Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3256

Appeal PA12-113

Ministry of Natural Resources

September 23, 2013

Summary: The appellant sought access to records of communication between the Ministry of Natural Resources and a company relating to contractual and performance discussions. The ministry granted access to some records and denied access to others, either in whole or in part, claiming the application of the mandatory exemptions in sections 17(1) (third party information) and 21 (personal privacy) and the discretionary exemption in section 18 (valuable government information) of the *Act*. In this order, the adjudicator upholds the ministry's decision, in part, and determines that the exemptions in sections 18 and 21 apply and that the three part test in section 17(1) are met in regard to portions of records. The adjudicator also upholds the ministry's exercise of discretion. The remaining portions of the records for which the test under section 17(1) are not met are ordered disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 17, 18 and 21.

Orders Considered: PO-2497.

OVERVIEW:

[1] The Ministry of Natural Resources (the ministry) operates a number of provincial parks in Ontario through Ontario Parks. These parks are open to the public for a number of activities, including camping. The Park Reservation and Registrations Service (the service) provides a number of services relating to provincial parks including

the use of an integrated reservation/accounting tool used to streamline park reservations, including:

- a staffed call centre;
- an internet reservation website;
- software to process the reservation, issue permits and account for revenues;
- computers at the call centre and park level;
- an ongoing helpdesk; and
- a telecommunications network to move data between the call centre/internet and each provincial park.

[2] The current service commenced following an RFP process. The ministry entered into a contract with the first ranked vendor, the requester, to develop and implement the service. According to the ministry, several problems began to emerge with the service and eventually the ministry terminated its contract with the appellant and entered into another contract with the second ranked vendor. The ministry, the requester and the second ranked vendor are currently engaged in a civil litigation in relation to the termination of the contract.

[3] This order disposes of the issues raised as a result of a decision made by the ministry in response to a request under the *Freedom of Information and Protection of Privacy Act* (that *Act*) for information related to communications between the ministry and a named company. After ongoing discussions with the ministry, the requester revised the request to include the following information:

> All records of communication between MNR and [a named company] in regards to [the named company]/MNR contractual discussions, [the named company] performance discussions and [the named company] contractual performance between June 1, 2009 and September 1, 2011; and
>
> All records of communication between [a staff member] of MNR and [the president of the name company] between June 1, 2009 and September 1, 2011.

[4] The ministry identified responsive records and notified several affected third parties to obtain their views regarding disclosure of the records.

[5] Some of the affected third parties provided the ministry with submissions on which portions of the records they believed should not be disclosed.

[6] After considering the representations from the third parties, the ministry issued a decision, granting access to some records, in whole, and to others, in part. The

remaining records were withheld, in full. The ministry claimed the application of the mandatory exemptions in section 21 (personal privacy) and 17 (third party information), and the discretionary exemptions in sections 18 (economic and other interests) and 19 (solicitor client privilege) of the *Act*.

[7] The requester (now the appellant) appealed the ministry's decision to this office.

[8] During the mediation of the appeal, the mediator contacted the appellant, the ministry and three affected third parties. The ministry confirmed its position that no additional portions of the records may be disclosed. The affected party whose company is the subject matter of the request advised the mediator that, in his view, third party information about how the affected party conducts business must be withheld as it is part of a very competitive business.

[9] The appellant advised that he was not seeking access to personal information, such as personal email addresses or phone numbers. The appellant also advised, however, that he was seeking access to information that may state when a ministry employee was on vacation, as he believes this information may be of interest to him.

[10] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the ministry and the appellant. I sought but did not receive representations from three affected parties.

[11] During the inquiry, the ministry issued a supplementary decision letter to the appellant and two of the affected parties, in which it withdrew its reliance on the discretionary exemption in section 19. The two affected parties had 30 days from the date of the letter to file an appeal with this office with respect to the records in which they have an interest. As no appeals were filed, further records were disclosed to the appellant and section 19 is no longer at issue in this appeal. In addition, the ministry advised that it should not have claimed the exemption in section 17 with respect to record A0149107_3. As no other exemptions were claimed with respect to this record, I will order the ministry to disclose this record if it has not done so already.

[12] In his representations, the appellant stated that he had no further representations in relation to sections 17 and 18 other than to state that I should place the ministry under the strict burden of proof with respect to the exemptions it claimed.

