Federal Court  Cour fédérale

Date: 20090928

Docket: T-1363-08

Citation: 2009 FC 974

Ottawa, Ontario, September 28, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

OCEANS LIMITED

Applicant

and

CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 44(1) of the *Access to Information Act*, R.S.C., 1985, c. A-1 (Act) for judicial review of a decision of the Canada-Newfoundland and Labrador Offshore Petroleum Board (Respondent or Board), dated August 12, 2008 (Decision), to release information in response to a request for information under the Act.

BACKGROUND

[2] On or about June 5, 2008, the Respondent received an Access to Information Request Form pursuant to the Act which requested the following:

> A copy of any and all correspondence between the Canada-Newfoundland & Labrador Offshore Petroleum Board, regarding the contract award of weather forecasting to AMEC Earth & Environmental by Chevron Canada Limited. We would also make specific reference in our request to a letter written by Mrs. Judith Bobbit of Ocean Ltd. on 16 August 2006, which letter contained allegations made against Mr. Gordon Mellis regarding his qualifications and his review of a bid submitted by Oceans Ltd. on the above noted contract.

[3] The documents in dispute in this case are a series of letters written by the Applicant to the Respondent, and replies thereto, regarding a complaint made by the Applicant about a bid on the Chevron Tender for which the Applicant was not successful.

[4] The Respondent informed the Applicant of the information request and invited a reply to the request. The Applicant informed the Respondent that it did not consent to the request, and cited subsection 20(1) of the Act to prevent disclosure. After considering the Applicant's response, the Respondent made the decision to release a copy of all seven documents that met the criteria of the request based on the determination that these documents did not fit within the exemptions contained in subsection 20(1) of the Act. The Respondent notified the Applicant of this decision.

[5] The Applicant then made this application pursuant to section 44 of the Act, seeking an order that the Respondent not disclose any of the Applicant's correspondence, documentation or information.

DECISION UNDER REVIEW

[6] Mr. Baker, on behalf of the Respondent, informed the Applicant that insufficient cause existed for the Respondent to deny the release of the requested information to the requestor. In his letter, Mr. Baker canvassed subsection 20(1) of the Act and explained why the Applicant's claim must fail.

[7] First of all, the Respondent contended that subsection 20(1)(*a*) was inapplicable in this case, since the Applicant had not claimed an exemption under this section.

[8] In consideration of subsection 20(1)(*b*), the Respondent set out the factors to be met in order to rely on this exemption, and determined that the Applicant had not adequately met the required onus to demonstrate that any financial, commercial, scientific or technical information was present in the records. As for confidentiality, the Respondent noted that the test to be used is an objective one and that the Applicant's correspondence did not contain any indication or markings that confidentiality was intended to apply. What is more, the Respondent noted, the subject matter of the correspondence had already been publicly disclosed by the Applicant.

[9] The Respondent found that the Applicant's claim under subsection 20(1)(*c*) had not met the required threshold of a reasonable expectation of probable harm. The Respondent found that the

Applicant had simply speculated that harm was a possibility. The Respondent noted that even if the actions speculated by the Applicant took place the negative result contemplated by the Applicant was still not certain to occur. Consequently, the Applicant had failed to meet the test for a reasonable expectation of probable harm.

[10] Finally, in consideration of subsection 20(1)(*d*), the Respondent found that the Applicant had not shown an obstruction in actual negotiations that would give rise to a reasonable expectation of harm. While the Applicant indicated that harm was possible, the Respondent was not convinced that such harm was probable.

[11] Since the Applicant had failed to prove that the documents fell under the exceptions listed in subsection 20(1) of the Act, the Respondent found that there was insufficient cause to deny the release of information to the requestor.

ISSUES

[12] The Applicant has raised the following issues:

1) Are the documents identified by the Respondent exempt from disclosure pursuant to subsection 20(1) of the Act?

2) Does the principle of a reasonable apprehension of bias apply to this case?

3) If the principle of a reasonable apprehension of bias applies, does it require that the identified documents not be disclosed?

STATUTORY PROVISIONS

Purpose

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

…

Third party information

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(*a*) trade secrets of a third party;

(*b*) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

…

Objet

2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

…

Renseignements de tiers

20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

a) des secrets industriels de tiers;

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

…

(*c*) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or	*c*) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;
(*d*) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	*d*) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

STANDARD OF REVIEW

[13] Judicial review under section 44 of the Act consists of the Court conducting a *de novo* review of the records in question: *Toronto Sun Wah Trading Inc. v. Canada (Attorney General)*, 2007 FC 1091, 62 C.P.R. (4th) 337 (*Toronto Sun Wah*). As such, the appropriate standard of review in this case is one of correctness and the Court owes no deference to the decision made by the Board.

ARGUMENTS

The Applicant

[14] The Applicant submits that each of the seven documents identified by the Respondent for disclosure should be examined individually to determine whether or not they should be disclosed. However, the Applicant submits that it is also necessary to view each document in context. The

Applicant cites and relies on *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 for the proposition that "it is necessary to view each report in the context of other reports requested for release with it, as the total contents of a release are bound to have considerable bearing on the reasonable consequences of its disclosure."

