

**Compelling public interest examples from
Mitchell Shnier's previous Freedom of Information Requests**

Information and Privacy Commissioner of Ontario Appeal PA16-128

Concerning

**Freedom of Information Request A-2015-00061 to the
Ontario Ministry of Natural Resources and Forestry**

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Supplementary Representations of Mitchell Shnier

Public interest examples from information learned from previous Freedom of Information Requests

Below are some examples of information which could only be learned through the Freedom of Information process, which have provided substantial benefit to the broad public.

- 1) I learned through an FoI request to the MOECC that the Environmental Site Assessment report (the "ESA") which the Appellant commissioned and received in 2013 for the site of the Proposed Project found the levels of Zinc in the groundwater exceeded the MOECC's guidelines.

As Zinc is considered a toxic heavy metal, and the proposed construction site is directly adjacent to the Moon River, this would be of concern to the hundreds of property owners – and the Wahta Mohawks First Nation – who are all just downstream of this Proposed Project.

- The Appellant has still not publicized this information, which would clearly be of broad public interest. Also of note is that the Appellant has still not done the re-tested recommended in the ESA.

- 2) I learned through an FoI request to the MOECC that the exploratory boreholes for the Appellant's ESA were all drilled upstream of the likely source of Zinc contamination. As the contamination would flow downstream, the actual contamination is likely worse than shown in the ESA.

- 3) I learned by reviewing records the Appellant submitted to the MOECC for Environmental Compliance Approval (the ECA) that the plan to treat this contaminated groundwater conflicted with commitments made to the Township of Muskoka Lakes (the Township), as follows.

- a) At first, the Appellant showed they would locate settling tanks to treat this contaminated water in the MNRF's Margaret Burgess Park even though the Appellant had made a land lease commitment to the Township they would not do this.

- b) The Appellant then changed their plans to instead locate these settling tanks in the Township's Portage Landing parking lot even though their lease with the Township does not permit this.

As shown by the MOECC's Environmental Registry posting in Appendix O, the MOECC subsequently cancelled the public's opportunity to learn about and comment on these contaminated water treatment plans.

As the Appellant did not publicize their contaminated water treatment plans and the MOECC cancelled the opportunity to learn more, the public and the Township had no way to learn of these plans – which could not actually be implemented, and therefore should not be approved by the MOECC.

Bad decisions by government agencies can be due to bad information provided by applicants.

- a) As noted in Decision PO-2018: *"one of the central purposes of the Act is to shed light on the operations of government"* and to enable: *"public scrutiny of government activities"*.

- b) Decision PO-2112 notes: *"In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices."*

To do this, the public requires knowing the inputs the government received for their decision-making.

- 4) I learned through an FoI to the MNRF that the Public Safety Measures Plan for the Bala dams which was prepared for the MNRF requires that the public recreating in the Moon River be warned before flow is increased to the Moon River.

As the Proposed Project would not have a local operator and the Appellant has stated they would not provide warning to the public before starting operation – which would often be at about noon on summer days – this is an unaddressed public safety issue of broad interest to the public.

- 5) I learned through an FoI request to the MNRF that the Appellant changed their upstream cofferdam plan from what they had committed to the MOECC as part of their environmental approval.

- a) For their environmental approval, the Appellant had shown they would only partially obstruct the Bala north channel (which is one of the ways Lake Muskoka flows to the Moon River and ultimately to Lake Huron) during their proposed construction.

- b) However, I found through reviewing a technical drawing which the Appellant later submitted to the MNRF that the Appellant changed their proposed construction plans to entirely obstruct the Bala north channel for a nine-month period.

Analysing historical flow data showed that fully obstructing the Bala north channel would result in more than a 20% probability of flooding Lake Muskoka. Another negative impact of fully obstructing the Bala north channel would be to harm the fish habitat at the base of the Bala north falls.

- c) There are thousands of private properties on Lake Muskoka and such flooding can, and has, caused damages costing millions of dollars to repair. It would therefore be of broad public interest to these thousands of upstream property owners to learn that contrary to the environmental approval and to facilitate the proposed construction, the Appellant changed their plans, and therefore risking damage to others' private property. The Appellant has not informed the public of this change.

