Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3038

Appeal PA09-462

Ontario Energy Board

January 18, 2012

Summary: The appellant is a company who appealed the Ontario Energy Board's (the board) decision to release a list of exempt distributors, which it submitted to the board in a proceeding before it. The appellant claims that this information qualifies for exemption under sections 17(1) and 21(1) of the *Act*. The original requester claimed that the public interest override at section 23 of the *Act* applied to the requested information. In this order, the adjudicator finds that: section 17(1) applies, in part, to the record; the record does not contain personal information; and the public interest override does not apply. The board is ordered to disclose portions of the record to the original requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, the definition of personal information in section 2(1), sections 17(1), 23.

Orders and Investigation Reports Considered: Procedural Order No. 1 and Decision and Order of the Ontario Energy Board in proceeding EB-2009-0111, Orders MO-2070, PO-2225.

Cases Considered: *London Property Management Association v. City of London*, 2011 ONSC 4710 (S.C.J).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made to the Ontario Energy Board (the board) under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for:

> … the exempt distributors' list from each of the smart sub-metering providers that contains the specific identifying information listed ….
>
> 1. Name of each exempt distributor
> 2. Address of each exempt distributor
> 3. Contact name and phone number for each exempt distributor
> 4. Address of each of the exempt distributor's buildings in which a smart sub-metering system has been installed.

[2] In particular, the requester sought the unredacted list of exempt distributors for one of the smart sub-metering providers (the company).

[3] In response, the board notified the company pursuant to section 28 of the *Act* and sought its views regarding disclosure of the requested information. After reviewing the company's submissions, the board issued a decision granting the requester access to the company's complete list of exempt distributors, as filed in an identified board proceeding.

[4] The company (now the appellant) appealed the decision to grant access to its list of exempt distributors on the basis that section 17(1) (third party information) applies to this information.

[5] Mediation did not resolve the issues in this appeal, and the file was forwarded to the adjudication stage of the process, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeal sought and received representations from the appellant, the board and the original requester. Representations were shared in accordance with the IPC's *Practice Direction 7*. In its representations, the appellant submitted that it is relying on section 17(1) and also indicated that the record contains personal information and should also be exempt from disclosure on the basis of section 21 (personal privacy) of the *Act*. This issue was, therefore, added to this appeal.

[6] In addition, the original requester appeared to have raised the possible application of the public interest override in section 23 in its representations. The application of section 23 to the record was also added as an issue in this appeal.

[7] The appeal was then transferred to me for final disposition. For the reasons that follow, I find that section 17(1) applies to the record, with one exception. I also find that the record does not contain personal information, and that the public interest override does not apply in this appeal.

RECORD:

[8] The record is a list of exempt distributors filed in a proceeding before the board.

ISSUES:

A. Does the third party information exemption at section 17(1) apply to the information at issue?

B. Does the record contain personal information?

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17 exemption?

DISCUSSION:

A. Does the third party information exemption at section 17(1) apply to the information at issue?

[9] The appellant provided the following background information in its representations. The appellant is a licensed smart sub-metering provider that has entered into contracts for the provision of smart sub-metering systems and/or associated services in the province. It is mainly engaged in providing the equipment and services to allow smart sub-metering and remote measurement of electricity, heat and water consumption in individual units in apartment and condominium buildings. The appellant uses sub-meters to measure the hourly consumption of electricity, water and heat at the individual suite level and then bills residents for their consumption.

[10] The appellant states that the board commenced a proceeding to determine whether and under what conditions certain distributors would be authorized to conduct discretionary metering activities in accordance with the *Electricity Act, 1998*.[1] In that proceeding, the appellant and other licensed sub-metering providers were required to file their exempt distributor lists to the board. It is the list that was provided by the appellant to the board that is the record at issue in this appeal. This list contains the names of property owners and property management companies.

[11] The appellant argues that access to the record should be denied, as section 17(1) applies to the information contained in the record. Section 17(1) states, in part:

> 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, if the disclosure could reasonably be expected to,

[1] S.O. 1998, c. 15, Sched. A.

