Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3472

Appeal PA13-293

Ministry of Finance

March 24, 2015

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* to the Ministry of Finance (the ministry) for actuarial and other financial records related to three separate pension plans. The ministry denied access to the responsive records, claiming the application of the mandatory exemption in section 17(1) (third party information), among other exemptions. During the mediation of the appeal, the request was narrowed to the actuarial reports, for which only section 17(1) was claimed. In this order, the adjudicator does not uphold the ministry's decision and orders it to disclose the records to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1).

Orders Considered: Order PO-3116.

Cases Considered: *Merck Frosst Ltd. v. Canada (Health)*, 2012 SCC 3.

OVERVIEW:

[1] This order disposes of the issue raised as a result of an access decision made by the Ministry of Finance (the ministry) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for actuarial and other financial records related to three separate pension plans.

[2] Pursuant to section 28(1)(a) of the *Act*, the ministry notified certain third parties whose interests may be affected by the disclosure of the records and sought their views regarding disclosure of the information relating to their pension plans. After considering the third parties' submissions, the ministry issued a decision granting partial access to the responsive records, relying on sections 17(1) (third party information), 17(2) (tax information) and 19 (solicitor-client privilege) of the *Act* to deny access to the remaining records. The ministry subsequently issued a revised access decision, in which it added a claim of section 15 (relations with other governments) to deny access to some of the records.

[3] The appellant appealed the ministry's decision to this office, and a mediator was appointed to explore resolution of the issues. After reviewing the ministry's index of records, the appellant indicated that he wished to pursue access to records 72, 74, 76, 92, 95, 96, 98, 114, 116 and 118. When contacted by the mediator, the third parties[1] confirmed their opposition to disclosure of these records. The only exemption claimed with respect to the records responsive to the appellant's narrowed scope is section 17(1).

[4] Since the appeal could not be resolved through mediation, it was transferred to the adjudication stage of the appeals process where an inquiry is conducted by an adjudicator. The adjudicator originally assigned to the appeal sought and received representations from the ministry, the three affected parties and the appellant. Representations and reply representations were shared in accordance with this office's *Practice Direction 7*. The appeal was then transferred to me for final disposition. Portions of some of the affected parties' representations were withheld, as they met the confidentiality criteria set out in *Practice Direction 7*. However, those representations were taken into consideration in this order.

[5] For the reasons that follow, I do not uphold the ministry's decision and order it to disclose the records to the appellant.

RECORDS:

[6] The following records remain at issue in this appeal:

- Records 72, 74 and 76, which are the Actuarial Valuations for a numbered Plan for three specific years;
- Records 92, 95, 96 and 98, which are the Actuarial Reports to the Board of Trustees for a numbered Plan for four specific years; and
- Records 114, 116 and 118, which are the Actuarial Valuations for a numbered Plan for three specific years.

[1] There are three third parties, which will be referred to as the affected parties.

DISCUSSION:

Background

[7] The ministry and the affected parties provided background information concerning the nature of the records at issue. Ontario's *Pension Benefits Act* (the *PBA*) sets minimum standards for registered pension plans in the province. The purpose of the *PBA* is not to protect the public at large or a subset of the public, such as consumers, but is intended to protect the beneficiaries of employment-based pension plans that are registered under it.[2]

[8] Generally, registered pension plans provided for individuals who work in Ontario are subject to the requirements of the *PBA* and its regulations. The records at issue are actuarial valuation reports that are statutorily required to be filed by administrators of pension plans which are registered with the Financial Services Commission of Ontario (FSCO) under the *PBA*.[3] These actuarial valuation reports are filed by specific Multi-Employer Pension Plans (MEPPs). MEPPs is a species of pension plan recognized and defined in the *PBA*. In particular, they are pension plans established and maintained for employees of two or more employers who contribute, or on whose behalf contributions are made to a pension fund by reason of the operation of a collective agreement. The pension plans have a Board of Trustees consisting of representatives of employers and unions. The Board of Trustees hires third parties to administer the plans. The beneficiaries of these plans are the union members and other designated persons, such as family members of those members or the plan's participants.