- d) Likely though my efforts publicizing this risk of flooding and harming fish habitat:

- The MNRF created a "cofferdam lowering plan", which required the Appellant to quickly lower their cofferdam if needed to avoid flooding Lake Muskoka. As a result, we learned that the proponent changed their upstream cofferdam plans to instead utilize a design called a "soldier pile cofferdam".

- The Appellant also changed their construction plans to not fully obstruct the Bala north channel.

- This would reduce the likelihood of flooding Lake Muskoka, would no longer harm the fish habitat at the base of the Bala north falls, and

would therefore conform to the commitment they made for their environmental approval.

- 6) I learned through an FoI request to the MNRF that the cofferdam lowering plan required capabilities that the Appellant's cofferdam design did not have, such as the ability to both quickly lower and later raising it.

As a result, the Appellant would not have been able to comply with the cofferdam lowering plan, yet the MNRF accepted this flawed design.

- 7) I learned through an FoI request to the MNRF that the Appellant's construction sequencing would have a period of time when they could not lower their cofferdam, no matter what type of cofferdam would be used (as flooding would occur through the excavation for the Proposed Project).

The result would be that an otherwise acceptable rain storm would cause flooding of Lake Muskoka.

From the information I have, this issue is still unresolved and it would only be through being able to view detailed construction plans – received through FoI requests – that I would be able to know if the Appellant has addressed this risk that their poor planning could cause damage to the thousands of private properties on Lake Muskoka.

- 8) Through reviewing a technical drawing the Appellant made available to the MOECC, I found that the Appellant's soldier pile cofferdam design would risk damage to both the Highway Bridge and the MNRF's Bala north dam:

a) The Appellant's technical drawing shows the construction of the soldier pile cofferdam would require boring 5'-deep, 1'-wide holes directly adjacent to the support piers for both the Highway Bridge and the dam, and these would need to hold back a wall of water 15'-high or more. The Appellant has not done any subsurface investigation in this area to know if the force of water would shift the foundations for the support piers for the Highway Bridge and the dam.

b) The Highway Bridge is crucial public infrastructure as the detour around it is 50 km.

■ This would be a major issue for emergency response vehicles, local business delivery vehicles, tourism, and everybody else. This bridge is owned by the District Municipality of Muskoka (the "District"), and the Appellant has apparently not detailed this risk and change in plans to them.

c) The Bala north dam holds back the water of Lake Muskoka, from the Moon River which is approximately 18' lower. If the Bala north dam was damaged, the resulting flooding of the hundreds of properties on the Moon River would be disastrous.

- 9) Through an Access to Information request, I was able to review a technical drawing the Appellant had provided to Transport Canada.

This drawing showed the location of the downstream safety boom proposed by the Appellant. This safety boom would be the most obvious and accepted method to indicate to those recreating in the Moon River downstream the extent of the water that would be made dangerous by the fast and turbulent flow created by water exiting from the Proposed Project.

As shown in Appendix M, the Appellant did provide flow simulation information in their ESR, however:

- a) This flow information did not show the location of the nearby private and public docks, so the proximity of this dangerous flow to in-water recreational areas could not be assessed.
- b) The Appellant did not provide the final location of their proposed downstream safety boom, so the public could not see that it would not encompass the full extent of the water which the Proposed Project would make dangerous.

- 10) Being able to directly utilize the technical drawing the Appellant provided to Transport Canada enabled me to create the composite graphic in Appendix N, knowing the information was exact and correct because I was able to use the proponent's own drawings without any interpretation or estimation.

This shows yet again the importance and broad public benefit of being able to receive technical drawings through the FoI process, as this composite graphic clearly shows:

- a) That the fast and dangerous water would extend far outside of, and downstream of, the downstream safety boom the Appellant proposes.
- b) That this fast and dangerous water would be in front of people's private docks, and also negatively impact people using the public docks.

Knowing the location of the Appellant's proposed downstream safety boom also enabled me to create the graphic in Appendix R which shows that the portage the Appellant plans to the south of the Proposed Project would encourage people to canoe through the dangerously fast and turbulent water which would exit their Proposed Project.

- 11) I learned through an FoI request to the MNRF that the MNRF feels they cannot require the Appellant to show before any further approvals are issued that the Appellant could actually operate their Proposed Project safely.

It is a significant problem if the MNRF believes it must approve the construction of hydro-electric generating stations even if it has not been shown they could be operated safely.

Clearly it is of broad public interest that the MNRF has a public safety responsibility, but does not have the power to enforce it.

