did not submit sufficient evidence to satisfy the three-part section 17(1) test.

With respect to part 1 of the section 17(1) test, the appellants simply assert that, "The information is related to our farm business." They do not provide any evidence as to whether the Nutrient Management Strategy contains one or more of the types of information listed in section 17(1).

I have carefully reviewed this record and find that it does not contain a trade secret or scientific, commercial, financial or labour relations information of any sort. However, I am willing to accept that portions of the Nutrient Management Strategy may contain "technical information." Consequently, part 1 of the section 17(1) test is satisfied with respect to those portions of the record.

With respect to part 2 of the section 17(1) test, the appellants submit that, "The information was supplied to the Ministry in confidence." I note that the word "confidential" is written on several pages of the Nutrient Management Strategy. The mere fact that a record is stamped "confidential" is not necessarily sufficient to establish that the information in that record was supplied to an institution in confidence. However, I am prepared to find the information in the record at issue in this particular appeal was supplied to the Ministry in confidence, which satisfies part 2 of the section 17(1) test.

For section 17(1) to apply, the party resisting disclosure must also satisfy the last part of the three-part test, which is that the prospect of disclosure of a record must give rise to a reasonable expectation that one or more of the harms specified in paragraphs (a), (b), (c) or (d) of section 17(1) will occur.

To meet this part of the test, the party resisting disclosure 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.)].

The appellants submit that the following harms could reasonably be expected to occur if the information in the Nutrient Management Strategy is disclosed to the requester:

> The release of this information could interfere with the contractual negotiations we have with [named individual] re outgoing manure. If the requester obtains our NMS for the purpose of the [Minimum Distance Separation], this person should be employing their own engineer to do their own MDS at their own expense and not using our records that we have paid for.

In my view, this submission amounts to an argument that the harms contemplated in paragraphs (a) (interfere significantly with contractual negotiations) and (c) (undue gain to any person) of section 17(1) could reasonably be expected to occur if the Nutrient Management Strategy is disclosed to the requester. The appellants did not make any submissions that would support a claim that the harms contemplated in paragraphs (b) or (d) could reasonably be expected to occur if the information in the record at issue is disclosed.

I have carefully reviewed the Nutrient Management Strategy and considered the appellants' representations. In my view, their submissions amount to speculation of possible harm, which is not sufficient to meet the threshold set out in section 17(1). As noted above, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." The appellants have not provided the "detailed and convincing evidence" required to support their claim that disclosure of the information in the Nutrient Management Strategy could reasonably be expected to interfere significantly with their negotiations with the individual to whom they provide manure [paragraph (a) of section 17(1)] or produce an "undue gain" for the requester [paragraph (c) of section 17(1)].

The failure of a party resisting disclosure to provide "detailed and convincing evidence" will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020]. In my view, there are no other circumstances in this appeal, exceptional or otherwise, that would lead to an inference that any of the harms specified in paragraphs (a) to (d) of section 17(1) could reasonably be expected to occur if the information in the Nutrient Management Strategy is disclosed to the requester.

I find, therefore, that the appellants have failed to prove that the information in the Nutrient Management Strategy qualifies for exemption under section 17(1) of the *Act*. Consequently, this record must be disclosed in its entirety to the requester.

ORDER:

1. I uphold the Ministry's decision to disclose the Nutrient Management Strategy to the requester.

2. The Ministry must disclose the Nutrient Management Strategy to the requester by [35 days from date of order] but not before [30 days from date of order].

Original signed by: February 28, 2008
Colin Bhattacharjee
Adjudicator