[13] For the reasons that follow, I uphold the ministry's decision, in part, and order it to disclose some of the records to the appellant.

RECORDS:

[14] The ministry provided the appellant with a 124 page index of records, which describes the record, stating whether access to each record or portion of a record was granted or denied, and identifies the exemption that was claimed for that record or portion of the record. The records consist of various types of correspondence, communications, reports, agreements, and invoices.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

C. Does the mandatory exemption at section 17 apply to the records?

D. Does the discretionary exemption at section 18(1) apply to the records?

E. Did the institution exercise its discretion under section 18? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[15] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
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> (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,
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> (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;

[16] 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.[1]

[17] 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.[2]

[18] 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.[3]

[19] The ministry submits that portions of some of the records contain personal information such as individuals' names in conjunction with home addresses, home telephone numbers, email addresses, names of relatives and details of vacations.

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.

[20] In his representations, the appellant states that he is not seeking any personal information unless it refers to information about the timing of when ministry employees were on vacation. Based on the appellant's stated position, personal information such as home addresses, email addresses, names of relatives and cell phone numbers is no longer at issue in this appeal. Consequently, I have removed this information from the scope of the request.

[21] Therefore, the remaining information that was withheld from the appellant and which remains at issue is information concerning vacation time taken by a number of individuals. I have reviewed the records and find that information about the individuals' vacation time is recorded information about them and qualifies as their personal information. I make this finding despite the fact that the named individuals were acting in their professional capacity. I find that information about an individual's vacation time would reveal something of a personal nature about them.

[22] I will now determine whether the portions of records that contain personal information, specifically an individual's vacation time, is exempt from disclosure under section 21(1) of the *Act*.

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

[23] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The ministry submits that disclosure of the personal information at issue would constitute an unjustified invasion of the individuals' privacy, as contemplated by section 21(1)(f).

[24] The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21.

[25] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[26] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[4]

[4] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[27] The ministry submits that the disclosure of information such as vacations is presumed to be an unjustifiable invasion of privacy, as it relates to one's employment or educational history. The ministry further states that even if the presumption does not arise, balancing the factors in section 21(2) and the circumstances of the request favour non-disclosure of the information at issue.

[28] With respect to the presumption in section 21(3)(d) (employment history), past orders of this office have found that information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption.[5]

[29] I am not persuaded by the ministry's argument that reference to an individual's one-time vacation would on its own qualify as information that would reveal their employment history. I find, therefore, that the presumption in section 21(3)(d) does not apply in this appeal.

[30] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[6]

[31] I have considered the factors in section 21(2) and find that there are no factors either favouring disclosure or non-disclosure of the individuals' vacation time to the appellant. However, as the section 21(1) exemption is mandatory, and there are no factors favouring disclosure, I uphold the exemption and the ministry's decision with respect to the personal information contained in the records. Consequently, those portions of records that were withheld under section 21(1) will not be disclosed to the appellant.

C. Does the mandatory exemption at section 17 apply to the records?

[32] The ministry submits that disclosure of the information would give rise to a reasonable expectation of harm as identified in sections 17(1)(a) and/or 17(1)(c) of the *Act*, which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

[5] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.
[6] Order P-239.

> supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (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 undue loss or gain to any person, group, committee or financial institution or agency;

[33] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[7] 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.[8]

[34] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

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

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

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

Part 1: type of information

[35] The ministry submits that the information at issue is the technical and/or commercial information of the affected party. These types of information listed in section 17(1) have been discussed in prior orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences

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[7] *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.).
[8] Orders PO-1805, PO-2018, PO-2184, MO-1706.

> or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[9]
>
> *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.[10] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[11]

[36] With respect to commercial information, the ministry states that records relate to the buying and selling of the affected party's parks reservation system and detail:

- The development of an escrow agreement;
- Discussions of other business ventures of the affected party;
- The development of a commercial agreement and discussions of amendment provisions;
- Discussions of business practices and schedules;
- Discussions of the letter of credit and the letter of guarantee;
- The rate schedule and charges per minute;
- The form required to set up an electronic fund transfer;
- A reference to one of the affected party's other customers;
- The affected party's call volumes; and
- Discussions about a monthly invoice.

