



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

# **ORDER PO-2935**

**Appeal PA09-318**

**Ministry of Natural Resources**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **BACKGROUND**

The Ministry of Natural Resources (the ministry) offers a program entitled the Managed Forest Tax Incentive Program (MFTIP), the goal of which is to bring greater fairness to the property tax system by valuing privately owned forest land according to its current use, as well as to increase landowner awareness about forest stewardship.

Under the program, landowners who qualify have the eligible area of their property classified and assessed as Managed Forest under the Managed Forests property class. The assessed value is reduced from what it would be if the property did not qualify under the program. This process involves a consideration of the provisions of the *Assessment Act* and its regulations. The eligible area of the property is then taxed for municipal purposes at one-quarter of the residential rate. The reduction in municipal taxes on an eligible property is, therefore, a result of both a reduction of assessed value and a reduction in the standard residential tax rate.

This appeal deals with a request for access to a former landowner's application under the MFTIP.

### **NATURE OF THE APPEAL:**

The request was initially for access to all the MFTIP agreements and plans and any agreements and plans under the former *Woodlands Improvement Act* for an identified property. With the ministry's consent, the requester subsequently modified the request to be for access to copies of all MFTIP applications and Plans for the identified property that were submitted by a specified current property owner, as well as previous property owners.

The ministry identified records responsive to the request and wrote to the current owner, as well as a previous property owner, under section 28 of the *Act*, seeking their views on disclosure. The current property owner and a previous property owner (the third party) responded. The current owner consented to the release of its information. The third party requested that none of their information be released.

Notwithstanding the objection of the third party, the Ministry decided to grant access to the responsive records pertaining to the current owner and the third party. The third party (now the appellant) appealed the Ministry's decision releasing the third party's information. In the Appeal Form submitted to this office, the appellant refers to sections 17(1)(a) and (c) (third party information) and 17(2) (tax information) as the basis for denying access to their information.

Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the appellant. The appellant provided representations in response to the Notice. The appellant also relied on the reasons set out in the Appeal Form. I then sent a Notice of Inquiry to the requester and the ministry, along with the non-confidential representations of the appellant, which included a severed version of the appeal form, inviting their representations in response.

Both the ministry and the requester provided representations. Their representations raised issues to which I determined the appellant should be provided an opportunity to reply. Accordingly, I sent the complete representations of the requester and the relevant representations of the ministry to the appellant inviting reply representations. No reply representations were received.

### **PRELIMINARY MATTER - SCOPE OF THE REQUEST**

The requester submits that it is only seeking access to the number and types of trees that were planted on the identified property, as well as the purpose for which the trees were planted. The requester stated that it does not seek access to any personal, financial, tax information or technical information such as topographical features, soil characteristics, or historical uses that may be contained within the responsive records. As a result, I have limited the scope of this request to include only access to any information in the records regarding the number and types of trees that were planted on the identified property as well as the purpose for planting those trees.

### **RECORDS**

At issue in this appeal are portions of the Ministry's internal Approval Form (2 pages) and a Managed Forest Plan: Area Verification Form and Management Plan submitted by the appellant.

### **THIRD PARTY INFORMATION**

The ministry states that before issuing its decision letter it sought the views of the appellant who objected to disclosure. The ministry disagreed with the affected party's position and decided to release the records on the grounds that neither sections 17(1) or 17(2) of the *Act* applied in the circumstances.

Section 17(1) states, in part:

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

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

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.), leave to appeal

dismissed, Doc. M32858 (C.A.)). 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].

For section 17(1) to apply in this appeal, the institution and/or the affected 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) and/or (c) of section 17(1) will occur.

### **Part 1: type of information**

The types of information listed in section 17(1) have been discussed in prior orders:

*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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

*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 [Order PO-2010].

