Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3774

Appeal PA15-139

Ministry of Transportation

October 5, 2017

Summary: The sole issue in this order is whether the mandatory exemption in section 17(1) applies to exempt two batches of compliance reports related to Ontario's DriveTest Centres. The Ministry of Transportation received an access request for these compliance reports and, after notifying two third parties, granted partial access to them. The ministry withheld portions of the records, claiming the application of the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemption in section 14 (law enforcement). One of the third parties then appealed the ministry's decision, claiming that all of the records were exempt in their entirety as section 17(1) applied to all of the information contained within them.

During the mediation of the appeal, the information that the ministry decided to withhold under sections 14 and 21(1) was removed from the scope of the appeal. During the inquiry, the requester removed further information from the scope of the appeal. In this order, the adjudicator upholds the ministry's access decision and dismisses the appeal, finding that only one portion of one record is exempt from disclosure under section 17(1)(c).

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

Orders and Investigation Reports Considered: MO-3335, PO-2599, PO-2675 and PO-3116.

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

OVERVIEW:

[1] This order disposes of the sole issue raised as a result of an appeal of a decision made by the Ministry of Transportation (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) in response to an access request for copies of audit reports relating to Ontario's DriveTest Centres. In particular, the request was for:

- Audit reports that the ministry undertakes and then delivers to a named company over a specified period of time; and

- Audit reports that the named company undertakes and then provides to the ministry over a specified period of time (subsequent to the above-referenced time period).

[2] The ministry located the responsive records and notified two third parties under section 28(1) of the *Act* to seek their views regarding disclosure of the records. One of the third parties was the company named in the request. The other third party's interests were engaged with respect only to the records identified as responsive to the second part of the request. The named company provided representations to the ministry which were adopted by the other third party.

[3] The ministry then decided to grant partial access to the records. The ministry withheld portions of the records, claiming the application of the mandatory exemptions in section 21(1) (personal privacy) and 17(1) (third party information)[1], as well as the discretionary exemption in section 14 (law enforcement).

[4] The third party (the named company), now the appellant, appealed the ministry's decision to this office. During the mediation of the appeal, the appellant advised the mediator that the records should be withheld in their entirety under section 17(1). The requester advised the mediator that he did not wish to pursue access to any records regarding leases, lease extensions, amendments and agreements.[2] As a result, section 14 is no longer at issue in this appeal. In addition, the requester advised the mediator that he was not seeking access to the portions of the records the ministry withheld under section 21(1). At that time, section 21(1) was removed from the scope of the appeal.

[5] The appeal was then transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeal initially sought representations from the appellant and the other third party (the affected party). The affected party advised the adjudicator that it would not be submitting representations, but supports the position taken by the appellant. The appellant provided representations and raised a new issue, namely that the names of its employees (Driver Examiners) contained in the records qualifies as their personal

[1] The ministry applied section 17(1) to one record (record 40c) only.
[2] This removed records 33a, 33b, 33c, 35b, 35c, 39b, 40d, 40e, 40f and 41b from the scope of the appeal.

information, and should be withheld under section 21(1).

[6] The adjudicator then sought representations from the ministry and the original requester. The requester provided representations. The ministry advised the adjudicator that it would not be submitting representations.

[7] The appeal was then transferred to me for final disposition. Portions of the appellant's representations were not shared with the requester and will not be reproduced in this order, as they meet this office's confidentiality criteria. However, I have taken them into consideration in making my findings. Prior to the issuance of this order, the requester confirmed with staff of this office that he was no longer seeking access to the information for which the appellant is claiming section 21(1), that is, the names of the Driver Examiners. As a result, this information is no longer at issue and will not be disclosed to the requester. Also, as the requester raised the possible application of the public interest override in section 23, I sought reply representations from the appellant on this issue.

[8] For the reasons that follow, I uphold the ministry's decision and dismiss the appeal. I find that only one portion of one record is exempt from disclosure under section 17(1)(c).[3] I order the ministry to disclose the records to the requester, severing the information that is exempt or no longer at issue.

RECORDS:

[9] The records consist of compliance reports. In particular, records 1 to 32 consist of compliance reports prepared by the ministry (Batch 1). Records 33 to 47c, minus the records removed during mediation by the requester, consist of compliance reports prepared by the appellant, including items such as customer satisfaction surveys, schedules, complaints, and an HST invoice (Batch 2).

