Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4039

Appeal PA16-524

Ministry of the Environment, Conservation and Parks

March 11, 2020

Summary: The Ministry of the Environment, Conservation and Parks (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified wind turbine project. The ministry issued a decision granting full access to the records at issue, which contain third party information. The third party, now the appellant, appealed the ministry's decision to this office. In this order, the adjudicator upholds the ministry's decision to disclose the records at issue, and dismisses the appeal.

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, Conservation and Parks[1] (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a specified wind turbine project.

[2] The ministry notified third parties about the request and sought their input on the disclosure of records that the ministry identified as possibly affecting their interests. The ministry subsequently issued a decision granting the requester partial access to the responsive records.

[1] Formerly the Ministry of the Environment and Climate Change.

[3] A third party, now the appellant, appealed the ministry's decision to this office, taking the position that some information ought to be withheld from the requester.

[4] During the course of mediation, some information was removed from the scope of the appeal. However, the requester continues to pursue access to the records identified by the ministry as pages 000090, 000946-000972 and 001370. The appellant maintained the position that these records ought to be withheld from the requester, in full, pursuant to section 17(1) (third party information) of the *Act*.

[5] As no further mediation was possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence an inquiry, and representations were sought from the appellant, the requester and the ministry. The appellant and the ministry both submitted representations, which were shared, in full, in accordance with this office's *Practice Direction 7: Sharing of Representations*. The requester declined to submit representations. The appellant was given an opportunity to reply to the representations of the ministry, but declined.

[6] In this order, I uphold the ministry's decision, and dismiss the appeal.

RECORDS:

[7] The records identified by the ministry as pages 000090, 000946-000972 and 001370, which the ministry has decided to release in full, remain at issue in this appeal.

DISCUSSION:

Does the mandatory exemption at section 17(1) apply to the records?

[8] The appellant claims that the mandatory exemption at section 17(1)(c) of the *Act* applies to the information at issue in this appeal. Section 17(1)(c) 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,
>
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[9] Section 17(1) is designed to protect the confidential "informational assets" of

businesses or other organizations that provide information to government institutions.[2] 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.[3]

[10] 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

[11] The types of information listed in section 17(1) have been discussed in prior orders. The one that is relevant in this appeal is:

> *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.[4]

[12] The appellant submits that the records at issue in this appeal contain technical information as the term is described above. The appellant submits that the records contain detailed technical information relating to the operation of the wind turbines at the specified wind farm, which includes but is not limited to, (i) measurements in MWHR (megawatt hour), MW (megawatt), and volts, regarding the amount of power generated by the wind turbines at the specified wind farm on March 29 and April 18, 2009 and (ii) measurements related to average rotor-speeds, power and reactive power of the wind turbines at the specified wind farm between November 8 and November 9, 2009.

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[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[4] Order PO-2010.

[13] The ministry submits that it agrees with the appellant that the records at issue contain technical information, which relates to the operation of the wind turbines at the specified wind farm.

[14] After reviewing the records at issue and the representations of the parties, I am satisfied that the records at issue contain the technical information of the appellant as defined above, and I find that part of the test under section 17(1) has been met.

Part 2: supplied in confidence

Supplied

[15] 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.[5]

[16] 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.[6]

[17] 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.[7]

[18] 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.[8] The "immutability" exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[9]

[19] The appellant submits that the records at issue were directly supplied to the ministry in response to specific requests from the ministry. The ministry also submits that the records at issue were supplied by the appellant to the ministry.

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[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.
[7] 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*).
[8] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[9] *Miller Transit*, above at para. 34.

[20] After reviewing the representations of the parties and the records at issue, I find the records at issue were supplied by the appellant to the ministry, which would reveal, if disclosed, the technical information of the appellant.

In confidence

[21] 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.[10]

[22] 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.[11]

[23] The appellant submits that the records at issue were submitted to the ministry on the basis that the information they contained was confidential and further, that information was treated in a manner that indicates a concern for its protection from disclosure. The appellant submits the facsimile cover sheets accompanying Records 000090 and 001370 both contain the following statement: "The information contained in this facsimile message is intended only for the person or entity named above. If you are not the intended recipient, please be aware that any dissemination of this communication is strictly prohibited ..."

[24] The appellant further submits that the email to which Records 000946-000972 were attached contained the following statement: "…All electronic mail messages sent by [the third party] and any files transmitted with them ... are confidential, intended solely for the addressee(s) and may be legally privileged and/or confidential. If you are not the intended recipient of the transmission, you must not use, disclose, copy, distribute or retain it or any part of it."