[37] The ministry also submits that the records contain technical information, in that they contain specific information relating to the technical implementation of the services provided by the affected party. In particular, the ministry states, the records detail:

- Technical approaches to business solutions;
- Development and implementation plans;
- Discussions of technical issues with the reservation system at specific provincial parks and campgrounds;
- Discussions of the affected party's software capabilities and functionality;
- Discussions of possible technical solutions to reservation problems;
- Discussions of "PCI" testing;

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[9] Order PO-2010.
[10] See note 9.
[11] P-1621.

- Troubleshooting solutions; and
- Discussions of software issues.

[38] Past orders of this office have found that pricing information[12] constitutes "commercial" information for the purposes of the municipal equivalent of section 17(1) as it relates to the buying, selling or exchange of merchandise or services. In this case, there is information in the records about the rate schedule and charges, which relates to the buying and selling of a service.

[39] Further, some of the records contain information about the pre-contractual negotiations between the ministry and the affected party, in relation to the buying of the affected party's services by the ministry. I find that this type of information also qualifies as commercial information. In addition, portions of the records also refer to some of the affected party's other customers, which in past orders has been considered to be commercial information.

[40] Consequently, I find that some of the records contain "commercial" information for the purposes of section 17(1).

[41] Similarly, I find that some of the records contain "technical" information, as described above. In particular, some of the records describe technical connection problems and how they were resolved, software issues and development and implementation plans. This type of information qualifies as technical information for purposes of section 17(1), as it describes the operation or maintenance of a process, specifically the on-line reservation system.

[42] However, I find that the information contained in records A0150117 through A150179 does not contain commercial or technical information. These records contain statistical data prepared by the affected party at regular intervals in regard to the number and type of telephone calls received by it since the implementation of its on-line reservation system and call centre. I find that this information, which is essentially the affected party's call volumes on this particular project, does not qualify as commercial information as it does not contain information belonging to an organized field of knowledge that relates to the buying, selling, or exchange of merchandise or services. Similarly, this information does not qualify as technical information as it does not describe the operation or maintenance of the on-line reservation system or the call centre, and simply sets out telephone call data. Consequently, the first part of the three-part test has not been met with respect to these records. As all parts of the test for section 17(1) must be met, I will order the ministry to disclose these records to the appellant.

[12] Orders MO-1237 and MO-2197.

[43] The remaining commercial and technical information has met the first part of the three-part test. I will go on to determine whether the second part of the test has been met.

Part 2: supplied in confidence

[44] 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.[13]

[45] 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.[14]

[46] In order to satisfy the "in confidence" component of part two, 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.[15]

[47] 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
- prepared for a purpose that would not entail disclosure.[16]

[48] The ministry submits that the information at issue, largely in the form of emails, was submitted to it by the affected party as part of the development of the agreement and the implementation of the system. I have reviewed the records and I agree with the ministry that the information at issue was supplied to it by the affected party.

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[13] Order MO-1706.
[14] Orders PO-2020, PO-2043.
[15] Order PO-2020.
[16] Orders PO-2043, PO-2371, PO-2497.

[49] With respect to the confidentiality of the information at issue, the ministry submits that the nature of the contract awarded would suggest that the information was supplied in confidence. The ministry states:

> There is a significant degree of confidentiality implicit in the process of developing the reservation system, particularly the technical aspects of it which is part of competitive industry. An examination of the records makes it clear by the candor of the discussion and the information provided that it was communicated in confidence. Consequently, within the context of the records, there is an objective basis as required by past orders[17] for an expectation of confidentiality with respect to the affected party's information.

[50] Based on the ministry's representations and my review of the agreement between the ministry and the affected party, I am persuaded that the affected party had a reasonably-held implicit expectation that the commercial and technical information supplied to the ministry as part of their agreement would be treated confidentially by the ministry. I have reviewed the contract between the ministry and the affected party and note that there is a confidentiality clause in it. The existence of the confidentiality clause in the contract, although apparently binding on the affected party and not the ministry, is nonetheless evidence which supports the position that the information at issue was intended to be treated as sensitive and confidential.

[51] Consequently, the second part of the three-part test has been met with respect to the remaining information at issue. I will now determine whether the third part of the test has been met.

Part 3: harms

[52] 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.[18]

[53] 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.[19]

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[17] P-582, P-607, P-610, M-258, P-765 and P-788.

[18] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[19] Order PO-2020.