[9] The *PBA* provides for access to information about pension plans. Section 29 of the *PBA* provides certain parties with the right to access prescribed information from the administrator of a pension plan, namely: those who have entitlements under the pension plan; a representative of a trade union that represents members of a pension plan; and an employer. Section 30 of the *PBA* grants these individuals and the plan administrator the right to inspect certain documents pertaining to pension plans at the offices of the Superintendent,[4] including the records that are the subject matter of this appeal.

[10] The sole issue in this appeal is whether the records at issue are exempt under section 17(1) of the *Act*.

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[2] Relying on the Supreme Court of Canada's discussion of the *PBA*'s purpose in *Monsanto v. Ontario (Superintendent of Financial Services)* [2004] 3 S.C.R. 152 at para. 38.
[3] R.S.O. 1990, c. P.8, as amended.
[4] See sections 45 and 46 of Regulation 909.

[11] 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, 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;
>
> . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[12] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[13] 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) and/or (c) of section 17(1) will occur.

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[5] *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.).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[14] The relevant types of information listed in section 17(1) have been discussed in prior orders. In particular, financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[7]

[15] The ministry submits that the records contain "financial information" because they include not only financial information, but also constitute a type of financial report whose purpose is to disclose the financial condition of the pension plans in question. For example, the ministry states, the reports set out the level of contributions that are made into the plans and whether the contributions are sufficient to pay the benefits. The ministry also argues that information about the plan beneficiaries, such as the number of active and retired members, also constitutes financial information because the ratio of active members to retired members affects the long-term financial viability of the plan.

[16] The three affected parties also argue that the records contain financial information, including:

- Assessments of the long-term financial status and health of the plan;
- Accounting of whether the plan has a surplus of assets, a shortfall of assets or sufficient assets to cover the future outlay of benefits;
- The annual rates of return for the plan on a market value basis and actuarial basis;
- Information about the financial history of the plan based on its audited financial statements;
- The actuarial methods and assumptions used in the valuation;
- The actuarial value of assets, actuarial liabilities, including a breakdown by class of beneficiary;
- Funding excess/deficit and sensitivity analysis;
- The financial position of the plan on a wind-up basis, as well as on a solvency basis;
- Contribution requirements and anticipated expenses on an annual and per-hour basis;
- Rates for employer contributions as provided under the collective agreements;
- Allocation of the assets amongst different investment classes;
- The method and formula for calculating pensions, including specific dollar figures for those calculations;

[7] See note 3.

- The numbers of beneficiaries within each category of beneficiary by age range and the total and average pension within each beneficiary category by age range; and
- A listing of invested assets and the names of the funds invested in.

[17] The appellant's representations do not address whether the records contain financial information in particular, but argue that the records contain neither commercial nor labour relations information.

Analysis and findings

[18] The records at issue are actuarial valuation reports prepared for the Boards of Trustees of three construction industry unions. I agree with the representations provided by the affected parties that the records contain financial information. I am satisfied that the information contained in the records consists of information relating to the financial status of the three pension plans. In addition, I find that the records contain the specific data that was used to complete the valuations. Consequently, I find that all of the records at issue contain financial information for the purposes of section 17(1), and the first part of the three-part test in section 17(1) has been met.

[19] Having found that the records contain financial information, it is not necessary for me to consider whether they also contain commercial or labour relations information.

Part 2: supplied in confidence

[20] 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.[8]

[21] 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.[9]

[22] 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.[10]

[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] Order PO-2020.

[23] 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.[11]

[24] From my review of the representations, there does not appear to be a dispute amongst the parties that the records at issue were "supplied" by the administrators and/or Boards of Trustees of the pension plans to FSCO. Consequently, the issue to be determined in the second part of the test in section 17(1) is whether the valuation reports were supplied "in confidence" to FSCO.

[25] The ministry submits that the valuation reports were prepared solely for the purpose of complying with the reporting requirement in the *PBA* and not for the purpose of providing information to the public. The ministry goes on to argue that the *PBA* sets out its own regulatory scheme for providing the disclosure of information about pension plans registered with FSCO, but limits access to those persons who have a direct interest in the pension plan, such as persons who have entitlements under the plan, a trade union representative or an employer.