(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

[12] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[3]

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[14] The appellant submits that the record contains commercial information within the meaning of section 17(1). In particular, the appellant states that the record contains the names of 123 exempt distributors (property owners and property management companies) with whom it has actually entered into contracts or has entered into letters of intent to form a contract, for the provision of smart sub-metering systems and/or

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[2] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.).
[3] Orders PO-1805, PO-2018, PO-2184, MO-1706.

associated services. The list, the appellant argues, is its confidential customer list and one of its most important business assets.

[15] Neither the board's nor the original requester's representations address whether the record contains "commercial" information for purpose of section 17(1).

[16] The types of information listed in section 17(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

[17] Based on my review, I find that the list of the exempt distributors is, in essence, the appellant's customer/client list. Past orders of this office have found that customer lists[4] qualify as "commercial" information as they relate to the buying and selling of merchandise or services. The customer list in this appeal sets out the name of property owners and property management companies who are the appellant's current and potential customers.

[18] Therefore, I find that the record contains commercial information within the meaning of section 17(1) and the appellant has met part 1 of the test under the exemption.

Part 2: supplied in confidence

Supplied

[19] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[5]

[20] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[6]

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[4] Orders MO-1237, MO-2197, MO-2686, PO-3012.
[5] Order MO-1706.
[6] Orders PO-2020, PO-2043.

[21] The appellant submits that it supplied its customer list to the board pursuant to a procedural order, as part of the board's proceeding to determine whether certain distributors would be authorized to conduct discretionary metering activities under the *Electricity Act, 1998.* The appellant also states that the list contains immutable information belonging to it and that the information in the record would not have been known to the board or anyone else had it not been supplied by the appellant.

[22] The board states that the appellant's complete list of exempt distributors was filed with the board pursuant to Procedural Order No. 1 in the identified proceeding.

[23] The original requester states that the board ordered smart sub-metering companies to disclose to the board the names of those exempt distributors that they smart sub-metered.

[24] As stated above, past orders of this office have found that third party information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party. I am satisfied that the customer list was immutable, non-negotiated information belonging to the appellant and was directly "supplied" to the board for the purpose of section 17(1) of the *Act*.

In confidence

[25] In order to satisfy the "in confidence" component of part two of the test under section 17(1), the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[7]

[26] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;

- not otherwise disclosed or available from sources to which the public has access; and

[7] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[8]

[27] The appellant submits that the exempt distributor list supplied to the board as part of its proceeding was filed with an express understanding that it was being supplied on a confidential basis. The appellant's cover letter to the board, sent with the list, is marked "confidential" and it makes a specific request that the list not be disclosed to third parties, along with its reasons why.

[28] The appellant further states it submitted two versions of the list to the board. The first version was marked "redacted for public filing" and provided the number of exempt distributers, but redacted all of the other information on the list. The second version was marked "filed in confidence" and included an unredacted version of the list. The board, the appellant argues, accepted the filing of two versions of the list, including the unredacted version, for use only in the board proceeding and agreed not to disclose the unredacted version in the public record of the proceeding. The appellant also states that the board preserved the confidentiality of the list and that at all times, the appellant expected that the list would be treated as confidential. The list, the appellant argues, was not prepared for purposes that would entail disclosure, has not otherwise been disclosed, and is not available from another publicly-available source.

[29] The board submits that it was not required to hold the information on the list in confidence, but chose to do so in the proceeding involving the appellant. In addition, the board submits that it stated in its decision and order of August 13, 2009[9] that:

> It is to be noted that the [b]oard offers no opinion on whether the confidentiality claim made by [the appellant] would survive a request made pursuant to the *Freedom of Information and Protection of Privacy Act*. In this [d]ecision the [b]oard merely finds that it will not, on its own motion, place the affected material on the public record. This approach should be seen to be very case specific, and without any broad or precedential application to other circumstances. [emphasis added]

[30] The board also noted that the identities of some of the customers contained in the record have already been publicly identified in other parties' representations, which were filed in the board's proceeding. In addition, the board states that the appellant has identified three of its customers by way of news releases and on its website. In total, the board submits, five of the appellant's customers have been publicly identified. However, the board did not provide copies of the news releases, or printouts from the appellant's website to substantiate this claim. In addition, the board has not indicated how parties' representations in board proceedings are publicly available through, for example, the board's website or some other process.

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[8] Orders PO-2043, PO-2371, PO-2497.
[9] Decision and order in proceeding EB-2009-0111.

