Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3049

Appeal PA10-224

Ministry of Tourism and Culture

February 8, 2012

Summary: A requester sought access to information pertaining to the operation of boat tourism in the Niagara Gorge. Notwithstanding the objection of an affected party that certain records contained information that was exempt under section 17(1), the ministry determined that section 17(1) did not apply. The affected party appealed the ministry's decision. The ministry's decision is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1), 2(3), 2(4), 17(1)(a), (b) and (c).

OVERVIEW:

[1] The Niagara Parks Commission (NPC) is an agency of the Ministry of Tourism and Culture (the ministry). According to its website, its role is to protect the natural and cultural heritage along the Niagara River for the enjoyment of visitors while maintaining financial self-sufficiency. The NPC is an institution subject to the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*).[1]

[2] This appeal, brought by an affected party (the appellant), arises out of a request to the ministry for access to information pertaining to an identified individual or a named company relating to "the [then] current situation of the [NPC] and the operation of boat tourism in Niagara Gorge".

[1] The Niagara Parks Commission is listed as an institution subject to the *Freedom of Information and Protection of Privacy Act* in regulation 460.

[3] In response to the request, the ministry conducted a preliminary search for records and made an interim access decision. The ministry initially took the position that the mandatory exemption at section 17(1) (third party information) and the discretionary exemption at section 19 (solicitor-client privilege) of the *Act* might apply to some of the responsive records. The ministry then notified the appellant of the access request under section 28(1) of *FIPPA*.

[4] The appellant responded by indicating the records that he consented to be disclosed and those that he wished to be withheld on the basis that they contained information that was exempt under section 17(1) of the *Act*.

[5] The ministry then issued a final access decision to the original requester. The decision was accompanied by a detailed index of records. The ministry decided to only rely on section 21(1) of the *Act* (invasion of privacy) to deny access to those portions of the responsive records that the appellant did not ask to be withheld. Notwithstanding the position of the appellant that certain records should be withheld because they contained information that was exempt under section 17(1) of the *Act*, the ministry also decided to grant partial access to those records. It further advised the original requester that certain information was actually not responsive to the request. Accordingly, that information was removed from the scope of the request.

[6] The original requester did not appeal the ministry's decision. The ministry then provided the original requester partial access to the responsive records that the appellant consented to disclose. However, the appellant appealed the ministry's decision to grant partial access to the records that he claimed were subject to section 17(1) of the *Act*.

[7] At mediation, the original requester confirmed that he is not seeking access to the information that the ministry withheld under section 21(1) of the *Act*. I interpret this to mean that the requester is not seeking access to any personal information that may be contained in the records at issue in this appeal. This is addressed in more detail below.

[8] I commenced the inquiry by inviting representations from the appellant and the ministry. They were shared between these parties in accordance with section 7 of the IPC's Code of Procedure and Practice Direction number 7.[2]

[9] In the order that follows, I will only be addressing the application of the section 17(1) exemption to the responsive information that the ministry decided to disclose.

[2] The appellant did not provide reply submissions although invited to do so.

[10] In the discussion that follows, I reach the following conclusions:

> - I uphold the decision of the ministry and find that the records do not qualify for exemption under sections 17(1)(a), (b) or (c) of *FIPPA*
>
> - when preparing records for disclosure the ministry should carefully review the records remaining at issue so as to ensure that no inadvertent disclosure of personal information occurs.

RECORDS:

[11] The records at issue consist of emails and attachments.

ISSUES:

A. How should the ministry sever personal information?

B. Does section 17(1) apply to information contained in the records?

DISCUSSION:

A. How should the ministry sever personal information?

[12] As set out above, the original requester made it clear that he does not seek access to any personal information that may be found in the records. To that end, the ministry attempted to sever personal information from the records disclosed to the original requester and indicated on the remaining records where personal information is to be found, in its opinion. I have reviewed the records remaining at issue and note that, likely as a result of the volume of the records at issue, some of the severances are not consistent. As access to personal information was not sought by the original requester, the ministry should carefully review the records remaining at issue with a view to ensuring that personal information is not inadvertently disclosed to the original requester in the event that the application of the section 17(1) exemption is not upheld.