[26] Further, the ministry submits that:

- the pension plan administrators did not intend for the valuation reports to be made publicly available and therefore, there was an implicit expectation of confidentiality;
- the Boards of Trustees and pension administrators consistently kept the information in the records confidential; and
- the records were prepared for regulatory purposes that would not entail disclosure.

[11] Orders PO-2043, PO-2371 and PO-2497.

[27] The ministry goes on to state:

> FSCO has not made these reports available to the public in the past. It has only made them available to persons who have an interest in the pension plan in accordance with section 30 of the *PBA* and section 46 of Regulation 909. The BCIPC Pension Decision[12] considered and rejected the argument that the availability of this type of information to the members of the pension plan meant it was publicly available (the British Columbia *Pension Benefits Standards Act* contains similar provisions to the *PBA* that makes this type of record available to plan beneficiaries):
>
> > [27] I do not accept ICBA's assertion that, because the PBSA requires a plan administrator to provide certain information directly to a person entitled to a benefit under a plan, there could not be an expectation of confidentiality when they provide that same information. Disclosure to a beneficiary does not constitute general disclosure to the world.
> >
> > [emphasis added]

[28] The affected parties also submit that the records were supplied in confidence to FSCO for the same reasons as argued by the ministry. In addition, they add:

- that the disclosure scheme of the *PBA* creates a clear implication of a reasonable expectation of privacy at the time the information was provided to FSCO;
- that the valuation reports prepared for one of the affected parties explicitly states that they should not be distributed to persons other than the intended users without consent; and
- that given the Board of Trustees has a fiduciary obligation to the beneficiaries which includes confidentiality obligations and the restricted requirements for disclosure under the *PBA*, the records were supplied to FSCO with the expectation that their confidentiality would be maintained.

[29] Conversely, the appellant submits that the records were not supplied "in confidence." First, the appellant states that there is no explicit promise of confidentiality in the *PBA*. Second, the appellant argues that because the *PBA* provides for the records' availability to any one of thousands of beneficiaries, the records could hardly be said to be confidential. Third, the appellant submits that one of the affected parties made a public assertion about its funding status and, therefore, lost the ability to rely upon the confidentiality of the records.

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[12] Order F13-02 of the Office of the Information and Privacy Commissioner for British Columbia, currently under judicial review.

[30] The appellant relies on a decision of the Office of the Information and Privacy Commissioner of Alberta[13] in which the Alberta Treasury Board and Finance had withheld pension plan information from records relying on, among other exemptions, section 16 of Alberta's equivalent of the *Act*. Section 16, the appellant advises, is almost identical to section 17(1) of Ontario's *Act*. In that order, Adjudicator Teresa Cunningham concluded that there was no evidence to show that the pension plan records requested had been supplied in either explicit or implicit confidence. In addition, the appellant advises that the adjudicator noted that the governing pension legislation did not prohibit the Superintendent of Pensions from disclosing information about a pension plan, and was also given wide ranging powers which would potentially entail disclosure of information gathered during the course of an investigation into the compliance of a pension plan. The appellant goes on to argue that the principles in Order F2012-17, weighing in favour of disclosure apply in the present appeal, given the similarities between the two provinces' freedom of information and pension legislation.

[31] In reply, the ministry reiterates its original arguments and adds that the third party interests at stake are not only for the benefit of the unions, but also the plan beneficiaries. The ministry also argues that Order F2012-17 can be distinguished from the circumstances in this appeal because it appears that the records at issue in that appeal were not actuarial reports, and the adjudicator made her conclusions because the institution and the pension plan administrator made only "bare arguments" that the records were intended to be kept confidential. Lastly, the ministry submits that the records at issue in this appeal are not part of an investigation, but are statutory filings made in the normal course of business. In any event, the ministry states the fact that records could be disclosed in the course of litigation does not mean there is no expectation of privacy when they are provided in the normal course for regulatory purposes.