[15] The Applicant notes that the exemptions contained in subsection 20(1) of the Act are mandatory. Accordingly, once it is determined that a particular document contains information of the nature listed in 20(1)(*a*)-(*d*), an order should be made that a document should not be disclosed: *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 268 at paragraph 22.

[16] The Applicant canvasses each of the documents identified by the Board, and discusses the relation of each piece of information to subsection 20(1) of the Act through the affidavit evidence provided by Ms. Bobbit, who is President of the Applicant.

Letter dated July 25 from Applicant to Respondent

[17] The Applicant submits that, although this letter in its entirety should not be disclosed, paragraphs two and three (which discuss the differences between weather forecasting and weather observing) fall squarely under subsections 20(1)(*b*) and 20(1)(*d*) of the Act.

[18] The Applicant submits that in these paragraphs the Applicant has set out its view regarding the technical differences between its approach to bidding for weather observing and weather forecasting. The Applicant says that the knowledge it has acquired of the processes used in forecasting and monitoring is critical to the commercial success of the Applicant, and is essential to the Applicant's business operations. Moreover, the Applicant suggests that disclosure of this information would cause harm to the Applicant, since it would allow a third party to adjust future bids accordingly to the Applicant's detriment.

[19] The fifth paragraph of the same letter contains information regarding a sub-contractor who had been retained by the Applicant.

[20] This paragraph identifies the relationship that the Applicant has with a particular sub-contractor. The Applicant says that including a specific sub-contractor in the bid is a practice that is unique to the Applicant. The Applicant further holds that the disclosure of the relationship between the Applicant and the sub-contractor will cause the Applicant to be disadvantaged on future bids, and will cause damage to the relationship between the Applicant and the sub-contractor. The Applicant contends that due to the harm which would occur in future bids, this information falls under the exemption found in subsection 20(1)(*c*).

[21] The Applicant submits that the information contained in paragraph five is an example of commercial information that is specific to the Applicant's operational processes, and is therefore within the ambit of subsection 20(1)(*b*). The Applicant also contends that this paragraph contains

information about cost and pricing that is not shared with competitors. The disclosure of this information would improve the competitive position of commercial competitors, including AMEC Earth and Environmental.

[22] The sixth paragraph of the July 25, 2006 letter also makes reference to the sub-contractor.

[23] Again, this paragraph contains a specific reference to the identity of the sub-contractor, and the relationship between the Applicant and the sub-contractor, that should not be disclosed. The inclusion of a specified sub-contractor in a bid is unique to the Applicant, and is commercial information that would not normally be given to a third party. Accordingly, the Applicant contends that this information falls under subsection 20(1)(*b*) of the Act.

[24] The Applicant submits that the ninth paragraph of this letter contains technical information which would cause harm to the Applicant and should not be disclosed.

[25] The information that the weather forecasting component of the Scope of Work for the Chevron Tender was focused on saving drilling time is specific information related to the Applicant's approach to bidding. The Applicant holds that this strategic and technical approach to bidding is never disclosed to competitors, and that its disclosure is likely to cause an unfair commercial advantage to competitors and be economically damaging to the Applicant. Moreover, the Applicant submits that it is a reasonable expectation that it should be able to provide such information to the industry regulator without fear that this information would be disclosed to third parties.

Letter dated July 26 from Respondent to Applicant

[26] The Applicant has no specific objection to the production of this document.

Letter dated August 11 from Respondent to Applicant

[27] The Applicant submits that the disclosure of this letter would cause harm to the Applicant in the marketplace because of the inaccuracies it contains. Specifically, this letter claims that "no bidders asked any questions with respect to the bid prior to its closing." However, the Affidavit of Judith Bobbit states that the Applicant complained that the review made by the Respondent was not full and proper, and that there were factual inaccuracies in Mr. Smyth's letter. The Applicant submits that the disclosure of this inaccurate record could cause financial loss to the Applicant or damage its competitive position or reputation.

Letter dated August 16 from Applicant to Respondent

[28] The Applicant submits that this letter should not be disclosed because it contains a reference to the sub-contractor in paragraph two.

[29] Again, the Applicant submits that the inclusion of a specific sub-contractor in a bid is unique to the Applicant and that the disclosure of this information would cause the Applicant to be disadvantaged on future bids.

Letter dated September 1 from the Respondent to the Applicant

[30] The Applicant submits that this letter in its entirety would cause harm to the Applicant if disclosed, since it infers that there was no basis for the Applicant's complaint to the Board. The Applicant says that this letter is inaccurate, and contains both an erroneous assumption and an erroneous conclusion. Accordingly, the Applicant contends that its disclosure may serve to negatively impact the reputation of the Applicant with existing or future clients. Consequently, the Applicant submits that subsection 20(1)(*d*) applies, and this letter should not be disclosed.