The ministry submits that the records contain technical information because the information is contained in, or is sourced from, a plan developed by a registered professional forester in the application of the forester's professional judgment to a particular situation. The ministry submits:

Past orders of your office have indicated that “technical information” is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. It usually involved information prepared by a professional in the field and describes the construction, preparation, maintenance of a process, equipment or thing. [Footnote omitted]

The ministry took the position that because it had determined that the records contained technical information, it was not necessary for it to also consider whether the records also contained commercial information.

The appellant submits that the plan at issue was provided pursuant to the MFTIP and the appellant’s intention was to enter into this program in order to make productive use of the land, yield income and realize the investment potential by the commercial harvesting of timber. The appellant submits that the plan includes a detailed background and inventory of the property, as well as highly technical information about it that is not available to the public. The appellant submits that this includes, but is not limited to, tree inventory, topographical features, soil characteristics, historical uses, short and long term growth predictions and analysis.

As the requested information in the records, or sourced from the records was provided under the MFTIP “in order to make productive use of the land, yield income and realize the investment potential by the commercial harvesting of timber” I am satisfied that the number and types of trees that were planted on the identified property, as well as information relating to the purpose for planting those trees qualifies as “commercial information” for the purposes of section 17(1) of the *Act*. As a result, it is not necessary for me to determine whether this information also qualifies as “technical information” for the purposes of section 17(1).

## **Part 2: supplied in confidence**

The requirement that it be shown that the requested information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

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 [Orders PO-2020, PO-2043].

### ***In confidence***

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371, PO-2497].

The appellant submits that the information was provided with the intention that it would be used solely for the MFTIP. The appellant submits that it did not provide this information with the expectation that details of its property inventory and long term economic intentions would be made available to the general public.

The ministry submits that there is nothing in the records indicating that any information was supplied in confidence. Furthermore, the ministry submits that the appellant has failed to provide evidence that would reasonably support a conclusion that any information in the record created by the ministry was supplied either implicitly or explicitly in confidence by the appellant.

The requester acknowledges that the information was provided with the intention it would be used for the MFTIP and acknowledges the appellant's position that the information was supplied by the appellant in confidence. The requester submits, however, that releasing the requested information would not cause the appellant any harm.

In light of my conclusion with respect to harms below, it is not necessary to address this part of the section 17(1) test.

### **Part 3: harms**

To meet this part of the test, the institution and/or the third party 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 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].

The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 17(1) [Order PO-2435].

Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

In the non-confidential portion of its Appeal Form, the appellant submits that disclosing the Managed Forest Plan will make it available to competing landowners. The appellant submits that these competing landowners will be provided “with the detailed inventory of [the] property, the long term plan and predictions and intentions for the property, thus diminishing any competitive advantage that this sensitive information currently protects.” In addition, the appellant asserts that an economic interest, the nature of which is confidential, could be impacted in the event that this material was disclosed and could result in undue loss to the appellant.

The ministry submits that the appellant has failed to establish the section 17(1)(a) and (c) harms alleged:

The records at issue relate to plans for the environmental management of a forest on the [appellant’s] lands. The Ministry is not aware of and can not see based on the information available to it, the necessary connection between the information contained in these records and harms to the [appellant], particularly in light of the fact that the current landowner to whose lands the plans pertain has consented to release.

In response to the appellant’s concerns, the requester submits:

Again, this plan is part of a tax incentive program offered by the Government of Ontario. We believe the public has a right to know how their tax dollars are spent for this program. Landowners with interest in this program must submit the same application and are guided by the same rules of eligibility. We can not assume that there is a competitive advantage to any party as they must follow the same program rules. If information relating to the predictions and intentions for the property is contained within the plan, [the requester] will not seek access to that information. Should future uses involve zoning changes, [the requester] and other competing landowners will be informed at that point, as zoning changes are a public process. Again, [the requester] solely requests information as to the number and type of trees on the property, as well as the purpose for planting the trees. We believe this information will be found within the long term plan for the trees.