[32] Also in reply, one of the affected parties states that contrary to the appellant's assertions, it did not make public statements about the pension plan provided to its members. It also argues that Order F2012-17, which the appellant is relying on, simply confirms that determining whether information was supplied in confidence to an institution requires considering all the circumstances in which the information was supplied. This affected party goes on to argue that the reasoning in British Columbia Order F13-02 should be followed in this instance.

[33] Another affected party also states that the records that were the subject matter in Order F2012-17 were the result of an investigation, not a statutory filing and do not appear to be actuarial records. This affected party also argues that the findings in The Office of the Information and Privacy Commissioner for British Columbia's Order F13-02 regarding whether records were supplied in confidence should be followed.

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[13] Order F2012-17.

Analysis and Findings

[34] The information contained in the records was provided by the Boards of Trustees/administrators to FSCO in order to meet the reporting requirements of the *PBA*. There is no explicit confidentiality provision in this statute which would create an expectation of confidentiality on the part of a party providing the information to FSCO.

[35] However, in the ministry's and the affected parties' representations, they have explained and I am satisfied that the records at issue were supplied "in confidence" for the purposes of section 17(1) of the *Act*. I accept the position taken by all three affected parties, as well as the ministry, that:

- the valuation reports were not intended to be made publicly available;
- the Boards of Trustees and pension administrators consistently kept the information in the records confidential;
- the records were prepared for regulatory purposes that would not entail disclosure; and
- FSCO has not made these reports publicly available in the past.

[36] All of these circumstances lead me to conclude that the valuation reports were supplied implicitly with a reasonably-held expectation of confidentiality between the affected parties and the ministry.

[37] In making this finding, I am mindful of the Alberta and British Columbia Orders cited by the parties. However, I am not bound by these decisions. In any event, for the reasons articulated above, I find that the ministry and the affected parties have provided sufficient evidence to demonstrate that there was an implicit expectation of confidentiality when the records at issue were supplied to FSCO.

[38] The appellant takes the position that the records were not supplied "in confidence" because there is no explicit promise of confidentiality in the *PBA*, and the *PBA* provides for the records' availability to any one of thousands of beneficiaries. As described in the representations, the *PBA* and Regulation 909 provide for disclosure of the records to persons who have an interest in the pension plans, such as, but not limited to, members, beneficiaries, employers and union representatives. However, I agree with the ministry that this limited disclosure does not negate the reasonable expectation of the confidentiality of the valuation reports at the time they were supplied by the Boards of Trustee/administrators to FSCO.

[39] Consequently, I find that the records at issue were "supplied in confidence" by the Boards of Trustees and/or administrators to FSCO, and the second part of the three-part test in section 17(1) has been met.

Part 3: harms

[40] 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.[14]

[41] 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.[15]

[42] 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).[16] 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*.[17]

[43] The ministry states that contributions to fund the benefits provided by MEEPs are paid on the basis of the employment earnings or period of employment of the active members in the plan. If an actuarial report indicates there are insufficient contributions to provide the benefits, the actuary is required by regulation to propose options which make the contributions sufficient. The ministry also advises that the *PBA* provides for the transfer of pension assets and liabilities where members of the original plan cease being represented by one trade union and become members of another trade union (that is associated with the successor plan). The ministry refers to this labour relations practice as "raiding."

[44] The ministry goes on to argue that the information in the records, if disclosed, can reasonably be expected to be exploited by competitors of the pension plan. For example, the ministry argues, other trade unions could use the information to displace or raid the trade union that represents the members of the plan, resulting in members transferring their pensions out of the plan. The ministry further argues that this raiding of pension assets can cause financial harm to the beneficiaries who remain in the plan, by reducing their benefits. In addition, the ministry argues that employers who continue to participate in the original plan may also be required to increase the level of their contributions, causing them undue harm as well.

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[14] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[15] Order PO-2020.
[16] Order PO-2435.
[17] *Ibid*.

[45] The ministry cites BC Order F13-02, stating that Assistant Commissioner Jay Fedorak found that the pension administrators had not established the reasonable expectation of harm that was required under the British Columbia statute. In that appeal, the request was made by an employers' organization for the following information: the average annual pension paid; the average accrued monthly pension; the surplus or unfunded liability from the previous valuation report; and the surplus or unfunded liability from the current valuation reports for each of 13 pensions. The requester had asked for this information to be extracted from the actual valuation reports that had been filed. Although Assistant Commissioner Fedorak was prepared to accept that loss of members from pension plans would result in the harm that the Boards of Trustees and unions identified, their representations did not persuade him that disclosure of the information at issue could reasonably be expected to cause them to lose members.

