Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3563

Appeal PA14-389

Ministry of the Environment and Climate Change

December 30, 2015

Summary: The requester sought access to records about a specific wind project. The ministry decided to grant access to the records. The third party company appealed the ministry's decision, relying on the mandatory third party information exemption in section 17(1) of the *Freedom of Information and Protection of Privacy Act* for certain information. The adjudicator finds that the information at issue, the comments made by the third party on the draft Renewable Energy Approval (REA) application for the wind project, is not exempt under section 17(1) and orders this information disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1).

OVERVIEW:

[1] The Ministry of the Environment and Climate Change (the ministry) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to records regarding a specific wind project. Specifically, the request was worded as follows:

> I am requesting all correspondence between [a specified ministry employee] and representatives of [a specified company] as well as agents working on behalf of [the company] regarding the [name] wind project between the dates of April 1, 2013 and November 26, 2013.

[2] The ministry located records responsive to the request and provided the company with third party notice to seek its position on disclosure of most of these records. In response, the company provided submissions on disclosure; it also consented to the disclosure of some of the records.

[3] The ministry then wrote to the requester and advised that after a review of the company's submissions, the ministry had decided to provide full access to all records that were subject to the third party notice, except for one record. The ministry denied access to a portion of this one page record as non-responsive to the request.

[4] The ministry also wrote to the company to advise it of its decision.

[5] With respect to the records not subject to third party notice, the ministry took the position that these records are outside the scope of the request.

[6] The company, now the appellant, filed an appeal of the ministry's decision to provide access to the records that were subject to the third party notice.

[7] During mediation, the requester confirmed that she was seeking access to all records that the ministry had decided to disclose in full to her. She also confirmed that she would not file her own appeal as she was not pursuing information the ministry deemed not responsive or outside the scope of the request.

[8] The ministry subsequently advised the mediator that prior to disclosing any records to the requester, the ministry required clarification from the appellant regarding the records and portions of records that it had consented to disclose to the requester.

[9] The mediator relayed this information to the appellant. The appellant sent the mediator an email providing clarification, which the mediator forwarded to the ministry. In response, the ministry disclosed to the requester pages 70-83, 306, 313 and 373 in full and page 404 in part. The mediator subsequently obtained further clarification from the appellant regarding the remainder of the records. In a second email, the appellant confirmed that it consents to the disclosure of the following:

- pages 3, 4, 36, 37, 65, 68, 69, 218-262, 265-294, 296-302, 304, 307-312, 315, 317, 369, 371-372, 374, 375, 378-388, 390-400, 402, 403, and 405, in full, and
- pages 1, 2, 5-9, 34, 35, 38, 39, 64, 66, 67, 263, 264, 295, 303, 305, 314, 342, 343, 368, 370, 376, 377, 389, and 401, in part.

[10] The appellant confirmed that it believes the remaining responsive records or portion of records should be denied pursuant to the mandatory third party information exemption in section 17(1) and/or the mandatory personal privacy exemption in section 21(1) of the *Act.*

[11] In response, the ministry confirmed its position that all remaining responsive

records should be disclosed in full to the requester. Therefore, the records or portions of records that the appellant objected to disclosure of under sections 17(1) and/or 21(1) of the *Act* remained at issue in this appeal.

[12] As mediation did not resolve all of the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. Representations were sought and exchanged between the appellant and the requester in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[13] In its representations, the appellant agreed to the disclosure of further records or portions of records. In its representations, the appellant also agreed to the disclosure of the information that it had claimed was subject to section 21(1), therefore this exemption is no longer at issue. This information was sent to the requester by the ministry by letter dated March 27, 2015.

[14] During adjudication of this appeal, the issue of whether the public interest override in section 23 applies was also added as an issue to the appeal.

[15] In this order, I find that the information at issue in the record is not exempt under section 17(1) and I order it disclosed.

RECORD:

[16] The information remaining at issue consists of the appellant's comments on certain definitions set out in the draft Renewable Energy Approval (REA) for the wind project, as set out in pages 19-21, 32, 41-42, 48-54, and 61-63 of the record.

DISCUSSION:

Does the mandatory third party information exemption at section 17(1) apply to the information remaining at issue?

[17] 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,
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> > (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;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
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> (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.

[18] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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.[2]

[19] 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.

Part 1: type of information

[20] The appellant states that it is in the business of selling electricity to the Ontario Power Authority[3] by establishing infrastructure to harness wind energy. In order to do so, the appellant states that it was required to obtain a REA from the ministry as a precondition to the establishment of a wind energy project. Accordingly, it states that the draft REA which comprises the record, including any comments on it, relate solely to the appellant's commercial enterprise of selling electricity.