- 12) As shown in Appendix S (red lines added) in my e-mail to the MNRF Chief of Staff, I learned through FoI requests to the MNRF that internally some of their senior staff refer to my communications to them as "Total silliness", "falsified", "have become equally bizarre", and "This is more bullshit".

I would accept this if it included any justification, but there was none, and this shows the MNRF is not accepting outside input with an unbiased and open mind, which would negatively impact their ability to make government decisions.

- 13) I learned through an FoI request to Transport Canada the location the Appellant plans for their downstream safety boom, and that water too fast and dangerous for the area's in-water recreational activities would extend far outside of this proposed safety boom. Therefore, the location of the planned safety boom would not comply with the public safety guidelines from the Canadian Dam Association.

This is a good example of one of the main benefits of being able to receive a wide variety of records through the FoI process – to reconcile information from one source with the requirements of another.

- 14) I learned through an FoI request to the MNRF that they require all sluices of the Bala north dam to be unobstructed during the spring freshet.

But a technical drawing the Appellant submitted to the MOECC shows they would obstruct at least one of the sluices during the spring freshet, the result would be an increased risk of flooding Lake Muskoka.

This is another example of the Appellant providing conflicting information to different Ministries. The result would be bad government decision-making as a result of each Ministry being able to check only the information submitted directly to them through their own processes.

Being able to cross-check information sent to different Ministries is another benefit of the public being able to view records, including detailed technical drawings, through the FoI process.

- 15) I found through an FoI request to the MNRF that due to the well-written Request for Proposals (the RFP) which the MNRF issued to initiate this Proposed Project, the MNRF has the option of cancelling the Proposed Project without cost or penalty as the Appellant has not honoured significant commitments they made to be awarded the opportunity to pursue this work.

I also found through an FoI request to the MNRF that the MNRF wrote an internal report claiming they could not cancel without cost or penalty.

By carefully reading the MNRF's internal report I found that they had inadvertently based their internal report on a draft, and not the released version of their RFP.

This is an example where the MNRF made a mistake and it only became known due to the good purposes of the Act that: *"information should be made available to the public"*.

I could never have known in advance that this erroneous internal MNRF report was available, it is only by being able to view all records concerning the Proposed Project, no matter how technical or for what purpose, and with as few redactions as possible, that I was able to bring this error to the attention of the MNRF.

- 16) I found through an FoI request to the MNRF that the Appellant intended to blast and excavate below and between the support piers of the Highway Bridge. I also found that the MNRF claimed that this land under the Highway Bridge was owned by the District but that the Appellant did not accept this.

Such blasting and excavation could damage the Highway Bridge, which could cost millions of dollar to repair. As the detour around the Highway Bridge is 50 km, this would also have many serious negative impacts such as emergency vehicle not being able to reach the other side, as well as to local delivery vehicles, tourism, and the general public.

As a result of my bringing this to the attention of the District:

- a) The Appellant changed their plans to not require this risky blasting and excavation.

- b) The District required that the Appellant post a \$2,000,000 Letter of Credit (rather than just having insurance coverage, which is always subject to dispute and delay) before any construction work could begin.

This is a good example of how making technical drawings available through the FoI process resulted in a compelling benefit to the broad public, as it enabled me to communicate information between different levels of government and to reduce the risk to crucial public infrastructure.

- 17) I learned through an FoI request to the MNRF that the Appellant:
 - a) Changed to a cycling mode of operation (where their Proposed Project would start at about noon on many summer days), which would be much more dangerous to the public.
 - b) Increased the minimum flow through their Proposed Project, resulting in their making the water downstream more dangerous.
 - c) Reduced the days for which they would provide scenic flow down the Bala falls.

All of these changes were made without the Appellant informing the public, and are contrary to written commitments from the Appellant. They are all significant as they would have negative impacts on public safety and tourism.

- 18) It was through carefully reviewing technical drawings that I found that while the Proposed Project would have a public viewing platform, the view from it would be obstructed by huge steel I-beams and the large hoist mechanisms required for the proposed tailrace gates.

This issue is still unresolved and is one reason why I look forward to being able to view the technical drawings in the contested records.

- 19) Another benefit from receiving records through the FoI process is that I can be sure that information I publicize is correct. In fact, the Appellant has never contacted me to request a change or correction to the information I have provided to the public.