[31] The original requester submits that the appellant objected to the customer list becoming part of the board's public record and now claims that the list of landlords who they "illegally" smart sub-metered is a confidential customer list. The original requester also states that the appellant identifies two of its biggest customers on its website and that, therefore, the list should not be considered to be confidential. The original requester provided a copy of a printout from the appellant's website, which included a testimonial from one of the appellant's customers, a property management company.

[32] In reply, the appellant reiterated that even though the board chose to hold the list in confidence, as opposed to being required to hold it in confidence, the appellant still had a reasonable expectation of confidentiality at the time it supplied the list to the board.

[33] In Order MO-2070, Adjudicator Catherine Corban found that a third party's customer list had been supplied in confidence to an institution. She stated:

> . . . [T]he affected party objects to the disclosure of Attachment 10 of Record 2 and page 6 of Record 5 which are both user lists that detail the affected party's clients as of the date of the submission. As noted above, in its representations the affected party submits that such lists are not generally divulged to the public as they would permit competitors to identify and target the affected party's customers. I accept the position put forward by the affected party. Customer lists, client lists, users lists are all compiled by companies as a result of a great deal of work expended to seek out and solicit new clients, and are normally kept confidential. In the circumstances of this appeal, I am satisfied that these lists were supplied, implicitly to the City in confidence by the affected party.

[34] I adopt Adjudicator's Corban's reasoning regarding the confidentiality of the customer list for purposes of this appeal.

[35] I have considered the representations of the parties, and in the circumstances of this appeal, I accept the appellant's position that it supplied the record to the board with a reasonably-held expectation of confidentiality, with one notable exception.

[36] The evidence before me shows that the identity of one of the appellant's customers[10] has been disclosed on its website as a testimonial. Given that this information has already been publicly disclosed, I find that any expectation that this customer's name would be treated confidentially is not reasonable. Accordingly, I conclude that it was not supplied in confidence for the purposes of section 17(1). I will,

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[10] A property management company.

however, consider this information later in this order under my analysis of whether the record contains personal information.

[37] I note that the board had indicated in its representations that the identity of five of the appellant's customers is publicly available. However, the board did not provide sufficient evidence to support its position with respect to four of the five customers.

[38] Consequently, as stated above, with the exception of one of the appellant's customers, I find that the remainder of the information was supplied in confidence for the purposes of section 17(1) of the *Act* and that part 2 of the test has been met.

Part 3: harms

[39] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[11]

[40] 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.[12]

[41] As previously stated, the appellant submits that the record is effectively its customer list and is the result of the investment of considerable time and resources. The appellant states that it does not believe that its competitors have knowledge of the identities of the customers contained in the list. The appellant argues that disclosure of the list would reasonably be expected to harm its business interests by interfering with its competitive position and by causing undue financial loss in terms of profits and lost customers. In particular, the appellant states that disclosure of the list could cause the following harms:

- competitors could target its customers, including those where a signed contract has not yet been entered into, and prejudice the appellant's competitive position;

- access to the list would provide useful insight into market access issues, allowing competitors to seek out the appellant's customers

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

and potential customers but also to develop market access strategies to the appellant's detriment;[13]

- competitors would be in a position to target the appellant's customers and potential customers with offers and negative messaging about the appellant, designed to lead the customer to switch providers;

- the appellant's contracts are typically ten years in length. Given that sub-metering services can be provided indefinitely, this relatively short term makes the appellant vulnerable to competitor initiatives, particularly upon expiry of the contracts; and

- competitors would gain financially to the appellant's detriment.

[42] The board submits that the smart sub-metering business is meant to be a competitive activity and while it may be true that making the list public may subject the appellant to more competition for business once their contracts expire, the board is not convinced that such competition would "prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations." It is simply, the board states, part of operating a competitive business.

[43] In addition, the board states that all of the other smart sub-metering providers that were subject to the board's proceeding disclosed their exempt distributor lists publicly. Therefore, the board argues, the disclosure of the appellant's exempt distributor list would not place it in a different position than that of its competitors; rather, the disclosure of the list would put the appellant in the same position as it competitors.

[44] The board also notes that five of the appellant's customers have already been publicly disclosed as a result of its proceeding and various news releases. The board then states that it does not believe that the disclosure of the appellant's list can reasonably be expected to produce the harms identified by the appellant, as "many" of the customers on the list have already been publicly identified.