[46] The ministry argues that the nature of the potential harm identified by the Board of Trustees in BC Order F13-02 is different from this appeal. The ministry states:

> . . . The harm identified in that case was of a more general, diffuse nature pertaining to collectively bargained pension plans as a whole. The potential harm was a more general concern that the information could be used for a campaign to encourage employees to cease being represented by trade unions, and to switch to RRSPs instead of pension plans. It should be noted that the Assistant Commissioner accepted that if the disclosure of the information was to result in a loss of membership for a pension plan that this would constitute harm, but that in the circumstances of that decision, the risk of this happening was simply not made out.
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> The situation with respect to these records is different. The information that is requested is in respect of specific pension plans where, as identified by the affected third parties, there is a competitive labour relations environment between different trade unions who offer their own pension plans. Given this context, it can reasonably be anticipated that the information about the financial condition of the pension plans in question would be used by trade union competitors to have trade union sponsors de-certified and result in the termination of members of the pension plan. Any reduction in the number of active members may be expected to adversely affect the financial condition of the pension plan, its remaining beneficiaries and remaining employers.

[47] The ministry further submits that because disclosure of the records could be used by competitor trade unions to attempt to draw members away, it could weaken the position of the trade union in its bargaining with the employer over terms and conditions of the pension plan, as contemplated in section 17(1)(a) of the *Act*.

Similarly, the ministry argues that the harms in section 17(1)(c) are also relevant, as reduction in the membership base can result in increased contributions for employers and members, as well as a reduction in benefits for plan beneficiaries.

[48] One of the affected parties argues that the appellant is a rival trade union, seeking to use the information in the records to "seek a labour relations advantage" over it. The two unions (the appellant and the affected party), according to the affected party, are currently in litigation before the Ontario Labour Relations Board. The affected party states that the appellant is not only attempting to gain leverage in the ongoing labour relations litigation, but it also attempting to "defame" the affected party and members of its own pension plan who are seeking information about their plan. The affected party goes on to state that disclosure of the records to the appellant would allow the appellant to undermine the affected party's interests, causing them "litigation hardship," and the harms contemplated in sections 17(1)(a) and (c).

[49] Another affected party states that the construction industry is very competitive and the pension plan represents one aspect of that competition; for example, the information in the records could be used to draw comparisons between the pension plans and other benefit plans provided within the industry. These comparisons, the affected party submits, can be used by participants within the construction industry to seek to improve their own competitive position in regards to signing up union members or other interests. As a result, it argues, it is not unreasonable to expect that the information at issue would be used by individuals or groups with adverse interests to attempt to better their competitive position. In particular, the information in the records could be used to generate comparisons between the affected party's pension plan and other plans. In addition, the affected party argues, inaccurate comparisons could be made through misinterpretation and misconstruction in order to encourage plan members to cease to participate in the plan in favour of other plans. This, the affected party submits, significantly prejudices its competitive position, and causes undue loss to the Board of Trustees and the pension plan.

[50] The third affected party states that every three years in Ontario, construction unions may "raid" each other, and that in the 2013 raiding period there were approximately 170 displacement applications filed with the Ontario Labour Relations Board. It submits that if a rival trade union had the records, it would have a "leg up" during the raiding period. In particular, the membership data, distributions of membership by age, asset data, valuation results, normal cost, solvency, surplus, changes over time and funding sufficiency which are found in the records would reasonably be expected to be used by rivals to:

- advantageously and opportunistically change their own plans;
- attempt to persuade members that the rival plan is more advantageous;
- seek to persuade members to change unions or abandon the union, undermining the funding basis of the pension plan; and

- discourage investment managers and funds in which the assets are invested from dealing with the pension plan.