[54] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[20]

[55] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[21]

[56] The ministry states that the affected party is in the best position to present evidence on the question of whether disclosure of the information would prejudice its competitive position resulting in undue loss or gain. However, the ministry made representations on this issue, submitting that prejudice to competitive position would result if pricing, material variations, and bid break down information, was disclosed, as it would enable competitors to adjust their bids and underbid in future business contracts.

[57] In addition, the ministry submits that disclosure of "intellectual property and information" such as development and implementation plans, technical approaches to business solutions, and financial information around project and performance measures would allow competitors to use the affected party's business strategy, adjust their bids, underbid in future contracts or misuse the performance information to detract from the affected party, which would significantly undermine the affected party's position or result in an undue loss to it.

[58] Further, the ministry submits that one record contains information relating to the transfer of money. It argues that the disclosure of this information, which is a link to set up an electronic fund transfer, could be misused by others with an improper intent to obtain money illegally or interfere with payments, resulting in undue loss to the affected party.

[59] The ministry further submits that disclosure of the technical information in the records would provide insight into the affected party's provision of service, which could be used by competitors to address issues within their system, to develop software that mimics the affected party's software, or to undermine the affected party, resulting in diminishing the affected party's competitive position.

[60] As previously stated, the on-line reservation/call centre service provider was provided with the opportunity to provide representations but did not.

[61] I have reviewed all of the information at issue in this appeal and I am prepared to accept the ministry's argument regarding the harms caused by the disclosure of the commercial information in the records. The commercial information in the records that was withheld consists of information which was being discussed between the parties

[20] Order PO-2435.
[21] Order PO-2435.

during the negotiation of the contract. I find that disclosure of this information could prejudice the affected party's competitive position in the future, as competitors would be able to undercut the affected party or adopt its business strategy, resulting in undue loss to the affected party and undue gain to a competitor.

[62] However, the technical information in records A0149032-A0149067, A0149162, and A0149252-A0150088 sets out details about the progress of the project and/or connection problems and how they were resolved. As previously stated, during the mediation of the appeal, the affected party advised the mediator that third party information about how the affected party conducts business must be withheld as it is part of a very competitive business.

[63] In the absence of representations from the affected party, I find that I have not been provided with sufficiently "detailed and convincing" evidence that disclosure of these records could reasonably be expected to give rise to the harms outlined in sections 17(1) of the *Act*. The affected party provided no evidence that the three parts of the test have been met, nor has it provided evidence to support its claim that disclosure of the records would result in any of the harms set out in sections 17(1)(a) and/or (c). In previous orders,[22] this office has rejected similar "bald assertions" of harm without specific explanation or evidence as being insufficient to meet part three of the section 17(1) test. I find that the statements made by the affected party in its earlier objection to disclosure during the mediation of the appeal, without any additional information, do not support a finding of reasonable expectation of harm. Furthermore, I find that the harms described in section 17(1) are not self-evident from the records I have listed above, with the exception of certain technical information.

[64] I make this finding despite the fact that the ministry made representations on this exemption. In Order PO-2497[23], Adjudicator Daphne Loukidelis addressed the cogency of the evidence required to establish harm under section 17(1) of the *Act*, where she stated:

> The mandatory exemption for confidential third party information was never intended to be wielded as a shield to protect third parties from competition in the market place, but rather, from a reasonable expectation of *significant* prejudice to their competitive position. I could accept for the sake of argument that some negative market-share consequences to the CMPA could follow with the release of Record 6. However, I am not persuaded by the evidence that the potential for this harm is sufficiently linked with the disclosure of Record 6 to constitute significant prejudice or undue loss as those terms are contemplated by

[22] Orders PO-3032 and PO-3185.
[23] Upheld on judicial review in *Canadian Medical Protection Association v. Ontario (Information and Privacy Commissioner),* Divisional Court File No. 461/06.

> paragraphs (a) and (c) of section 17(1), or to trigger the protection of the *Act*.

[65] I adopt this approach for the purposes of this appeal. Much of the technical information in these records describe connection difficulties being experienced at the park level in general terms and I find that the disclosure of this information would not enable a competitor to develop software that mimics the affected party's software, as argued by the ministry.

[66] I am not satisfied that the ministry has provided sufficiently detailed and convincing evidence of a reasonable expectation of *significant prejudice* to the affected party's competitive position [17(1)(a)] or undue loss [17(1)(c)] by the disclosure of the records containing this technical information, with one exception.