[45] The requester states that the appellant entered the residential tenancy sector without authorization under the *Electricity Act, 1998* and that, therefore, there should be no list of customers or potential customers who were smart sub-metered or who were in the process of being smart sub-metered when it was a prohibited activity in the first place. The requester further submits that the appellant cannot assert that customers will be lost when it should not have had them in the first place. In addition,

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[13] The appellant notes that it has reviewed its competitors' exempt distributors lists, which were filed with the board as part of a specific board proceeding, for purposes of its own strategic initiatives.

the requester states, in response to the appellant's argument about "negative messaging," that the appellant has no one else to blame for any negative messaging but itself.

[46] In reply, the appellant submits that customer lists are maintained in strict confidence and are necessarily of commercial value. For example, the appellant states, in some cases, enterprises are purchased solely with a view to acquiring the enterprise's customer list. In the appellant's case, the customer list is one of its most important business assets and the harm suffered by the disclosure of the list goes well beyond a mere increase in competition.

[47] In addition, the appellant states that it is a market leader in the provision of sub-metering services and that, other than local distribution companies, none of its competitors have a customer list nearly as substantial as the appellant's list. The appellant states that it is the very secrecy of its customer list (compiled with great effort and expense) that has enabled it to maintain its leadership position and that it would be a detriment to the appellant and a benefit to its competitors if the list was disclosed.

[48] I have carefully reviewed the representations from all the parties. I accept that disclosure of the appellant's customer list could reasonably be expected to result in prejudice to the competitive position of the appellant and/or result in an undue loss for it or undue gain for its competitors. Customer lists are created and compiled as a result of a significant degree of work on the part of the company to whom the list relates, and disclosure could reasonably be expected to provide a competitor with a significant advantage facilitating its ability to compete with the appellant and attempt to solicit existing clients away from the appellant.[14]

[49] I make this finding despite the fact that the appellant's competitors filed their customer lists with the board and did not expect or request that their lists be kept confidential. I have already found that, in this case, the appellant had a reasonable expectation of confidentiality with respect to the list. I also find that the appellant's representations were sufficiently detailed and convincing to establish a reasonable expectation of the harms set out in section 17(1)(a) and (c).

[50] Accordingly, I find that the harms listed in section 17(1)(a) and (c) have been established and part 3 has been met for the customer list, with the exception of one of the appellant's customers, whose identity has already been publicly disclosed.

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[14] This approach is consistent with the findings of Adjudicator Corban in Order MO-2070.

B: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[51] With respect to the information contained in the record that I did not find exempt under section 17(1), namely, the identity of one of the appellant's customers, the appellant claims that the record contains personal information, which ought to be found exempt under section 21(1) of the *Act*. In order to determine if section 21(1) applies, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) 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 if 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 where 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;

[52] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[53] 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.

[54] 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.[15]

[55] 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.[16]

[56] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[17]

[57] The appellant submits that the list includes "personal information", including the names of certain individual customers or business names that reveal individual customers. The appellant then provided a few examples, and states that personal information is defined in the *Act* as including information about an identifiable individual including information "relating to financial transactions in which the individual has been involved."

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[15] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[16] Orders P-1409, R-980015, PO-2225 and MO-2344.
[17] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[58] The appellant further states that the fact that these identifiable individuals are the appellant's customers is information relating to a financial transaction in which they have been involved and is therefore presumed to be an unjustified invasion of privacy.

[59] The board submits that the record does not contain personal information, but even if it did, sections 2(3) and 2(4) of the *Act* are applicable in this case. All of the persons listed in the record, the board states, are included because they are either the owners or the landlords of a residential complex as defined in the *Residential Tenancies Act, 2006* or of an industrial, commercial or office building that was subject to the proceeding before the board. Owning or being a landlord for a residential complex or an industrial, commercial or office building is a commercial or business activity and, as such, the names are not personal information as they are only identified in a business, professional or official capacity.

[60] The requester did not make representations on this issue.

[61] Previous decisions of this office have drawn a distinction between an individual's personal and professional capacity, and found that in some circumstances, information associated with a person in a professional capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information."[18] While many of these orders deal with individuals acting as employees or representatives of organizations,[19] other orders have described the distinction more generally as one between individuals acting in a personal or business capacity.