[21] The appellant submits that as the redacted portions of the record are part of and directly connected to a commercial venture, they should be considered commercial

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[1] *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.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[3] The former Ontario Power Authority has merged with the Independent Electricity System Operator.

information. It states that the redacted portions of the record consist of the internal comments of an employee of the appellant on the terms and conditions of the draft REA application.

[22] The requester did not provide direct representations on section 17(1). Instead, her representations focus on the public interest override in section 23.

Analysis/Findings re: part 1

[23] The type of information identified in the appellant's representations, as set out in section 17(1), has 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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]

[24] I agree with the appellant that the record contains commercial information as it contains information related to the selling of services by the appellant for the establishment of a wind project to generate electricity. As such, I agree that the information at issue is commercial information and that part 1 of the test under section 17(1) has been met.

Part 2: supplied in confidence

Supplied

[25] 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.[6]

[26] 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.[7]

[27] The appellant states that the information at issue was supplied by it to the ministry, as the comments were drafted by its employee. It states that each of the comments in the margins had the employee's initials, indicating that this employee was the drafter of those comments.

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[4] Order PO-2010.
[5] Order P-1621.
[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.

[28] The requester describes the information at issue as comments made on the contents of a draft copy of the REA application sent by the ministry to the appellant relating to the approval of the REA application for the wind project. She states that the appellant's comments resulted in several changes to the final REA approval, some of which are significant.

Analysis/Findings re: supplied

[29] I find that the comments in the record set out the appellant's views concerning specific information in the draft REA application. I agree with the appellant that these comments, which were made by the appellant's employee and forwarded to the ministry for its review and comment, were supplied by the appellant to the ministry for the purposes of section 17(1).

In confidence

[30] 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.[8]

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[9]

[32] The appellant states that the REA application for the wind project was approved after the time period set out in the request. It states that during the period set out in the request (April 1, 2013 to November 26, 2013), the ministry was still undertaking its review of the REA application.

[33] The appellant states that the record contains sensitive information relating to the ministry's then ongoing review and evaluation of the wind project, including the

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[8] Order PO-2020.

[9] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

appellant's comments on the draft REA application. It states that although the final REA application is a public document, the appellant had a reasonable expectation that its comments on the draft REA application would remain confidential. According to the appellant, the industry standard amongst developers is that comments on draft REA applications are not publicized as they may prejudice the developer in the event the REA is appealed to the Environmental Review Tribunal (the ERT).

[34] The appellant further states that any information regarding the wind project was submitted by it to the ministry to facilitate the development of the project and, in light of anti-wind coalitions attempting to halt proposed wind energy projects in Ontario and the competitive nature of the industry, it has consistently acted with due caution to protect the information at issue from disclosure. Accordingly, it states that it had a clear expectation of confidentiality when it provided its comments on the draft REA to the ministry.

[35] The requester points out that the ministry, in deciding to release the record in full, did not find the information at issue confidential. She states that nowhere in the ministry's Technical Guide to REAs is it stated that REA applications will be received in confidence. Further, she states that the REA application process is open to all members of the public.

[36] In reply, the appellant states that only certain elements of a REA application are public and that there are specific disclosure and consultation requirements established by the regulations under the *Environmental Protection Act* (the *EPA*). It states that these regulations do not require that every piece of information in connection with a REA application be made public.

[37] The appellant does not dispute that the Technical Guide is a public document and that the regulations under the *EPA* require requisite studies and reports to be made publicly available. It states that throughout the REA application process, it adhered to all such disclosure requirements. It submits that simply because a guide to the REA application process is a public document or certain reports are required to be publicly disclosed does not automatically make all information in connection with the wind project public.

[38] In sur-reply, the requester states that there is no evidence that the intent of the legislation was to provide any sort of confidentiality for the application process for an REA at this stage.

Analysis/Findings re: in confidence

[39] Based on my review of the appellant's and the requester's representations and the record, I find that the information at issue, the comments made by the appellant on the draft REA application, was supplied in confidence by the appellant to the ministry.

[40] In making this finding, I have not found that the final REA application is a

confidential document. I am only determining that, in the circumstances of this appeal, the comments made by the appellant were supplied in confidence. These comments were communicated to the ministry on the basis that they were confidential and would be kept confidential, treated consistently so by the appellant in a manner that indicates a concern for confidentiality, not otherwise disclosed or available from sources to which the public has access, and prepared by the appellant for a purpose that would not entail disclosure.