Letter dated October 17 from the Applicant to the Respondent

[31] The Applicant submits that the second paragraph of this letter includes technical information unique to the Applicant that highlights the differences between weather forecasting and weather observing. The Applicant believes this information is not recognized by some of its competitors and that its disclosure would allow a third party to adjust future bids to the detriment of the Applicant. What is more, this paragraph includes a reference to the Applicant's approach to costing services. The Applicant holds that such information is considered highly confidential and that this type of trade secret should not be disclosed to a third party without the Applicant's consent. Based on the

exemptions set out in subsections 20(1)(*b*) and 20(1)(*c*) of the Act, the information should not be disclosed.

[32] Moreover there is another reference in this paragraph to the sub-contractor used by the Applicant. The disclosure of this information to a third party is likely to disadvantage the Applicant in future bids, since it will allow a third party to adjust its bid or its approach to bidding. Thus, the Applicant submits that the exemptions set out in subsection 20(1)(*b*)-(*d*) apply.

[33] The Applicant also submits that paragraph five of this letter contains specific information about pricing and costing the disclosure of which would harm the Applicant on future bids. The Applicant contends that such information falls under subsections 20(1)(*b*)-(*c*) of the Act.

Letter dated November 10 from the Respondent to the Applicant

[34] The Applicant makes no specific objection to the contents of this letter. However, since the Board regulates the oil exploration industry of Newfoundland and Labrador, the Applicant believes that disclosure of this letter may negatively impact the Applicant's reputation with existing and potential clients. Accordingly, the Applicant relies on subsection 20(1)(*c*) of the Act in requesting that this letter not be disclosed. Moreover, the Applicant submits that it should reasonably be able to expect that its correspondence with the Board would not be disclosed to third parties

Summary

[35] The Applicant submits that it has discharged the burden of proof in demonstrating why each letter should be exempted from disclosure. The Applicant believes it has shown a reasonable probability of harm if these documents are disclosed to third parties and competitors. Additionally, the Applicant submits that no contrary evidence has been provided to rebut its evidence on the positions put forward in this application.

[36] What is more, the Applicant submits that, in reviewing the Applicant's request, the Respondent did not appropriately consider the significant implications of the disclosure, either by law or by its own policy. Nor did the Respondent properly consider the sensitive nature of the materials and information contained within the record. In addition, the Applicant contends that the Respondent did not properly consider whether the sensitive material included in this correspondence could be severed from the disclosed documents.

Reasonable Apprehension of Bias

[37] The Applicant further submits that the documents should not be disclosed because there is a reasonable apprehension of bias by the Respondent in its decision to disclose these documents.

[38] The appropriate test for a reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1

S.C.R. 369: “What would an informed person, viewing the matter realistically and practically…conclude?”

[39] The Applicant believes that the Respondent’s decision to disclose the documents was biased by the participation of the Chairman and CEO of the Respondent, Mr. Max Ruelokke, in the determination process. The Applicant submits that Mr. Ruelokke was General Manager of AMEC Americas Limited before starting his employment with the Respondent and that AMEC Earth & Environmental is a division of that company.

[40] In addition, the Applicant opposed the appointment of Mr. Ruelokke to his position on the Board, and it was later made known that the Applicant’s opposition to this appointment was known by Board officials or employees.

[41] Based on a Court finding that Mr. Ruelokke had been the “de facto Chair and CEO of the Board since the panel made its selection on December 5, 2005,” (see *Ruelokke v. Newfoundland and Labrador (Minister of Natural Resources),* [2006] N.J. No. 228 at paragraph 11) the Applicant submits that during December 2005 to April 2006, while the Applicant was participating in the bidding process for the contract that was awarded to AMEC Earth and Environmental, Mr. Ruelokke was employed by AMEC.

[42] Considering his past employment connection with the successful contract bidder, the Applicant suggests that Mr. Ruelokke’s involvement in reviewing the Applicant’s complaint tainted

the objectivity and independence of the review. The Applicant submits that a reasonably informed person would see Mr. Ruelokke's involvement as creating a reasonable apprehension of bias, since his former employer was in direct competition with the Applicant.

[43] Moreover, the Applicant contends that it was entitled to a fresh, untainted, independent review of the documents in questions, and that Mr. Ruelokke's participation in the process denied the Applicant its right to procedural fairness. In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, 89 D.L.R.(4th) 289, the Supreme Court of Canada found that an unbiased appearance is an essential part of the duty of procedural fairness. The Applicant submits that an essential component of procedural fairness is missing in this case: Mr. Ruelokke's participation in the process means that it cannot be said that there was an unbiased appearance in the Decision of the Respondent to disclose the documents.

[44] The Applicant cites and relies on *Szilrd v. Szasz*, [1955] 3 S.C.R. 3 at paragraph 4, for the proposition that "each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs." The Applicant submits that, in this case, it did not receive a sustained independence of mind of those who judged of its affairs. As a result of Mr. Ruelokke's current position with the Board, he is now in a position to benefit his previous employer. Additionally, the Applicant finds the comments made by Mr. Smyth about the Applicant's opposition to Mr. Ruelokke's appointment call into question the independence of the Respondent in its Decision to release the documents. As such, the Applicant submits that the duty of procedural fairness has been breached.