[62] For example, in Order PO-2225, Former Assistant Commissioner Tom Mitchinson determined that landlord information did not meet the definition of "personal information" within the meaning of section 2(1) of the *Act*. He stated:

> Based on the principles expressed in these orders, the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? In my view, when someone rents premises to a tenant in return for payment of rent, that person is operating in a business arena. The landlord has made a business arrangement for the purpose of realizing income and/or capital appreciation in real estate that he/she owns. Income and expenses incurred by a landlord are accounted for under specific provisions of the *Income Tax Act* and, in my view, the time, effort and resources invested by an individual in this context fall outside the personal sphere and within the scope of profit-motivated business activity.

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[18] Orders P-257, P-427, P-1412, P-1621.
[19] Orders P-80, P-257, P427, P-1412.

> I recognize that in some cases a landlord's business is no more sophisticated than, for example, an individual homeowner renting out a basement apartment, and I accept that there are differences between the individual homeowner and a large corporation that owns a number of apartment buildings. However, fundamentally, both the large corporation and the individual homeowner can be said to be operating in the same "business arena", albeit on a different scale. In this regard, I concur with the appellant's interpretation of Order PO-1562 that the distinction between a personal and a business capacity does not depend on the size of a particular undertaking. It is also significant to note that the *TPA* requires all landlords, large and small, to follow essentially the same set of rules. In my view, it is reasonable to characterize even small-scale, individual landlords as people who have made a conscious decision to enter into a business realm. As such, it necessarily follows that a landlord renting premises to a tenant is operating in a context that is inherently of a business nature and not personal.
>
> The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?
>
> In my view, there is nothing present here that would allow the information to "cross over" into the "personal information" realm. The fact that an individual is a landlord speaks to a business not a personal arrangement.

[63] I agree with and adopt Former Assistant Commissioner Mitchinson's reasoning with respect to whether landlord information constitutes "personal information."

[64] Further support for this approach can be found in a recent decision of the Superior Court of Justice,[20] in which Leitch J. found that landlords who lease rental units are engaged in business whether or not the landlord is an individual leasing a unit in his/her own home or a corporate landlord leasing units in a large apartment building. In each case, they are operating as a business. The court then concluded that this type of information falls within the exclusion to the exemption set out in the *Act*.[21]

[65] Therefore, I find that the remaining information at issue in the list is excluded from the definition of "personal information" by virtue of section 2(3) of the *Act*.

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[20] *London Property Management Association v. City of London*, 2011 ONSC 4710 (CanLII).
[21] See note 20. The exclusion the court relied on was the definition of business identity information at section 2.1 of the *Municipal Freedom of Information and Protection of Privacy Act*. The equivalent section under the *Act* is the definition of business identity information at section 2(3).

Consequently, the personal privacy exemption cannot apply. Having found that the identity one of the appellant's customers is not "personal information" and having already found that this information is not exempt under section 17(1), I will order the board to disclose the name of that customer to the requester.

PUBLIC INTEREST OVERRIDE

C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17 exemption?

[66] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[67] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[68] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[22]

Compelling public interest

[69] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.[23]

[22] Order P-244.
[23] Orders P-984 and PO-2556.

[70] A public interest does not exist where the interests being advanced are essentially private in nature.[24]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[25]

[71] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[26]

[72] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

[73] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391 and M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614].

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[24] Orders P-12, P-347 and P-1439.
[25] Order MO-1564.
[26] Order P-984.

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

- the records do not respond to the applicable public interest raised by appellant [Orders MO-1994 and PO-2607].

[74] The requester has raised the public interest override as an issue in this appeal and states the board "stood up to protect innocent tenants" when they became aware of the smart sub-metering companies' "illegal activity" in the residential tenancy sector. The requester submits that the board's decision of August 13, 2009 set out a compliance scheme, and that disclosure of the customer list is essential for tenants, the public, the press, and public interest or advocacy bodies to satisfy themselves that the smart sub-metering companies are complying with the order.

[75] Further, the requester submits that there is no legal basis for the appellant to assert that it has a customer list to protect as the customer list represents 123 "illegal" contracts.