[25] The appellant submits that the records were not disclosed or available from

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[10] Order PO-2020.

[11] 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.

sources to which the public has access, and the measurements and specifications contained in the records were obtained using advanced equipment including SCADA (supervisory control and data acquisition) systems for the specified wind turbines and meteorological evaluation tower systems located at the specified wind farm.

[26] The appellant submits that members of the public would never be able to access this type of information without the use of highly specialized equipment, and the appellant does not publish or make publically available the data it obtains about its wind turbines from its SCADA and MET (meteorological evaluation tower) systems. Furthermore, the appellant submits that it views this type of information as confidential and proprietary, as set out at paragraph 8 of the affidavit of its Director of Business Development, which was submitted with its representations.

[27] The appellant submits that the records were prepared for a purpose that would not entail disclosure, because they were provided to the ministry in connection with ongoing correspondence with the ministry related to wind turbine noise generated at the specified wind farm. The appellant further submits that this information was provided to the ministry in response to complaints that were received about the noise generated by the wind turbines at the specified wind farm and was not intended for public dissemination.

[28] The ministry submits that the records at issue and the information it contains was supplied implicitly in confidence to the ministry, and this is predicated on the confidentiality statements in the facsimile cover sheets and email footnotes accompanying the appellant's submission of information to the ministry.

[29] After reviewing the records and the representations of the parties, I find that the information contained in the records at issue was supplied to the ministry by the appellant, in confidence, because I am satisfied that the appellant had an objectively reasonable expectation of confidentiality at the time the information was provided. Both the appellant and the ministry acknowledge this. Furthermore, the appellant marked its facsimiles and emails with confidentiality statements and footnotes, which I find support the conclusion that the appellant had a reasonable expectation of confidentiality at the time it supplied the information to the ministry.

[30] Since I find that the records at issue in this appeal meet part two of the test, because they were supplied in confidence by the appellant to the ministry, I must now determine if this information meets part three of the test in section 17(1), by reason of there being a reasonable expectation of the harms outlined in section 17(1)(c) resulting from its disclosure.

Part 3: harms

[31] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that

disclosure will in fact result in such harm.[12]

[32] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[13] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or 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.*[14]

Representations

[33] The appellant submits that the disclosure of the records at issue would result in undue loss to the appellant and undue gain to its competitors, as outlined in section 17(1)(c), that is well beyond the merely possible or speculative. The appellant submits that the measurements contained in the records reflect the value of "wind resources" in the surrounding area and this type of knowledge (i.e., how much wind power can be generated in a particular geographic area) allows wind farm developers like the appellant and its competitors to make critical decisions about where to site or develop wind projects. The appellant argues that, accordingly, this type of data is treated as a significant development asset and is often bought and sold among wind developers, either as part of a project in development or on its own in order to support development activities in a specific geographic area.

[34] The appellant submits that it invests significant financial resources and time into obtaining the valuable data contained in the records. The appellant argues that, in particular, it uses internal resources to identify optimal locations for wind measurement and subsequently must procure the right(s) to engage in wind measurement activities with landowners, either by leasing or acquiring land. The appellant further submits that it must expend significant resources to purchase and/or lease, install and engage the necessary technical experts to utilize the equipment (SCADA and MET tower systems) that are used to take the measurements contained in the records. The appellant submits that the resources invested into obtaining the information contained in the records are a direct reflection of its value to the appellant, both as an asset that can be bought or sold but also as a valuable tool that the appellant can use to inform future development.

[35] The appellant submits, in summary, that disclosure of the information contained in the records represents "the thin edge of the wedge": while the records contain a

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[12] *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

[14] Order PO-2435.

snapshot of the wind resources from the specified wind farm, authorizing their release may be the first step in justifying the release of broader swaths of wind resource data. The appellant submits that doing so has the potential to rob the appellant (and other wind farm developers) of an important and confidential development asset, and allows competitors to obtain and utilize data that they would have otherwise had to purchase.

[36] As noted above, in support of its representations the appellant submitted the sworn affidavit of its Director of Business Development, which reiterate the appellant's arguments. Therefore, I will not summarize the contents of it.

[37] The ministry submits that the *Act* requires the ministry to refuse to disclose a record, where the disclosure could reasonably be expected to result in undue loss or gain. The ministry submits, however, that the information at issue does not meet the reasonable expectation of harm for undue loss to the appellant or undue gain to a third party, as the assertion of the harm is speculative.