Other Concerns

[45] The Applicant feels that it is also apparent that its opposition to Mr. Ruelokke's Board appointment was known by the Respondent's employees, as was indicated during the complaint and review process when a Board member, Mr. Smyth, said the Applicant "should not have opposed the appointment of Mr. Ruelokke as Chairman and CEO of the Board."

[46] Additionally, the Applicant submits that the portion of the information request describing its August 16, 2006 letter as making allegations against Mr. Mellis is also a cause for concern. The Applicant is concerned about how the requestor acquired the knowledge that such a letter existed, and contends that this information must have been leaked from someone within the Board.

[47] Moreover, the Applicant finds it disconcerting that it is currently engaged in litigation with AMEC Earth and Environmental with respect to contract work and that the disclosure of this information could affect the lawsuit.

[48] The Applicant requests that the documents not be disclosed, but should the Court find that disclosure is appropriate, the Applicant requests that the portions of correspondence objected to by the Applicant be removed from the correspondence prior to disclosure.

[49] In the alternative, the Applicant requests that these documents not be disclosed due to a reasonable apprehension of bias surrounding the decision to disclose and because the disclosure of these documents would breach the Applicant's right to procedural fairness and natural justice.

The Respondent

[50] The Respondent reminds the Court that it is the Applicant's burden to establish that the documents in question fit into one of the exemptions contained in subsection 20(1) of the Act. The Respondent contends that the Applicant has failed to discharge this burden.

Section 20(1)(*a*)

[51] *Société Gamma Inc. v. Canada (Department of Secretary of State)*, 79 F.T.R. 42, 27 Admin. L.R. (2d) 102 (*Gamma*), states at paragraph 7 that "a trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure." The Respondent disputes the Applicant's allegation that the information highlighting the differences between weather forecasting and weather monitoring is a trade secret. While the knowledge of the difference between weather forecasting and weather monitoring may be critical to the Applicant, this information is not unique to the Applicant. In fact, the Respondent points out that a lay person understands the difference between forecasting (which is projecting into the future) and observing (which is monitoring the current situation). Consequently, these terms and their use in the documents in

question cannot be considered a trade secret. Accordingly, the Applicant has not proven that subsection 20(1)(*a*) applies to any of the documents in question.

Subsection 20(1)(*b*)

[52] In order to be exempt from disclosure under subsection 20(1)(*b*), the information must be 1) financial, commercial, scientific or technical; 2) confidential; 3) supplied to a government institution by a third party; and 4) treated consistently in a confidential matter by the third party: *Air Atonabee Ltd. v. Canada (Minister of Transport),* 27 F.T.R. 194, 37 Admin. L.R. 245. It is the Applicant's burden to show that the documents in question satisfy all four criteria in order to be considered exempt under subsection 20(1)(*b*).

Financial, Commercial, Scientific, or Technical

[53] The Respondent disputes the Applicant's submission that there is information contained in these documents related to costing and pricing. The Respondent submits that these documents contain no pricing or costing information of the Applicant.

[54] Moreover, the Respondent submits that the sub-contractor's involvement in the tender is not unique to the Applicant, and that the sub-contractor was already under a pre-existing contract with Chevron for weather observing. Accordingly, the Applicant's reference to the sub-contractor in its

bid is not unique to the Applicant, and disclosure of this information will not prejudice the Applicant.

[55] The Respondent submits that the documents in question cannot be categorized as being financial, commercial, scientific or technical in nature, regardless of how the Applicant attempts to characterize them.

Confidentiality

[56] If the Court finds that the information in question is financial, commercial, scientific or technical, then the Court must also consider if the information is confidential. In deciding whether or not the information is confidential, the Court must use an objective standard that considers the content of the information, its purposes, and the conditions under which is was prepared and communicated: *Air Atonabee*. The Respondent also submits that information should not be considered confidential, even if considered so by a third party, where it is available to the public from some other source: *Canada Packers* as cited in *Air Atonabee*.

[57] The Respondent says that the information in the requested documents has not previously been treated as confidential by the Applicant. Neither the Respondent nor the Applicant's correspondence was marked as confidential. What is more, the Respondent notes that Ms. Bobbit has been outspoken in the media regarding the Applicant's dispute with the Respondent over its review of the Chevron Tender. In fact, in one newspaper article Ms. Bobbit made reference to the

July 25 correspondence, the August 11 correspondence, and the November 10 correspondence. As such, it is clear that the Applicant's complaint to the Respondent regarding the Chevron Tender was not kept confidential by the Applicant, and is available in at least one public source – an article which appeared in The *Telegram* on December 23, 2006. More specifically, the fact that the contract dealt with both weather forecasting and weather observing is available in the newspaper article, and accordingly has not been kept confidential by the Applicant. The same is true of the fact that the Applicant included both components of the bid in one price. Overall, the Respondent submits that the content of the documents in question and, more importantly, the overall context and background of the Applicant's complaint to the Respondent, is available to the public in the newspaper article. Accordingly, this information cannot be characterized as confidential.

Supplied by a Third Party

[58] Under subsection 20(1)(*b*) it is also necessary that the information the Applicant seeks to have exempted must have been supplied by the Applicant to the Respondent. However, the documents at issue contain information that comes from sources other than the Applicant. As such, the information that was not specifically supplied by the Applicant does not meet the third criterion under subsection 20(1)(*b*).