[76] Lastly, the requester states that the public needs to have confidence in the board and in this office and that "clean hands" and the public interest should "carry the day" and form the biggest part of my analysis in this decision.

[77] The appellant submits that the requester's allegations about "illegal" activities are without merit and that the purpose of the board's proceeding was to determine whether, and under what conditions, certain distributors would be authorized to conduct discretionary metering activities in accordance with the *Electricity Act, 1998*. The board, the appellant argues, did not conduct a compliance proceeding.

[78] The appellant also states tenants would have been aware of the board's hearing, as the board issued a preliminary order in which a notice of hearing and the preliminary order itself were to be posted in a prominent location in each building in which a smart sub-metering system had been installed.[27]

[79] The appellant included a copy of the board's final decision and order dated August 13, 2009. I note that the board made the following findings:

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[27] Procedural Order No. 1 in proceeding EB-2009-0111.

> It is not intended that this proceeding make any findings with respect to compliance with the *Electricity Act*, the *Ontario Energy Board Act, 1998*, any regulations made pursuant to either of those statutes, or Board codes.
>
> . . .
>
> The Board finds that any smart sub-metering installation in bulk metered residential complexes and industrial, commercial or office building settings on or after November 3, 2005 is unauthorized, and any resulting changes to financial arrangements respecting the payment of electricity charges by tenants to be unenforceable. This conclusion flows directly from the clear wording of section 53.18(1) of the *Electricity Act*.
>
> It is important to note again that this proceeding is not a compliance proceeding nor is it intended to impose any form of penalty, restitution order, or other disciplinary action against any Exempt Distributor that has engaged in unauthorized discretionary metering activity.[28]

[80] In addition, in its final Decision and Order, the board permitted distributors to use the smart sub-metering system only if they provide customers with specific, detailed information about the system and its associated charges and then obtain the informed, voluntary written consent of customers.

[81] Further, the board ordered that a copy of its Decision and Order of August 13, 2009 be posted in a prominent location in each building in which a smart sub-metering system had been installed.

[82] As noted above, to order the disclosure of the information which I have previously found exempt under section 17(1), I must be persuaded that there is a compelling public interest in the disclosure of the records and, if there is a compelling public interest, that that compelling public interest clearly outweighs the purpose of those exemptions. In my view, in the current appeal, this threshold has not been met and section 23 does not apply.

[83] From the original requester's arguments I can extrapolate that she takes the position that a compelling public interest exists in the disclosure of the information in order to serve the purpose of informing tenants and tenants' advocacy groups about compliance by smart sub-metering companies and exempt distributors with the board's Decision and Order of August 13, 2009.

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[28] Decision and order of the Ontario Energy Board dated August 13, 2009 in proceeding EB-2009-0111.

[84] As previously stated, in considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, 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.[29]

[85] I agree with the position taken by the appellant that in the circumstances of this appeal, tenants residing in buildings with smart sub-metering would be aware of the board's Decision and Order of August 13, 2009, given that they must provide their written consent to become subject to the system.

[86] In addition, due to the nature of the information that has been withheld under the exemption, which is third party commercial information, there is no compelling public interest in its disclosure. The interest in this information, in my view, is essentially of a private nature. Disclosure of this information would not assist in public scrutiny of public funds, nor would it have any impact on the public perception of the integrity of the workings of the board. In essence, disclosure of this information would not address the concerns put forward by the original requester, nor would it shed any light on the operations of the board. Accordingly, I find that there is no compelling public interest in the disclosure of the information that I have found exempt under section 17(1) of the *Act* and, therefore, section 23 of the *Act* does not apply in this instance.

[87] In conclusion, I find that section 17(1) applies to the record with the exception of the identity of one of the appellant's customers. I also find that the record does not contain personal information. In addition, the public interest override is not applicable in this appeal.

ORDER:

1. I order the board to deny access to the record at issue with the exception of one of the appellant's customers. I have enclosed a copy of the record and have highlighted the information that is to be disclosed to the original requester by **February 22, 2012** but not before **February 16, 2012**.

[29] Orders P-984 and PO-2556.

2. To verify compliance with this order, I reserve the right to require the board to send me a copy of the record disclosed pursuant to order provision 1.

Original Signed by: ____________________ January 18, 2012

Cathy Hamilton
Adjudicator