[38] The ministry submits that the information at issue consists of data covering a short period of time over the course of two days, and that while the appellant submits that wind assessment data is often bought and sold among wind developers, detailed evidence has not been provided to establish this as a common practice. The ministry further submits that the appellant has not provided detailed evidence to establish the strategic value of this small amount of data.

[39] The ministry further submits that the strategic value of two days' worth of the appellant's wind assessment data to a competitor is uncertain, as a competitor seeking to develop a wind farm in the renewable energy sector would reasonably be expected to undertake their own wind energy feasibility study to determine if their project would be sustainable and profitable. The ministry submits that it is reasonable to believe that such a feasibility study would provide independent forecasts on energy production values, project costs and a forecasted return on investment; and therefore, it is unclear how the appellant would be at a disadvantage or harmed should a competitor obtain their wind assessment data or how a competitor would be unduly advantaged by obtaining it.

[40] The ministry submits, finally, that the assertion by the appellant that disclosure of this information may lead to justifying the release of broader swaths of wind resource data in the Freedom of Information (FOI) access process is speculative as the FOI access process considers information and records on a case-by-case basis. The ministry further submits that a third party, when consulted on their information, would have the opportunity to submit representations concerning the disclosure of the information, and can file an appeal with this office should they disagree with a decision on disclosure.

Analysis and findings

[41] While the appellant argues that it could suffer harm if the information in the records at issue is disclosed, its representations do not provide sufficiently detailed evidence in support of its arguments, which is required to establish part three of the test. Instead, I find its representations amount to speculation of possible harms. The appellant argues that this type of information is a significant development asset, which is often bought and sold among wind developers, and if the records at issue are disclosed, it could reasonably be expected to result in an undue loss to the appellant amounting to the value of the wind data. However, the appellant does not provide sufficiently detailed evidence to support that this is a common practice, and that it could reasonably be expected to suffer an undue loss, if the records at issue were disclosed.

[42] The appellant submitted the sworn affidavit of its Director of Business Development in support of its arguments. However, I do not find that this affidavit is sufficient evidence to support that the disclosure of the records at issue could reasonably be expected to result in undue loss to the appellant, or undue gain to another entity. As noted above, the affidavit largely reiterates the arguments the appellant made in its representations, and does not add any additional information.

[43] Furthermore, it is important to note, as the ministry did, that the records at issue contain a few days' worth of data at one specified wind farm. Even if I accepted the appellant's argument that wind data is a significant development asset that is often bought and sold, which I do not have sufficient evidence of, the appellant has not provided sufficient evidence to support that this limited amount of data could be sold as a significant development asset among wind developers. Additionally, the appellant does not specify how a competitor, or another entity, could receive an undue gain from the disclosure of the limited data contained in the records at issue.

[44] I find the representations of the appellant to be broad and speculative, and conclude that they do not establish that disclosure of the records at issue could reasonably be expected to lead to the harms listed in section 17(1)(c). Specifically, I do not find that the release of the records, which only contain a few days' worth of data, could reasonably be expected to cause undue loss to the appellant, or undue gain to the requester or any other entity. Furthermore, from my review of the records at issue, I am not persuaded that the harms in sections 17(1)(c) are inferable from the information itself.

[45] I also do not accept the appellant's argument that disclosure of the records at issue will lead to the disclosure of "broader swaths of wind resource data" under the *Act*, because I agree with the ministry that each request under the *Act* is decided on an individual basis. Furthermore, if the appellant disagrees with an institution's decision, it can appeal the decision to this office, as it has done in this appeal. Accordingly, I find that the appellant has not established that the harms outlined in sections 17(1)(c) could

reasonably be expected to result from disclosure of the records at issue.

[46] All parts of the three-part test must be met for the mandatory exemption at section 17(1) to apply. Since the appellant has not established that there is a reasonable expectation of harm that could reasonably be expected to result from the disclosure of the records at issue, the third part of the test has not been met, and I find that the section 17(1) exemption does not apply to the records at issue in this appeal. Accordingly, I uphold the ministry's decision to disclose the records at issue, and dismiss the appeal.

ORDER:

I uphold the ministry's decision to grant full access to the records at issue, and order it to disclose the records in accordance with its access decision by **April 20, 2020** but not before **April 15, 2020**.

Original signed by	March 11, 2020

Anna Truong
Adjudicator