Consistently Treated As Confidential

[59] It is also a requirement under subsection 20(1)(*b*) that the information must have been treated consistently as confidential by the Applicant. The Respondent cites and relies on *Toronto Sun Wah* which found that "the party seeking to exempt the information from disclosure must demonstrate that the information has been treated consistently in a confidential manner with evidence that goes beyond assertions." The same problem arises in the present case as was addressed in *Toronto Sun Wah* at paragraph 25:

> There is an affidavit in which the Chief Executive Officer of the applicant states that it was treated in a confidential manner, but there is no indication of how this was done. There is no reference to "confidential" on any of the invoices and no facts set out in the affidavit to indicate how the applicant was consistently treating the information as confidential.

[60] The Respondent submits that, as demonstrated by the newspaper article, the documents in question have not been treated by the Applicant as confidential. As such, the Respondent's position is that the Applicant has failed to prove that the documents should be exempted from the presumption of disclosure.

Subsections 20(1)(*c*) and (*d*)

[61] A party seeking to prevent disclosure pursuant to these provisions needs to establish a reasonable expectation of probable harm: *Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services),* 107 N.R. 89, 67 D.L.R. (4th) 315. This is a higher onus than speculation as to

possible harm. The Court in *Saint John Shipbuilding* found that "what the Applicant has established…is a possibility of prejudice to its competitive position. However, the possibility of prejudice to its competitive position does not meet the test established…in *Canada Packers.*" The Respondent also cites and relies on *SNC Lavalin Inc. v. Canada (Minister for International Co-operation)*, 2003 FCT 681, 234 F.T.R. 294 (*SNC Lavalin)* at paragraph 36:

> …the Applicant's affiant attests, albeit often in conditional language, to a reasonable expectation of financial loss and prejudice to the competitive position of the Applicant if the records at issue were disclosed. The conditional language used is critical. It is simply not sufficient for the Applicant to establish that harm might result from the disclosure. Speculation…does not meet the standard of reasonable expectation of material financial loss or prejudice to the Applicant's competitive position.

Subsection 20(1)(*c*)

[62] The Respondent submits that the Applicant's affidavit does nothing more than speculate about possible harm. The affidavit contains general statements, and uses conditional language, which are unsupported by any evidence to show a probability of harm or loss. The Applicant has failed to demonstrate that there is a reasonable expectation of financial loss or competitive position.

[63] Furthermore, the Applicant must prove that any loss would be a result of the disclosure of the documents. In this instance, the Applicant has disclosed much of the information itself. As such, even if the Applicant could satisfy the test of probable harm, such harm could just as likely be from the Applicant's own disclosure of the content of the documents to the media. For these reasons, the

Applicant has not proven that these documents, or portions thereof, should be excluded from disclosure as per subsection 20(1)(*c*).

Subsection 20(1)(*d*)

[64] For an exemption under this subsection, the Applicant must show some obstruction or thwarting of contractual negotiations. To be distinguishable from subsection 20(1)(*c*), this cannot simply be an increase in competition. According to *Gamma* at paragraph 47, subsection 20(1)(*d*) "must refer to an obstruction to those negotiations and not merely the heightening of competition for the third party which might flow from disclosure." The Applicant has not provided any evidence to demonstrate that the release of the documents in question would likely result in an interference with any specific negotiations. The Applicant in this instance has failed to provide any evidence of specific harm. Accordingly, the Applicant has failed to establish that subsection 20(1)(*d*) is applicable in this case.

Reasonable Apprehension of Bias

[65] The Respondent submits that the issue of a reasonable apprehension of bias is not relevant to the Court's determination of whether or not the documents should be released under the Act. The Court is considering *de novo* whether the documents should be released. Moreover, since Mr. Ruelokke was not involved in the Respondent's Decision to release the documents, there can be no reasonable apprehension of bias. The Respondent submits that there is no evidence on which an

informed person, viewing the matter realistically and practically, could conclude on a balance of probabilities that there is a suggestion of bias within the Decision.

Bias and the Act

[66] The Court cannot refuse the disclosure of the documents under the Act on the basis of a reasonable apprehension of bias. If the Court were to make a finding of a reasonable apprehension of bias, the remedy would be that the decision of the Respondent to release the documents would be quashed and sent back to the Respondent for reconsideration. Indeed, a reasonable apprehension of bias would not prevent the Court from making its own determination on the disclosure of the documents in question.

[67] What is more, section 2 of the Act clearly states that the general rule is disclosure, and that there are only a few enumerated exceptions to this rule. As such, if the Applicant fails to prove that the documents fall within subsection 20(1) of the Act, then the documents must be disclosed.

Access to Information Determination

[68] The evidence clearly demonstrates that Mr. Ruelokke was not involved in the determination of whether or not the documents should be released. What is more, the Respondent has no knowledge of how the requestor obtained the specific information regarding the letter written on August 16, 2006. Neither did Mr. Baker, who testified in cross-examination that he did not know

how this information had been obtained by the requestor. However, based on the newspaper article and the Applicant's discussion with people involved with the Chevron Tender, the Respondent believes that it is possible this information was obtained through the Applicant.