[41] Although the REA application process is open to all members of the public, I find that this does not address whether comments made by an applicant on specific documents during the process are confidential. As stated above, in the circumstances of this appeal, I find that such comments were made in confidence.

[42] Accordingly, I find that part 2 of the test has been met for the information at issue in the record, as I have found that it was supplied in confidence by the appellant to the ministry.

Part 3: harms

[43] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[10]

[44] 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 the surrounding circumstances. However, parties 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.*[11]

[45] In applying section 17(1) to government contracts, 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).[12]

[46] The appellant submits that disclosure of the information at issue can reasonably be expected to significantly harm its competitive position and cause it undue loss.

[47] The appellant states that the redacted information contains or allows inferences to be drawn with respect to its internal operations and development processes, as well

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[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[11] Order PO-2435.
[12] Order PO-2435.

as its approach to REA conditions. It submits that disclosing this type of information could reasonably be expected to harm its competitive position given the competitive nature of the wind energy industry and the controversy surrounding it.

[48] Furthermore, it states that the information at issue could be used prejudicially against it in future hearings before the ERT.

[49] The appellant states that the commercial reality of the wind energy industry is that there is significant opposition against wind energy development in Ontario.[13] It states that it has experienced firsthand the attempts made by anti-wind coalitions to delay or halt its projects.

[50] The appellant provides an example of a lawsuit brought by various landowners in a named township that sought an injunction to prevent the construction and operation of another of its wind projects and compensatory damages of $16.6 million against it for loss of property value, negligence, nuisance, trespass and strict liability. It states that ultimately, the Ontario Superior Court of Justice granted the appellant's motion for summary judgment and dismissed all the claims. In any event, it states that it was still required to devote a significant amount of time and money to defend against these claims. The appellant states that the lawsuit demonstrates that opponents of wind energy projects will go to great lengths to delay or halt a project and is an excellent example of the harms that have been incurred by it to date as a result.

[51] The requester's representations focus on the public interest in disclosure of the information at issue, which is more appropriately addressed in an analysis of the application of section 23. She does point out that the ministry had decided to disclose all of the information at issue in the record.

Analysis/Findings re: harms

[52] At issue in this appeal are the comments of the appellant found at pages 19-21, 32, 41-42, 48-54, and 61-63 of the record. From the appellant's representations, it appears that it is relying on sections 17(1)(a) and (c) as it submits that disclosure of the information at issue can reasonably be expected to significantly harm its competitive position and cause it undue loss.

[53] I have carefully reviewed the comments at issue. I specifically had asked the appellant in the Notice of Inquiry concerning part 3 of the test under section 17(1)(a) and (c) to provide representations on the harms in section 17(1) with respect to each page at issue in the record. The appellant did not provide representations on each page of the record. Instead, it provided representations on the record in general.

[54] As stated above, the appellant is concerned that disclosure of the information at

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[13] The appellant relies on Order PO-2965.

issue could allow inferences to be drawn with respect to its internal operations and development processes, as well as its approach to REA conditions.

[55] Based on my review of the comments in the record, and in the absence of specific representations on the actual information in the comments, I cannot ascertain how any of the comments at issue could reasonably be expected to allow inferences to be drawn with respect to the appellant's internal operations and development processes, or its approach to REA conditions.

[56] I find that the comments in the record are not about the appellant's internal operations and development processes or approach to REA conditions, but consist of:

- corrections of typographical or formatting errors,
- clarification questions concerning what the ministry meant, and
- comments about consistency or how to make the information in the record clearer.

[57] Even if the appellant's internal operations and development processes or approach to REA conditions could be ascertained from the comments in the record, I cannot ascertain how the actual information at issue in the record could reasonably be expected to reveal information that could result in the harms set out in sections 17(1)(a) or (c). In making these findings, I acknowledge the competitive nature of the wind energy industry and the controversy surrounding it, as well as the strong opposition to wind projects.

[58] Accordingly, I find that the information at issue in the record does not meet part 3 of the test. As all three parts of the test under section 17(1) must be met, the information at issue in the record is not exempt under that section and I will order it disclosed.

[59] As the information is not exempt under section 17(1), there is no need for me to consider whether the public interest override in section 23 applies.[14]

ORDER:

1. I order the ministry to disclose the information at issue in the record to the requester by **February 8, 2016** but not before **February 3, 2016**.

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[14] Section 23 reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

2. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the requester.

Original Signed by: December 30, 2015

Diane Smith
Adjudicator