DISCUSSION:

[10] The sole issue in this appeal is whether the mandatory exemption in section 17(1) applies to all of the records. The appellant advises that it is a global service delivery company that delivers a wide range of services on behalf of local and national governments world-wide. Under a partnership agreement with the ministry, the appellant administers all knowledge tests, vision test and road tests for all classes of drivers' licences in Ontario (the driver examination services). Prior to a certain date, the appellant contracted directly with the ministry for the performance of the driver examination services. After that date, the appellant began providing the driver examination services as a subcontractor to its consortium partner (the affected party).

[11] During the time when the ministry contracted directly with the appellant, the

[3] This is the information that was withheld by the ministry under section 17(1).

ministry conducted regular onsite compliance audits of the appellant's operations. Following these audits, the ministry generated monthly compliance reports on the basis of its onsite observations or through an analysis of the appellant's documentation that it collected and provided to the ministry. These reports contained the following components:

- Results of compliance monitoring activities;
- Summaries of province-wide impact of non-compliance;
- Summary of DriveTest centres in compliance by test;
- Provincial compliance statistics for all tests for all DriveTest centres;
- Provincial deficiency statistics for all tests for all DriveTest centres; and
- High risk tests compliance *pareto* charts.

[12] After the appellant became a subcontractor, it began carrying out self-audits and generating its own compliance reports, which it would then provide to its consortium partner, who would in turn provide the reports to the ministry. These compliance reports contained the following sections:

- An executive summary;
- A calculation of monthly concession payment;
- A performance penalty summary;
- Evaluation of the appellant's operations in accordance with key performance indicators, such as training requirements, error rates, various performance failures, notifiable incident reporting, customer satisfaction ratings; and
- Various appendices, schedules and customer satisfaction surveys.

[13] The appellant is claiming the application of the mandatory exemption in section 17(1)(a), (b) and (c) to all of the records at issue.

[14] Sections 17(1)(a), (b) and (c) state:

> 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,
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> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization n;

> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[15] Section 17(1) is designed to protect the confidential *informational assets* of businesses or other organizations that provide information to government institutions.[4] 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.[5]

For section 17(1) to apply, the institution and/or 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 given 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

[16] The appellant claims that the records contain commercial, financial and technical information. The types of information listed in section 17(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange or 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.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

[4] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.) (*Boeing Co*).
[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[6] Order PO-2010.
[7] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]
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> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences 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]

[17] The appellant submits that the records contain commercial information, because it relates to the buying and selling of driver examination services. The records also contain financial information, argues the appellant, because it contains information relating to the payment of money such as the calculation of, and direct or implied references to, monthly concession payments and performance penalty summaries. The appellant further submits that the second set of reports (generated by the appellant) reveals information about the appellant's compliance audit mechanisms and performance management techniques, which constitutes both commercial and technical information within the meaning of the *Act*.

[18] The requester advises that it cannot comment on the type of information contained in the records.

Analysis and findings

[19] With respect to Batch 1 of the records, I am satisfied that the compliance monitoring reports prepared by the ministry contain commercial information for the purposes of section 17(1). Past orders of this office have found that reports dealing with the adequacy a service provided qualified as commercial information where that information was directly related to the service sold by a given business to an institution. These orders show that findings about how services have been delivered can relate to the provision of those services, thereby qualifying as commercial information for the purposes of section 17(1).[10]

[20] On this basis, I am satisfied that the compliance monitoring reports in Batch 1 of the records contain commercial information because they describe and evaluate particular aspects of the appellant's service delivery to the ministry, based on the terms of the contract between them. I note that Batch 1 does not contain any financial information.

[21] Batch 2 of the records consist of monthly and quarterly compliance reports and attached appendices, customer satisfaction surveys, service delivery channel reports

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[8] Order PO-2010.
[9] Order PO-2010.
[10] See Orders PO-2675 and MO-3335.

(formerly referred to as customer satisfaction surveys), a summary of complaints, monthly transaction volumes, an HST invoice, a chart of performance penalties, and a refund adjustment.