[67] However, I find that some of information in records A0149252 through A0150088 is very specific technical information, the disclosure of which could result in harm to the affected party that is contemplated by section 17(1). In particular, portions of these records contain an IP address, and details about modem, router and hub.

[68] As a result, I find that part three of the test for the application of section 17(1) has not been met with respect to most of the technical information and, consequently this information is not exempt under section 17(1). I order the records containing the information that is not exempt to be disclosed to the appellant.

[69] Conversely, I uphold the ministry's decision with respect to the records containing commercial information and to the specific technical information described above.

D. Does the discretionary exemption at section 18(1) apply to the records?

[70] The ministry is relying on the exemptions in sections 18(1)(c) and (d), to deny access to portions of two records. These sections state:

> A head may refuse to disclose a record that contains,
>
> . . .
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario

> or the ability of the Government of Ontario to manage the economy of Ontario;

[71] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*[24] explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[72] For sections 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[25]

[73] The ministry states that the information withheld relates to the escrow account associated with the contract with the affected party. This information, the ministry advises, includes the escrow account number. The account is accessed through an internet portal which is held by a third party company that provides protection for intellectual property. Included in the account is the source code for the software provided by the affected party.

[74] The ministry submits that disclosure of the escrow account information would allow one to access the affected party's software, which could then be copied or tampered with. The reason software is stored in a third party's "vault" is to ensure the security of the software.

[75] The ministry states:

> If the Ministry cannot protect such information which it needs in order to run the reservation program, companies providing such services will either not deal with the Ministry or will only do so at a substantially higher price in order to take into account the greater risk. Thus, a release would adversely affect the government's ability to protect a legitimate economic interest of the ministry . . .

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[24] Vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report).

[25] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[76] I am satisfied that the ministry has provided credible, detailed and convincing evidence that the disclosure of the escrow account information could reasonably be expected to cause not just harm to the economic interests of the ministry and the financial interests of the government of Ontario, as it would hinder future negotiations between the ministry and other potential service providers.

[77] Accordingly, I find that the escrow account information in the records is exempt under sections 18(1)(c) and (d), subject to the discussion of the exercise of discretion, below.

E. Did the institution exercise its discretion under section 18? If so, should this office uphold the exercise of discretion?

[78] The section 18 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[79] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations or it fails to take into account relevant considerations.

[80] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[26] This office may not, however, substitute its own discretion for that of the institution.[27]

[81] Relevant considerations may include those listed below.

- the purposes of the *Act*, including the principles that information should be available to the public, and exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;

[26] Order MO-1573.
[27] Section 54(2).

- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[82] The ministry submits that, in exercising its discretion, it attempted to balance the purpose of the exemption in section 18 with all other relevant interests and considerations, including the facts and circumstances of this request. The ministry states that its exercise of discretion involved two steps. The first step was that the head of the ministry determined whether the exemption applied. The second step was that the head had "regard" to all relevant interests, including the public interest in the disclosure of the information and concluded that disclosure could not be made. In addition, the ministry submits that it severed the records in order to disclose as much information as possible.

[83] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which it exercised its discretion. I note that the ministry only withheld portions of the two records because they consisted of details of the ministry's escrow account with a third party.

[84] I am satisfied that that ministry weighed the appellant's interest in obtaining access to the requested information against the protection of sensitive escrow account information. Accordingly, I am satisfied that the ministry did not err in the exercise of its discretion in applying the exemption in section 18 and in refusing to disclose the withheld information contained in the two records to the appellant.

[85] In conclusion, I uphold the ministry's decision in part. I uphold the mandatory exemption in section 17 with respect to some of the records but not others, and I uphold the mandatory exemption in section 21. I also uphold the ministry's application of the discretionary exemption in section 18 and its exercise of discretion.

ORDER

1. I order the ministry to disclose records A0149107_3, A0149032 through A0149067, A-0149162, and A0150117 through A0150179, in full to the appellant by **October 29, 2013** but not before **October 24, 2013**.

2. I order the ministry to disclose records A0149252 through A0150088, in part to the appellant by **October 29, 2013** but not before **October 24, 2013**. The information to be withheld is the IP address, modem, router and hub details.

3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require that the region provide me with a copy of the record sent to the appellant.

Original signed by: September 23, 2013
Cathy Hamilton
Adjudicator