I am not persuaded that the disclosure of the requested information could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization, including the appellant. I find that I have not been provided with sufficiently persuasive representations to satisfy me that the requested information qualifies for exemption under section 17(1)(a). The appellant states that disclosing the information would “diminish any competitive advantage that this sensitive information currently protects”, but does not explain how this could reasonably be expected to occur should the information be disclosed. In my view, this is simple speculation and does not represent the kind of detailed and convincing evidence of harm to the appellant which is required by section 17(1)(a).

The appellant’s representations on section 17(1)(c) focus on the harm to its economic interest from disclosure, asserting that this interest could be impacted in the event that disclosing the information “in some way interferes with the obtaining of subdivision approval for this particular parcel of land.” The appellant does not go the extra step to explain how this interference could reasonably be expected to occur should the information be disclosed. In my view, this is a highly speculative submission, and also does not represent the kind of detailed and convincing evidence of harm to the appellant which is required by section 17(1)(c).

In my view, the appellant has failed to provide sufficiently detailed and convincing evidence to establish that the disclosure of the requested information could reasonably be expected to cause the section 17(1)(a) or (c) harms alleged. As I have found that the appellant has failed to meet the third part of the test, and all three parts of the test must be satisfied for section 17(1) to apply, it is not necessary for me to also consider whether the information was supplied in confidence.

Accordingly, I find that the section 17(1) exemption does not apply to the requested information.

### **INFORMATION GATHERED FOR THE PURPOSES OF COLLECTING A TAX**

The appellant also took the position that the records were exempt from disclosure under section 17(2) of the *Act*.

Section 17(2) of the *Act* states:

A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

The appellant submits that:

... the whole reason the material in question was generated was to take advantage of an income tax saving program. The result therefore, would be that clearly the material is directly related to the determining of tax liability and/or the collecting of tax. On this basis alone under section 17(2) this record should not be disclosed.



The requester agrees that that the plan was submitted as part of a tax incentive program, and concedes that it likely contains tax information. The requester submits, however, that it does not seek any tax or financial information that may fall under section 17(2) stating:

... to echo our previous submissions, [the requester] is not interested in obtaining any tax or financial information from this plan, only the numbers, types and purpose for planting the trees on the subject property. While there may be some tax information that falls under this exemption in the record, [the requester] is not seeking access to this information.

The ministry submits that section 17(2) provides a mandatory exemption to disclosure where disclosure would reveal information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax. The ministry further submits:

... there are two situations or grounds where the exemption could apply. The first is that the information was obtained on a tax return. In this instance, the information was not obtained on a tax return, so the information does not fit within the first ground of the exemption.

The second ground is that the information was gathered for the purpose of determining a tax liability or collecting a tax. To qualify for the second ground, the information must be collected and used by the institution for the purpose of determining the company's tax liability or collecting a tax [footnote omitted]. In this case, the records were not submitted for the purpose of collecting tax nor were they submitted for the purpose of determining whether someone was liable for tax. They were submitted as part of an application to qualify for a program which if the application was successful, the applicant would be subject to a different tax treatment. Accordingly, the only conclusion that appears to be available is that subsection 17(2) does not apply in this instance.

### ***Analysis and finding***

In Interim Order PO-2059-I, Adjudicator Laurel Cropley reviewed the history of the section 17(2) exemption:

Section 17(2) is an amendment to the *Act*, which came into force on January 1, 1990. It arose from a comprehensive review of confidentiality provisions conducted by the Standing Committee on the Legislative Assembly in 1989 (in relation to sections 67(2) and (3) of the *Act*). During the review, Management Board of Cabinet identified a number of tax-related confidentiality provisions under other *Acts*, but was of the view that these provisions could be adequately protected by an amendment to section 17. Murray Elston, the then Chairman of Management Board subsequently issued a *Report on [section] 67(2) of the Freedom of Information and Protection of Privacy Act* [(the Elston Report)]. The report had this to say about tax records (at pages 12-13):

There are eleven confidentiality provisions in statutes administered by the Ministry of Revenue which provide for the secrecy of information submitted on tax returns and other records relating to the tax liability of taxpayers. With respect to individual taxpayers, such information is strongly protected from disclosure in s. 21(3)(e) of the [Act]. However there is no similar provision in the [Act] for taxpayers other than individuals (e.g. corporations). While the tax system provides for the mandatory supplying of information to government, the system could not function without a high degree of voluntary compliance since enforcement mechanisms could not realistically be used to force compliance. Furthermore, the applicable exemption in the [Act] – s. 17 – is limited since the harms tests of the section are very difficult to apply to the raw financial data contained on such records. The uncertainty inherent in such a result could cause difficulty in ensuring continued compliance.