[69] Regardless, the Respondent submits that the specific knowledge of the requestor did not have an impact on the treatment of the request.

Investigation of Chevron Tender

[70] The Respondent submits that Mr. Ruelokke's involvement in the review of the Applicant's interactions with the Respondent does not give rise to a reasonable apprehension of bias. What is more, at the time the Applicant's complaint was investigated, Mr. Ruelokke had not yet begun working for the Respondent. While he was appointed to the Board on December 5, 2005, his appointment did not become effective until October 26, 2006, and he did not begin working until October 30, 2006.

[71] Mr. Ruelokke has made it clear that he was not involved in the operations of AMEC Earth and Environment. Additionally, Mr. Ruelokke's involvement with the Applicant in this instance was limited to reviewing how his staff at the Board handled the complaint.

[72] The Respondent submits that the Applicant's allegation of an unjust investigation stems from the fact that the result of the investigation was not favourable to the Applicant. In this case,

there is no evidence upon which an informed person, viewing the matter realistically and practically, could conclude on a balance of probabilities that there was a reasonable apprehension of bias in regard to Mr. Ruelokke's involvement with the matter of the Chevron Tender.

[73] The Applicant uses strong language in assessing Mr. Ruelokke's alleged involvement in this matter. The Respondent submits that such statements and allegations should not be made lightly. These statements should be considered frivolous and vexatious because they are not supported by any cogent evidence.

[74] If the Court determines that the Respondent's Decision to release the documents was correct, then the Court must uphold the Decision, notwithstanding any complaint the Applicant may have in regard to the decision-making process.

[75] The Respondent requests that the Court affirm that the documents in question do not fall within the statutory exemptions listed in subsection 20(1) of the Act, and that they should be disclosed to the requestor. The Respondent also requests costs for this application.

ANALYSIS

General

[76] Subsection 2(1) of the Act and the relevant jurisprudence make it clear that, as a general principle, government information should be made available to the public and that any exceptions

are limited. What is more, any doubt about what should be released should be resolved in favour of release and the burden of persuasion rests upon the party resisting disclosure. See *Toronto Sun Wah* at paragraph 8.

[77] This means that the documents and/or information at issue in this case must be disclosed unless the Applicant can demonstrate that they fall within one or more of the exemptions set out in subsection 2(1) of the Act.

[78] It is also clear that an appeal to this Court by way of section 44 of the Act is *de novo* and that the Court is not required to assess the Decision of the Respondent with the deference that arises in the usual case of judicial review (see *Toronto Sun Wah* at paragraph 11.)

Apprehension of Bias

[79] In addition to specific exemptions raised in subsection 20(1) of the Act, the Applicant has also raised a reasonable apprehension of bias as a ground for the Court to decide the disclosure issue in its favour. Quite apart from the fact that, upon review of the evidence, I do not believe that the Applicant can establish a reasonable apprehension of bias in accordance with the well-known principles set out by the Supreme Court of Canada in *Committee for Justice and Liberty* at page 17, the fact that I am considering this matter *de novo*, and that I am not reviewing the Decision of the Respondent under normal principles of judicial review, means that the bias issue is, in my view, irrelevant to the decision I have to make about whether the documents and information in question

qualify under any of the subsection 2(1) exemptions. Consequently, I see no need to address the apprehension of bias allegations in any detail.

The Documents in Question

1. Letter dated July 25, 2006 from Judith Bobbit, President of Oceans Ltd. to Frank Smyth, Manager, Industrial Benefits of Canada – Newfoundland and Labrador Offshore Petroleum Board.

[80] The Applicant says that the information contained in this letter about "the technical differences between the approach to bidding on the weather observing and weather forecasting components of the work on which Oceans (the Applicant) bid" falls within the exemptions contained in subsections 20(1)(*b*) and 20(1)(*d*) of the Act. The Applicant also says that the letter contains information about "bidding on work in the offshore" that is never disclosed to competitors and the disclosure of which will cause economic loss and create an unfair commercial advantage for competitors. The Applicant says that this type of information also falls within the subsection 20(1)(*b*) exemption.

[81] The Applicant also says that this letter contains specific information about the identity and relationship that the Applicant has with a particular sub-contractor, the disclosure of which will cause the Applicant to be disadvantaged on future bids, and which will cause damage to the Applicant and the sub-contractor and "potentially others."

[82] The Applicant believes that the information concerning the sub-contractor falls within subsections 20(1)(*b*) and 20(1)(*c*) of the Act.

[83] The Applicant further asserts that there is information on costing and pricing in this letter that is never shared with competitors and the disclosure of which "is likely to improve the competitive position of commercial competitors, including AMEC Earth and Environment." Hence, the Applicant says that subsection 20(1)(*b*) is applicable.

[84] However, the Applicant provides little in the way of evidence, principle or authority to support the exclusion of the information in question. The Applicant has not adequately discharged the burden of proving that a particular exemption applies to a particular piece of information or a document, even when each objection is viewed in the full context of this case.