[51] These actions, the affected party argues, would have a foreseeably severe effect on the pension plan's viability with adverse effects on beneficiaries and retirees, in particular, who may see the plan as unable to fulfil its obligations, resulting in undue loss and prejudice to the plan's competitive position. This affected party also submits that the records could be invaluable to rivals in a labour dispute, because construction unions face constant pressure from rivals over bargaining rights, leading to the type of harm contemplated by section 17(1)(d) of the *Act*.

[52] The appellant submits that the affected parties have provided only speculative evidence of harm stemming from disclosure of the records. In particular, the appellant argues that they have set out the harm that could possibly occur, not harm that is reasonably expected to occur. According to the appellant, the affected parties have not provided detailed and convincing evidence that the appellant or anyone else could be reasonably expected to interfere with, prejudice and/or cause undue harm to the affected parties should the records be disclosed. The appellant relies on the Supreme Court of Canada's decision in *Merck Frosst Canada Ltd. v. Canada (Health)*[18] in which Justice Cromwell explained that the objective of access to information would be "thwarted by a mere possibility of harm standard,"[19] as well as Order F13-02, issued by Assistant Commissioner Fedorak of the Office of the Information and Privacy Commissioner for British Columbia.

[53] The appellant quotes from paragraph 56 of Order F13-02 in which Assistant Commissioner Fedorak stated that it was:

> . . . not clear how the disclosure of the information could harm the interests of the Unions, given that the Unions submit that they already openly promote the terms of these pension benefits to attract prospective employees to join their respective Unions.
> . . .

[54] The appellant then goes on to quote some of paragraph 57 of the order in which Assistant Commissioner Fedorak concluded:

> . . .
>
> Without some more concrete evidence of how the disclosure of this particular data may affect a real set of negotiations, I find that the Trustees and Unions have not established, on the balance of probabilities,

[18] 2012 SCC 3 (*Merck*).
[19] See para. 204.

> a reasonable expectation that disclosure of the information will be likely to interfere significantly with the negotiating position of any third party.

[55] Lastly, the appellant states that one of the freedoms guaranteed by Ontario's *Labour Relations Act* is that employees have the right to join the union of their choice. The fact that a union may "raid" another, the appellant argues, is simply a demonstration of employees' freedom to choose their own union. The appellant concludes that such a raid does not constitute harm that is unfair or undue.

[56] In reply, the ministry submits that the appellant's representations suggest that it is acknowledging the context in which the records are being sought; namely, for the purpose of raiding, which then gives rise to a transfer of the pension plans' assets and liabilities. The ministry reiterates that the transfer of assets and liabilities out of a MEPP to another plan poses a foreseeable risk of harm to the beneficiaries who remain in the plan, such as retirees and their spouses.

[57] Also in reply, the first affected party argues that the request was made for an ulterior and improper purpose and that the appellant is attempting to disadvantage the affected party's plan by displacing and/or destabilizing it, causing the harms set out in section 17(1).

[58] The second affected party submits that Order F13-02 ought not to be followed, as the records at issue were significantly different than those in this appeal. In particular, the affected party states that the records at issue in Order F13-02 consisted of limited and summary information extracted from filings made with the British Columbia pension regulator. This affected party also reiterates by way of affidavit evidence that it did not make public statements about its pension plan.

[59] The third affected party argues that the appellant has not provided reasons for the request and does not claim that it is unlikely that the harms described by the affected party would occur. Therefore, the affected party states, an inference must be drawn that the appellant intends to use the information in ways that would engage the very harms the affected party has described. The affected party also submits that the appellant has taken an unreasonably narrow view of the scope of section 17(1). The affected party relies on Order PO-2734 in which insurance company statutory rate filings were held to meet the test in section 17(1). The affected party also submits that unlike that articulated by the appellant, the applicable test in *Merck* is that there is evidence that it is beyond a mere possibility or speculative that harm will occur. The affected party further submits that the decision in Order F13-02 is wrong and is currently under judicial review.