[13] "Personal information" is defined in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[14] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a

professional, official or business capacity will not be considered to be "about" the individual.[3]

[16] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[17] Accordingly, for the purposes of ensuring that personal information is not disclosed in the event that the application of the section 17(1) exemption is not upheld, the ministry should review the records to ensure that no inadvertent disclosure of personal information occurs. In that regard, the ministry should pay particular attention to:

- the personal information of the appellant's family that may appear in the records
- any personal information that falls within the scope of paragraph (e) of the definition
- any personal email or home postal addresses that fall within the scope of the definition of personal information other than those that are subject to sections 2(3) and 2(4) of the *Act*

[18] I will now address the main issue in the appeal.

B. Does section 17(1) apply to information contained in the records?

[19] The appellant claims that the mandatory exemption at section 17(1) of the *Act* applies to the information remaining at issue. The ministry submits that the appellant has not provided sufficient information or evidence to establish the application of section 17(1) of the *Act*.

[20] Section 17(1), states, in part, as follows:

> 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,

[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> …

[21] For section 17(1) to apply, the appellant must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the information must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

[22] The appellant sets out in his letter of appeal that the records at issue were submitted "under the strictest of confidence" in the course of his bidding to obtain the rights to the boat tour service at Niagara Falls, and that details of his bid are contained in the records.

[23] In particular, in response to the ministry's initial notification under section 28(1) of *FIPPA*, the appellant sent a letter to the ministry advising that:

- Records 45, 85, 86, 90, 95, 98, 102, 105 and 106 are "HIGHLY CONFIDENTIAL". The appellant submitted that these records contain "extremely confidential competitive information, including financial information and trade secrets that was provided in strict confidence and would prejudice significantly my competitive position." The appellant further submitted that these records "contain confidential third party information that includes trade secrets and/or financial information and/or commercial information. The information was intended to be confidential among the parties to whom it was provided."

- Records 2, 5, 6, 7, 9, 11, 14, 16, 17, 18, 21, 22, 23, 30, 31, 33, 35, 36, 39, 40, 41, 47, 51 (page 3 only), 54, 55, 56, 57, 58, 60, 62, 64, 66, 67, 69, 72, 74, 77, 82, 84, 92, 93, 96, 101, 107, 121, 122, 129, 134, 135, 137, 139, 141, 142, 144, 148, 149, 153, 157, 160, 161 and 163 are "CONFIDENTIAL". The appellant submits that these records "contain confidential third party information that includes trade secrets and/or financial information and/or commercial information. The information was intended to be confidential among the parties to whom it was provided."

- The disclosure of the above-noted records "could cause harms, interfere with contracts and negotiations, and prejudice significantly my competitive position".

[24] In the course of adjudication, the ministry provided the appellant with a copy of the records that remained at issue, along with a copy of a revised index of records at issue dated December 2, 2010. In response, the appellant provided a further letter to this office regarding his position on disclosure. It set out the following:

- Documents 95, 98, 101 and 106 contain "the most highly confidential" information that the appellant has "ever provided".

- Records 101 and 106 "are not my emails".

- Records 61 and 107 were "absolutely confidential".

- Record 72 "is not mine and has nothing to do with me" and that "the letter attached was confidential".

- The letters on pages 6 and 7 of Record 95 "were sent with a letter that stated these were absolutely confidential" and these are the appellant's "confidential financing sources". The appellant submits that the financing sources "required that their information be transmitted in total confidence".

- Records 2, 7, 9, 11, 14, 16, 17, 18, 21, 22, 23, 30, 31, 33, 35, 36, 39, 40, 41, 42, 44, 45, 47, 54, 55, 56, 57, 58, 60, 62, 64, 66, 67, 90, 92, 93, 95 and 105 "are not my emails. The sender was not a recipient of anything from me. There is no indication how these people got the information, whether it was modified, whether it was complete, etc."

- The appellant "has no objection" to the other records being disclosed.