[85] In particular, the Applicant has failed to show:

1. That any of the information contained in this document is financial, commercial, scientific or technical in nature under 20(1)(*b*). See *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2005 CarswellNat 3026, at paragraph 15. Indeed, most of the information referred to appears to be a summary of the scope of work in the Chevron bid. It is not even the Applicant's information and does not refer to technical information or commercial practices particular to the Applicant;
2. That the information is confidential within the meaning of subsection 20(1)(*b*). See *Air Atonabee* at paragraph 15. For example, there is no evidence that the information in question has been consistently treated as confidential in the past. The correspondence between the Applicant and the Respondent was not marked confidential, and there can be no expectation of confidentiality where the statute

makes it clear that the public has a right to the information, and the Applicant has been vocal in the newspaper about its dispute with the Respondent over the Chevron Tender process. See *Toronto Sun Wah* at paragraph 25;

3. A reasonable expectation of probable harm under subsections 20(1)(*c*) or (*d*). Assertion and speculation are not enough. See *Saint John Shipbuilding* at paragraphs 5 and 22; *SNC Lavalin Inc.* at paragraph 36; *Geophysical Service Inc. v. Canada-Newfoundland Offshore Petroleum Board*, [2003] F.C.J. No. 665, at paragraphs 47 and 48; and *Toronto Sun Wah*, at paragraph 27;
4. That financial loss or loss of competitive interest would result from the release of this letter;
5. Some obstruction or thwarting of contractual negotiations under subsection 20(1)(*d*). See *Société Gamma Inc. Canada (Secretary of State)* (1994), 79 F.T.R. 42 (Fed. T.D.) at paragraph 47.

[86] The Applicant's principal concern appears to be that competitors could somehow use information disclosed in parts of this letter, including the use of a particular sub-contractor, and gain some kind of advantage in future bids. However, the letter discloses a list of what the Applicant put in the Chevron bid. It reveals nothing about a bidding methodology that is confidential to the Applicant. Much of the general nature of the Chevron bid and the problems experienced by the Applicant have already been disclosed by the Applicant in the *Telegram* article, including the fact that the work involved "weather forecasting and weather observing," that "one daily quote was required" and that the "weather observation services were being provided by another company."

2. Letter dated July 26, 2006 from Frank Smyth of Canada-Newfoundland and Labrador Offshore Petroleum Board to Ms. Judith Bobbit, President of Oceans Ltd. (the Applicant).

[87] The Applicant says that it has no specific objection to the production of this letter and the attached facsimile confirmation report dated July 26, 2006.

3. Letter dated August 11, 2006 from Frank Smyth of Canada-Newfoundland and Labrador Offshore Petroleum Board to Ms. Judith Bobbit, President of Oceans Ltd. (the Applicant).

[88] The Applicant says that the disclosure of this letter would cause harm to the Applicant in the marketplace because the letter contains factual inaccuracies: "…no bidders asked any questions with respect to the bid prior to its closing."

[89] The assertion that the disclosure of this letter "could be expected to cause financial loss to the Applicant or could prejudice its competitive position" suggests that the Applicant is attempting to satisfy the exemption under subsection 20(1)(*c*) for this letter. However, as discussed above, and as the wording of the Applicant's objection suggests, this is no more than assertion, conjecture and speculation and does not raise a reasonable expectation of probable harm as set out in the case law referred to above.

4. Letter dated August 16, 2006 from Judith Bobbit, President of Oceans Ltd. to Frank Smyth, Manager, Industrial Benefits of Canada – Newfoundland and Labrador Offshore Petroleum Board.

[90] Here again, the Applicant's objection is to the disclosure of the identity of the sub-contractor. The Applicant says that the inclusion of a specific sub-contractor in the submission of a bid "is information that is unique to Oceans and it is a process or approach that Oceans used in carrying out its duties of marine forecasting and marine observing."

[91] The Applicant says that this information falls under both subsections 20(1)(*b*) and 20(1)(*c*) because the "disclosure of this information would cause Oceans to be disadvantaged on future bids, as it discloses the approach used by Oceans in bidding on such work, potentially to competitors or to opposing litigants such as AMEC."

[92] As discussed above, no real attempt is made to satisfy the qualification criteria as set out in the relevant case law for the exemptions contained in 20(1)(*b*) and 20(1)(*c*) as referred to above. It cannot be said that the Applicant has discharged the burden upon it to qualify this letter for the exemptions. The Applicant has already disclosed in the *Telegram* article a great deal about the Chevron bid and its use of "another company" for the weather observation services. The notion of any harm flowing from the identification of the sub-contractor is mere conjecture.

5. Letter dated September 1, 2006 from Frank Smyth of Canada-Newfoundland and Labrador Offshore Petroleum Board to Ms. Judith Bobbit, President of Oceans Ltd. (the Applicant)

[93] The Applicant claims the exemption contained in subsection 20(1)(*d*) for the entirety of this letter because it would cause harm in the market place and negatively impact the reputation of the Applicant with existing or future clients.

[94] No real attempt is made to substantiate these assertions and speculations, or to satisfy the case law for 20(1)(*d*) as referred to above.