[60] In sur-reply, the appellant submits that the *Act* provides that a requester has a presumptive right of access unless the institution or the affected parties can meet the onus required to justify the application of the exemption in section 17(1). In addition,

the appellant notes that he is not required to provide any reasons for the request; nor is he required to specifically address speculations set out in the other parties' representations. The appellant goes on to state that the union that is the subject matter of the affected parties' representations has never raided, nor attempted to raid any of the affected parties or the unions to which they correspond. This union, the appellant states, has a completely separate work jurisdiction from those of the affected parties. The separate work jurisdiction, the appellant advises, is enforceable at the Ontario Labour Relations Board. The appellant also submits that the fact that he did not expressly address the other parties' claim that this union was going to raid certain unions is not grounds for a negative inference that a raid has been planned.

[61] With respect to the other parties' claims of harm, the appellant submits that the parties have made boilerplate assertions about the possibility of harm, without any evidentiary foundation. In particular, the appellant argues that the other parties have failed to justify how he could use the records to prejudice their position, given that these records are available to all beneficiaries of the various pension plans.

Analysis and findings

[62] At the outset, I wish to address two points made by the various parties in this appeal. Firstly, one of the affected parties is concerned that the appellant has not articulated the reason for the access request, and another affected party's position is that the request was made for an improper purpose. I agree with the appellant's position that a requester is not required to provide a reason for an access request. If an institution receiving a request is of the view that the request is made for a purpose other than access, it can notify the requester that it has decided that the request is frivolous and vexatious. That decision can then be appealed to this office. In this case, the ministry did not do so and did not raise it in its representations. Therefore, the appellant's reason(s) for the request are irrelevant to my determination of the application of section 17(1).

[63] Secondly, the appellant and one of the affected parties discuss the Supreme Court of Canada's decision in *Merck*. In Order PO-3116, I considered the relevance of the *Merck* decision to this office's requirement that the evidence of harm in section 17(1) be "detailed and convincing." In doing so, I stated:

> In *Merck*, the Supreme Court of Canada engaged in a thorough examination of the elements of the third party information exemption in the *ATIA.* It may be that there are aspects of this decision that will inform this office's application of section 17(1). With respect to the particular argument made by the appellant here, I do not find anything in *Merck* which necessitates a departure from the requirement that a party provide "detailed and convincing" evidence of harm in order to satisfy its burden of proof. As the Ontario Court of Appeal stated in the *WCB* decision, the

phrase "detailed and convincing" is about the quality of the evidence required to satisfy the onus of establishing a reasonable expectation of harm:

> . . . the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed.[20]

[64] Therefore, I find that there is nothing in the *Merck* case which necessitates a departure from the requirement that a party provide "detailed and convincing" evidence of harm in order to satisfy its burden of proof under section 17(1) of the *Act*.

[65] Having reviewed the representations of the parties and the records themselves, I have concluded that the ministry and the affected parties have not provided sufficiently detailed and convincing evidence that disclosure of the records could reasonably be expected to prejudice the competitive position of the pension plans and its beneficiaries, or interfere significantly with the contractual or other negotiations of a person, group of persons or organization, or cause them undue loss as contemplated by sections 17(1)(a) and (c).

[66] The main argument advanced by the ministry and the affected parties in regard to the harms contemplated in section 17(1)(a) and (c) is that the records could be used by other trade unions to displace or raid the trade union that represents the members of the plan, resulting in members transferring their pensions out of the plan. This raiding of pension assets, they submit, can cause financial harm to the beneficiaries who remain in the plan, by reducing their benefits. In addition, they argue that employers who continue to participate in the original plan may also be required to increase the level of their contributions, causing them undue harm as well. They also argue that the use of the records could weaken the position of the trade union in its bargaining with the employer over terms and conditions of the pension plan. One of the affected parties also argues that certain data contained in the records could be used by a rival union to discourage investment managers and funds in which the assets are invested from dealing with the pension plan.

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

[67] In my view, all of the harms described, above, by the ministry and the affected parties could very well occur, but these events do not arise because of the disclosure of the records. Rather, these harms could result from the practice of one union successfully "raiding" another, as allowed by the *Labour Relations Act*. As advised by one of the affected parties, in the 2013 raiding period there were approximately 170 displacement applications filed with the Ontario Labour Relations Board. It is evident from the information provided by the parties that the ability of employees to choose their own union as part of this regime of "raiding" is permitted under the *Labour Relations Act*. In other words, based on the representations provided by the parties, the competitive practice of raiding is something that occurs in the construction trade industry. In my view, trade unions, including the affected parties, are familiar with this highly competitive practice of attempting to raid a rival union and I would imagine that various tactics are used by unions in an attempt to bolster their membership and make themselves more attractive to the members of rival unions.