[25] The ministry submits that:

> … If in fact the records contained the appellant's confidential business information, the ministry had difficulty accepting this argument because the appellant had disseminated this information to an email distribution list of countless parties. Furthermore, in response to the appellant's former claims to the ministry that the disclosure of his alleged confidential business information contained in the records would prejudice his bid preparation regarding the boat tour in the Niagara Gorge, the ministry was at a loss to explain why the appellant would disseminate such information on a broadcast email to multiple parties – not once, but in multiple instances of his email chains. As the records illustrate, there was a repeated pattern of disseminating this information to a wide audience by the appellant.
>
> The recipients of the appellant's emails were vast. They included members of the Ontario Cabinet, Members of Provincial Parliament, members of the media, people in the tourism industry, members of the public, union groups and public servants in other Ontario ministries. …

[26] The ministry then provided a number of examples in support of its position, submitting that:

- The ministry looked at some of the records that the appellant has claimed contain his "confidential" information. There are multiple references to litigation that the appellant was involved in as well as updates on the status of the litigation. However, the ministry noted that the appellant sent out this information in broadcast emails in multiple records - see Records 14, 18, 22, 23, 30 and 31.

- The ministry looked at some of the records that the appellant has claimed are "highly confidential" (Record 45) or "confidential". Multiple records show that the appellant actually sent out this information, not once or twice, but several times in broadcast emails - see Records 16, 17, 42, 44, 45 and 84.

- Records 123 and 124: The appellant has claimed that these emails contain his "confidential" information. Note the lengthy distribution list. Furthermore, if the information was in fact confidential, query why the appellant sent out the same information twice, by forwarding the same email information a second time in Record 124.

- Records 138, 142, 146, 149 and 150: The appellant has claimed these records contain his "confidential" information, however, he repeatedly

> included the following parties in the list of recipients on his broadcast emails: [named representative] of [named company] and [named representative] of [named company]. In the content of these records, the appellant identified that both of these parties were eager to bit on the boat tender. Therefore, it seems highly unusual and contrary to common sense that the appellant would include his competitors on his distribution list if these records truly contained the appellant's confidential information.

[27] In addition, the ministry refers to a number of records cited in the Notice of Inquiry where it asserts that it "appears that the appellant has made contradictory claims." The ministry provides the following examples:

- Record 95: On one hand the appellant has stated that this record contains "the most highly confidential" information that the appellant "has ever provided". However, the Notice of Inquiry also indicates that the appellant claims Record 95 is "not [his] email". The same situation can be found at Record 72 and Records 106 and 107.

- The appellant has claimed in the Notice of Inquiry that Record 45 is "highly confidential". However, Record 45 is duplicated in another record (ministry's Record 136). The appellant did not previously object to the disclosure of that record.

- With respect to Records 92 and 93, the appellant has claimed that he does not know how the recipients received these emails and the records are "not [his] emails". This is a contradictory assertion because both records clearly show that the appellant was the author of the emails.

[28] The ministry further submits that it cannot comment on the alleged harms that could reasonably be expected to occur if the records at issue were disclosed. It submits that the appellant, rather than the ministry is in the better position to provide evidence in support of the alleged harms. That said, the ministry submits with respect to section 17(1)(a) that:

> The ministry has not received sufficient evidence from the appellant to demonstrate any prejudice to his competitive position. The ministry can only take note of the fact that the appellant widely distributed this information in mass emails which would contradict his assertion that the disclosure would result in some sort of competitive harm. As noted above, some of the emails authored by the appellant were sent to his competitors in the industry. Moreover the appellant has not provided any details as to what the competitive harm might be.

[29] With respect to section 17(1)(c) the ministry submits:

> Again, the appellant has not provided the ministry with any information for the ministry to assess whether this type of harm is reasonable.

[30] Although provided with the ministry's representations, the appellant did not respond to these submissions.

Do the records reveal information that qualifies as commercial or financial information or a trade secret?

[31] The appellant had stated in its correspondence to the ministry that the records contained "confidential third party information that includes trade secrets[5] and/or financial information and/or commercial information".