... The type of information to be protected could be described and included as exempt records in a new subsection 17(2).

In my view, these comments reflect a generalized concern of the Legislature to protect financial information that individuals or corporations must supply to the government for taxation purposes.

Later on in the decision Adjudicator Cropley wrote that “the primary purpose of section 17(2) is to protect information about business entities that the government receives for taxation purposes”.

The requested information was clearly not obtained on a tax return, nor was it gathered for the purpose of collecting a tax. What is left, and what is at the heart of this matter, is whether the information the requester seeks was “gathered for the purpose of determining tax liability”, thereby qualifying for exemption under section 17(2).

This issue has been addressed by a number of orders of this office which turn on the characterization of the information at issue and the basis for providing the information.

In Order P-373, upheld by the Court of Appeal in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, Assistant Commissioner Tom Mitchinson held that the section 17(2) exemption applies narrowly to tax information and not to “assessments used to create and maintain compensation funds”. In Order PO-2007, Adjudicator Donald Hale found that the section 17(2) exemption did not apply to applications for tax credits under the *Ontario Mineral Exploration Program Act*. He wrote:

In my view, the disclosure of the information remaining at issue in this appeal would not reveal information that was obtained on a tax return or for the purpose

of collecting a tax. The applications were made by the appellants in order to secure approval for the payment of certain tax credits to assist them with their mining exploration activities. It cannot be said that the disclosure of this information would reveal information “obtained on a tax return” or information “gathered for the purpose of collecting a tax” within the meaning of section 17(2).

I further find that the information sought by the original requester is not information which was gathered by the Ministry “for the purpose of determining tax liability”. The name of the applicant, its address and the signatory of the application, along with the date it was made, was not information used by the Ministry to determine whether the applicant was liable for a tax. As the original requester is not seeking the actual financial information which accompanied the application but only evidence of the fact that it was made, the disclosure of that information alone would not reveal information which was gathered by the Ministry “for the purpose of determining tax liability”, as is required by section 17(2).

Similarly, in this appeal the requester is not seeking any financial information. The purpose for enacting section 17(2) was to exempt information provided in tax returns and other records related to tax liability from disclosure. It should be borne in mind that the Elston Report addressed the need for a provision similar to that available to individual taxpayers under section 21(3)(e) as the “applicable exemption in the [Act] - s. 17 - is limited since the harms tests of the section are very difficult to apply to the raw financial data contained on such records.” This is not the information at issue in this appeal, being information regarding the number and types of trees that were planted on a property, as well as information indicating the purpose for which the trees were planted.

Furthermore, in my opinion, the requester is seeking access to information that was provided in an application to the ministry for a program that might result in differential or more favourable, tax treatment. In my view, the distinction is important. The ministry gathered this information to process the application and to determine whether the appellant qualified for the program, not for the purpose of determining the appellant’s tax liability. That exercise is conducted by another entity.

I find, therefore, that the information sought by the requester does not qualify for exemption under section 17(2) of the *Act*.

As I have found that none of the claimed exemptions apply to the requested information, I will dismiss the appeal.

**ORDER:**

1. I uphold the Ministry's decision to release the information in the records regarding the number and types of trees that were planted on the identified property, as well as information indicating the purpose for planting those trees. The Ministry should release this information to the requester by **January 24, 2011**, but not before **January 19, 2011**.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the information disclosed to the requester.

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

December 17, 2010 \_\_\_\_\_