6. Letter dated October 17, 2006 from Judith Bobbit, President of Oceans Ltd. to Frank Smyth, Manager, Industrial Benefits of Canada – Newfoundland and Labrador Offshore Petroleum Board.

[95] The Applicant says that paragraph 2 of this letter contains technical information unique to the Applicant because it highlights differences between weather forecasting and weather observing.

[96] The Applicant also says that the "knowledge of duties and processes used in conducting weather forecasting and weather monitoring are critical" to the Applicant, but I can find nothing in the paragraph in question that discloses such knowledge. Everyone knows there is a difference between weather forecasting and weather monitoring.

[97] The Applicant also says that the paragraph contains a "reference to the approach of Oceans [the Applicant] on costing services to be bid on." The paragraph merely points out that, in this

particular bid, “The cost had to be quoted as one inclusive daily rate” but that the forecasting services aspect was reduced and the observing component was transferred to the sub-contractor’s contract.

[98] I see nothing in this paragraph that could possibly qualify under subsection 20(1)(*b*) or 20(1)(*c*).

[99] Also, the reference to the sub-contractor does not come within subsections 20(1)(*b*), (*c*) or (*d*) for reasons already given.

[100] The Applicant also says that paragraph 5 of this letter “contains specific information with respect to pricing and costing” which, if disclosed, “would harm the Applicant on future bids in the competitive offshore oil industry.” Besides a bald assertion, the Applicant provides no evidence that would satisfy the jurisprudence and bring this information within the 20(1)(*b*) and (*c*) exemptions.

7. Letter dated November 10, 2006 from Max Ruelokke, Chairman and CEO of Canada-Newfoundland and Labrador Offshore Petroleum Board to Ms. Judith Bobbit, President of Oceans Ltd. (the Applicant).

[101] The Applicant says it “has no specific objection to the contents of this letter” but its disclosure “may negatively impact upon the reputation of Oceans with existing and potential future clients” and that the Applicant “would reasonably expect the correspondence between it and the regulator would not be disclosed to third parties, including clients and competitors.”

[102] It is difficult to understand what such an expectation could be based upon, given that the law is that government information should be made available to public unless the information in question attracts a specific exemption and satisfies the jurisprudence relevant to that exemption.

[103] The Applicant here invokes 20(1)(*c*), but no evidence is adduced that supports the application of this exemption to the letter in question or demonstrates a reasonable expectation of financial loss or gain that could reasonably be expected to prejudice the Applicant's competitive position.

General Complaints

[104] The Applicant also makes some general complaints about the way that the Respondent Board handled the disclosure issue and claims that "the Board has not considered properly the sensitive nature of the materials and information contained in the record, in particular having regard to the evidence of Ms. Bobbit as to the probable harm to Oceans if the record is released or whether the sensitive materials can be severed."

[105] As the Court is considering the matter *de novo*, and is not reviewing the Decision of the Respondent Board, it is difficult to see the relevance of these allegations.

Conclusions

[106] The jurisprudence surrounding the exclusions contained in subsection 20(1) of the Act is clear that the Applicant faces a heavy burden to demonstrate that any particular exemption applies. The Act favours disclosure. The Applicant relies upon the affidavit of Ms. Bobbit and says that its fears are about future loss that cannot easily be demonstrated. Ms. Bobbit has done the best she can to provide evidence under the circumstances. The case law is clear, however, that the Court must be provided with more than mere assertion and conjecture. At times it is difficult to know precisely what it is the Applicant is referring to. In her affidavit, for instance, at paragraph 37, Ms. Bobbit says that the "knowledge of duties and processes used in conducting weather forecasting and weather monitoring are critical to Oceans, and the disclosure of this information to a third party would allow a third party to adjust future bids, to the detriment of Oceans."

[107] However, when the letters are examined, they contain nothing in the way of "knowledge of duties and processes used in conducting weather forecasting and weather monitoring."

[108] At the hearing, the Applicant said its concern is not with the science and technicalities of the duties and processes involved, but with the way that the Applicant goes about structuring its bids. Once again, however, if the letters are examined carefully, it is clear that they are really about the Chevron bid, the scope of work in the Chevron bid, and the Applicant's on-going dispute arising out of the Chevron bid. This is not the kind of information that the exemptions in subsection 20(1) are

intended to cover. In addition, any harm or disadvantage claimed by the Applicant remains entirely speculative and unproven in accordance with the requirements of the case law.

[109] Reviewing this matter entirely *de novo*, I must conclude that the Applicant has not established a case for any of the exemptions. Consequently, I must dismiss this application. In my view, the documentation in question should be released.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is dismissed;

2. The Respondent shall have its costs on the usual scale.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: T-1363-08

STYLE OF CAUSE: **OCEANS LIMITED**

v.

CANADA-NEWFOUNDLAND AND LABRADOR OFFSHORE PETROLEUM BOARD

PLACE OF HEARING: St. John's, NL

DATE OF HEARING: September 10, 2009

REASONS FOR JUDGMENT: RUSSELL J.

DATED: September 28, 2009

WRITTEN REPRESENTATIONS BY:

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