[32] The ministry submits:

> On the face of the records at issue, the ministry was unable to identify any confidential or financial information of the appellant. The ministry also notes that the appellant has not provided any further evidence or information in his representations to the IPC that would help answer this part of the test.

[33] Although provided with the ministry's representations, the appellant did not respond to the ministry's assertions.

[34] Based on my review of the records, notwithstanding the ministry's submissions, I am satisfied that some of the records contain information that is "financial" or "commercial" in nature as defined in previous orders of this office. I am not satisfied that any of the records remaining at issue contain any information that qualifies as a trade secret as that term has been defined by this office.

[35] In light of my conclusion with respect to harms below, however, it is not necessary to identify the records that contain the information that I found to qualify as "financial" or "commercial" information.

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[5] *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which (i) is, or may be used in a trade or business, (ii) is not generally known in that trade or business, (iii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Would disclosure of the records give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b) and/or (c) of section 17(1) will occur?

[36] To meet the section 17(1)(a), (b) and (c) harms test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[6]

[37] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[7]

[38] The records at issue consist, for the most part, of a series of emails that originate with emails from the appellant and, often, end at internal email addresses of the NPC, the ministry or other Ontario ministries.

[39] The ministry based some of its submissions on the appellant's statements contained in the letter to this office, that certain records:

- were not his emails or had nothing to do with him, or
- that the "sender was not a recipient of anything from me. There is no indication how these people got the information, whether it was modified, whether it was complete, etc.,"

[40] I interpret this as describing a situation where the appellant looked at the first few emails contained in a chain in a record which often show internal emails, instead of the attached email or documentation that contained the information that the appellant asked to be withheld. I do not interpret this as the appellant abandoning his objection to the disclosure of the content of the attached emails or documentation.

[41] That said, I am not persuaded that disclosing the information in any of the records remaining at issue could reasonably be expected to result in any of the harms outlined in sections 17(1)(a), (b) or (c) of the *Act*. In this instance, the appellant bears the onus of proving that disclosure could reasonably be expected to give rise to the harms set out in sections 17(1)(a), (b) or (c). The appellant is in the best position to substantiate how disclosure would affect its interests since these sections are intended

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[6] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[7] Order PO-2020.

to protect those interests. However, the appellant's submissions, for the most part, simply paraphrase some of the component parts of sections 17(1)(a), (b) and (c). In my view, neither the appellant's representations, nor my review of the records themselves indicates to me how disclosing the withheld information could reasonably be expected to result in the harms alleged.

[42] The comments of Assistant Commissioner Brian Beamish in Order PO-2435, involving a request for records from the Ministry of Health and Long-Term Care and the Smart Systems for Health Agency (SHHA), are instructive in understanding this office's approach to the harms issue. He writes:

> Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
>
> …
>
> While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1)(a),(b) and (c), this is not such a case. Simply put, I find that the appellant has not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

[43] In my view, the above-quoted analysis and findings of Assistant Commissioner Beamish in Order PO-2435 apply to this case. The representations of the appellant lack

particularity in describing how the harms identified in the component parts of sections 17(1)(a), (b) or (c) could reasonably be expected to result from disclosure in this case. Furthermore, based on the recipient email addresses that are set out in the records at issue the emails that originated with the appellant, as well as other documentation that originated with the appellant, were very widely disseminated, often to media outlets and sometimes to the appellant's competitors. In my view, the appellant has not provided the kind of detailed and convincing evidence required to support a finding that the information is exempt from disclosure under section 17(1). For this reason, I find that the section 17(1)(a), (b) or (c) harms test has not been met with regard to the information remaining at issue in this appeal.

[44] As all three parts of the test must be met in order for the information to be found to be exempt under sections 17(1)(a), (b) or (c), I find that this exemption does not apply to the records at issue in this appeal.

ORDER:

1. I uphold the ministry's decision that section 17(1) does not apply to the information in the records at issue. The ministry should release this information to the original requester, with any personal information appropriately severed, by **March 16, 2012**, but not before **March 12, 2012**.

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

Original Signed by: February 8, 2012
Steven Faughnan
Adjudicator