

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3837

Appeal PA17-113

Ministry of Natural Resources and Forestry

April 30, 2018

Summary: The appellant appealed a decision by the ministry to disclose records relating to its use and occupation of a lake and land located in a provincial park. The appellant claims the records are exempt under section 17(1) (third party information) of the *Act*. In this order, the adjudicator finds that the exemption does not apply and orders disclosure of the records.

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 Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a specific marina, including land use permits, provincial licenses, leases and easements. The requester limited his request to documents relating to the marina and surrounding lands and waters, which are located in a provincial park.

Specifically, the request was for copies of all current:

1. land use permits for the marina;
2. all provincial licenses for the marina's land or water operations;
3. all provincial leases provided to the marina;
4. all provincial easements provided to the marina; and,

5. land use permits on lands surrounding the contiguous lake.

[2] After locating records responsive to the request and receiving representations from an affected party whose interests the ministry identified could be affected by disclosure of the records¹, the ministry issued a decision to the requester and affected party granting the requester partial access to the responsive records.

[3] In its decision, the ministry wrote that it would grant the requester access to some records, but would withhold portions of one record in accordance with the mandatory personal privacy exemption in section 21(1) of the *Act*. The ministry also denied the requester access to some records on the basis that they were not responsive to the request.

[4] The requester did not appeal the ministry's decision. The affected party (now the appellant) objected to the disclosure and appealed the ministry's decision on the basis that the records are exempt under section 17(1). Mediation not resolve the appeal. An inquiry was commenced, in which the ministry and appellant made representations regarding disclosure of the records.

[5] For the reasons that follow, I find that the records are not exempt under section 17(1) of the *Act*.

RECORDS:

[6] Eight records are at issue in this appeal, consisting of maps, land use permits, and other records. They are more particularly identified as follows:

- Record A0292006 (pages 000001-000001) (hand-drawn map)
- Record A0292006 (pages 000002-000002) (hand-drawn map)
- Record A0292996 (pages 000005-000011) (licence of occupation and map)
- Record A0292011 (pages 000015-000015) (land use permit)
- Record A0292012 (pages 000024-000024) (land use permit)
- Record A0292012 (pages 000026-000026) (land use permit)
- Record A0292022 (pages 000033-000033) (land use permit)
- Record A0292024 (pages 000034-000034) (assignment of license of occupation)

¹ The affected party, the appellant in this decision, was contacted in accordance with section 28 of the *Act*.

DISCUSSION:

[7] The only issue in this appeal is whether the mandatory exemption at section 17(1) of the *Act* applies to the records.

[8] The appellant objects to the disclosure of the records, speculating that the requester, by making the request, intends to cause harm to its business and operations.

[9] Where a third party appeals the institution's decision to release a record, the burden of proving that the record should be withheld from disclosure falls on the third party.² In other words, the party objecting to disclosure – in this case, the appellant – must demonstrate that the information in the record satisfies the three-part test set out in section 17(1) of the *Act*.

[10] Section 17(1) prevents an institution from disclosing records in certain instances. It states that:

17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where 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.

[11] The appellant's representations focus on the harms in section 17(1)(c).

[12] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.³ 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

² See Order PO-2142.

³ *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.*).

parties that could be exploited by a competitor in the marketplace.⁴

[13] For section 17(1) to apply, the appellant 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

[14] The types of information listed in section 17(1) have been discussed in prior orders. They are broadly summarized below:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁵

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics.

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts.

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.⁶ The fact that a record

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁵ Order PO-2010.

⁶ Order PO-2010.

might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁷

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data.

Labour relations generally means relations and conditions of work, including collective bargaining.

[15] The appellant has not addressed the application of section 17(1) to the records. Having reviewed the records themselves, I find that they do not contain the trade secrets, scientific, technical, financial or labour relations information contemplated by section 17(1).

[16] However, on my review of the records, I find that some of them contain commercial information insofar as they reflect an arrangement between the appellant and the ministry, namely, the right to use crown lands for the operation of the appellant's business. In addition to maps, the records contain a licence of occupation and current and historic land use permits in favour of the appellant and in exchange for a fee. The land use permits set out the period, duration and purpose of use of the lands by the appellant.

[17] Because the records contain some commercial information, I will review whether the next two parts of the above-noted three-part test are met: that the information in the records was supplied to the ministry in confidence, and, if so, that specified harms will result from disclosure.⁸

[18] For the following reasons, I find that the appellant has not provided sufficient evidence to establish that it supplied information in the records to the ministry in confidence and has therefore failed to satisfy part two of the three-part test.

Part 2: supplied in confidence

Supplied

[19] 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.⁹

[20] 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.¹⁰

⁷ Order P-1621.

⁸ Because of my finding that the other parts of the three-part test are not met, it is not necessary to identify exactly which information constitutes commercial information.

⁹ Order MO-1706.

¹⁰ Orders PO-2020 and PO-2043.

[21] The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.¹¹

[22] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.¹² The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation.

In confidence

[23] 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.¹³

[24] 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.¹⁴

[25] The appellant’s lengthy submissions do not directly address the issue of whether the information was supplied by the appellant, or whether any such information was supplied in confidence to the ministry.

[26] The information in the documents relates to the identification of the appellant’s

¹¹ This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

¹² Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹³ Order PO-2020.

¹⁴ 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.

business that can occupy and use crown lands for a specified purpose and term, for a fee. Although some of the information may have been provided by the appellant to the ministry in order for the appellant to obtain the permit, I am not satisfied that the appellant had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. In the absence of representations on this point from the appellant, I am not persuaded that the information contained in the records, such as the appellant's business name, nature of the appellant's business, and the purpose of the licence of operation or land use permits is information that was communicated to the ministry on the basis that it was confidential and was intended to be kept confidential, or that a document such as a map would not otherwise be available from sources to which the public has access.

[27] Accordingly, I find that the second part of the three part test set out in section 17(1) has not been met and the records are therefore not exempt from disclosure.

[28] I also note that the appellant's representations focus primarily on the concern that disclosure of the records will cause harm to its business operations. Beyond speculating about possible harm which may result from disclosure, the appellant gives no evidence to support that disclosure of the records would result in any of the harms contemplated by section 17(1), which require detailed and convincing evidence about the potential for harm that is beyond the merely possible or speculative.¹⁵ However, because the appellant has not satisfied part 2 of the test, it is not necessary to review whether any of the harms in section 17(1) are established.

ORDER:

[1] I uphold the ministry's decision and dismiss the appeal. I order the ministry to disclose the records at issue by **June 5, 2018** and not before **June 1, 2018**.

[2] In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the requester.

Original signed by _____
Jessica Kowalski
Adjudicator

April 30, 2018

¹⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.