[68] However, I find that the ministry and the affected parties have not provided sufficiently detailed and convincing evidence that the disclosure of the records at issue could reasonably be expected to cause the harms they describe in their representations. For example, as previously described, the valuation reports filed by unions to FSCO are available under the *PBA* to those with an interest in the reports. Sections 29 and 30 of the *PBA* provide for the following individuals to be able to inspect and obtain a copy of a variety of records relating to the pension plans, including the records at issue:[21]

- member, former member, retired member;
- spouse of a member, former member or retired member;
- former spouse of member, former member or retired member in limited circumstances;
- any other person entitled to pension benefits;
- a representative of a trade union that represents members of the pension plan;
- an employer;
- a person required to make contributions under the pension plan on behalf of an employer;
- an agent of a person described above who is authorized in writing; and
- such other persons who may be prescribed.

[69] Notwithstanding the fact that the *PBA* provides for limited disclosure, the number of individuals who could access the valuation report of their union's pension plan is not insignificant, and it would be possible for these reports to be disseminated within the trade union community, including between rival unions. However, the ministry and the affected parties have not been able to cite one instance where a valuation report that was somehow obtained by a rival union was used to cause the harms contemplated in

[21] See also section 46(1)1 referring to section 45(1)8 of Regulation 909.

section 17(1) to another union. I find, therefore, that the ministry's and the affected parties' arguments are speculative and not sufficiently detailed and convincing.

[70] In addition, one of the affected parties advised that it is currently in litigation with the appellant before the Ontario Labour Relations Board. The affected party states that the appellant is not only attempting to gain leverage in the ongoing labour relations litigation, but it also attempting to "defame" the affected party and members of its own pension plan who are seeking information about their plan. The affected party goes on to state that disclosure of the records to the appellant would allow the appellant to undermine the affected party's interests, causing them "litigation hardship." I find that this affected party has provided vague representations about "litigation hardship" and allegations of defamation against the appellant. I also find that this affected party has not provided sufficient evidence of:

- the nature of the litigation before the Ontario Labour Relations Board;
- what "litigation hardship" is;
- how disclosure of the records would reasonably be expected to cause "litigation hardship" to it;
- details about the appellant's alleged attempts to defame the affected party; and
- how the disclosure of the records could reasonably be expected to prejudice the competitive position of the pension plans and its beneficiaries, or interfere significantly with the contractual or other negotiations of a person, group of persons or organization, or cause them undue loss.

[71] Therefore, this affected party has not provided sufficiently detailed and convincing evidence to support the harms contemplated in section 17(1)(a) and (c).

[72] With respect to section 17(1)(d), which was raised by one of the affected parties, I find that it is not applicable in this instance. The language of section 17(1)(d) is taken directly from the *Labour Relations Act*, and is limited to covering information furnished to, and the reports of conciliation officers, mediators, labour relations officers or other persons appointed as neutral third parties to resolve labour relations disputes, and only those who are appointed under statutory schemes.[22] Given that the records are filed with FSCO in the course of ordinary business, and not as part of a labour relations dispute, I fail to see how the disclosure of the records at issue to the appellant falls within this exemption.

[73] Consequently, as I have not been provided with sufficiently detailed and convincing evidence to substantiate the harms in section 17(1), I find that the third part of the three-part test in section 17(1) has not been met. I do not uphold the ministry's

[22] Order M-210.

decision to exempt the records under section 17(1), and I order the ministry to disclose the records to the appellant.

ORDER:

1. I order the ministry to disclose the records to the appellant in their entirety by **April 30, 2015** but not before **April 24, 2015**.

2. I reserve the right to require the ministry to provide copies of the records disclosed to the appellant to this office.

Original Signed By: March 24, 2015
Cathy Hamilton
Adjudicator