[22] I am satisfied that these records also contain commercial information, as they directly relate to the operation of the appellant's business, which in this case is to provide a service to the ministry pursuant to the terms of a contract. In addition, past orders of this office have found that market research surveys qualify as commercial information. In this appeal, I find that the customer satisfaction surveys and the service delivery channel reports qualify as commercial information. Further, in Orders PO-2675 and MO-3335 complaints made about how third parties were conducting their business with institutions qualified as commercial information. Applying the approach taken in those orders, I find that the summary of complaints about the appellant also qualifies as commercial information.

[23] I also find that there is information in some of the records forming Batch 2 that qualifies as financial information for the purposes of section 17(1). This information consists of banking information on the HST invoice, and information relating to various payments made between the parties to the contract, information I note is not present in the Batch 1 records.

[24] Conversely, I do not agree with the appellant that the records contain technical information for the purposes of section 17(1). Having reviewed the records, I find that they do not describe the construction, operation or maintenance of a structure, process, equipment or thing.

[25] In sum, I find that both Batch 1 and Batch 2 contain commercial information and that some records in Batch 2 also contain financial information. Consequently, I find that the first part of the three-part test has been met.

Part 2: supplied in confidence

[26] The requirement that the information was *supplied* to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[11] 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.[12]

[27] In order to satisfy the *in confidence* component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. The expectation must have an objective basis.[13]

[28] In determining whether an expectation of confidentiality is based on reasonable

[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.
[13] Order PO-2020.

and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality;
- Not otherwise disclosed or available from sources to which the public has access; and
- Prepared for a purpose that would not entail disclosure.[14]

[29] The appellant submits that the first set of compliance reports that was generated by the ministry was supplied in that the information that was provided to the ministry either on-site or in the appellant's *green bag* documents would be revealed or could be accurately inferred from the reports. The appellant cites a Supreme Court of Canada case, as well as a past order of this office, to support its position that information may qualify as supplied to an institution if its disclosure would reveal confidential information supplied to it by a third party.[15]

[30] Concerning Batch 2 of the records, the appellant argues that these compliance reports were supplied directly to the ministry by the affected party (originating from the appellant).

[31] The appellant goes on to argue that the records were not only supplied, but were supplied in confidence. It submits that the records were prepared for the purpose of demonstrating regulatory compliance to the ministry in accordance with its contractual obligations and were never intended for public disclosure. The information in the records, it states, has been consistently treated in a confidential manner by both the appellant and the affected party, and has not been disclosed or available in the public domain.

[32] The appellant further states that there are confidentiality provisions in both the current and past contracts with the ministry, in which any information related to the performance of the contract will not be disclosed, if it would be exempt under section 17(1) of the *Act*.[16]

[33] The requester submits that the ministry has the records in its possession, and that these records relate to the quality of services being provided by the appellant at

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[14] Orders PO-2043, PO-2371, and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.
[15] See *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paras. 157-158 (*Merck Frosst*) and *Kingston (City) Re*, 2007 CanLII 5678 (ON IPC).
[16] The appellant provided the sections of the contracts that relate to confidentiality of records, which I considered, but am not reproducing in this order.

DriveTest locations. The requester states that it seeks the information to scrutinize whether the government is properly monitoring the services it allows private third parties to operate on behalf of the public.

[34] The requester further submits that the first batch of records consist of compliance audits conducted by the ministry itself and that the information in those records was not supplied to the government. Concerning the second batch of records, which are the self-audits conducted by the appellant, the requester argues that information about compliance with ministry regulations, regardless of who compiles the information, should be made public if its disclosure to the government is required either by regulation or contract.

[35] The requester states:

> We respectfully submit that if all information supplied to the government by contracted third parties is confidential, the voting public is not served because it lacks the ability to scrutinize this information. If the public cannot see how its government is serving it, and cannot learn how government is handling any issues or problems on the public's behalf, then there is no transparency, and democracy suffers.
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> . . .
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> [The requester] does not know the contents of these compliance reports and audits. However, if any of them contain information about the safety of driver exams, the integrity of the testing process, the use of public roads for driver testing, and any other issues that may impact the public in some way, the public has a right to learn about it. Any potential adverse impacts to the public should not be hidden behind confidentiality provisions.

Analysis and findings

[36] With respect to the records that form Batch 1, I find that these records were not supplied to the ministry by the appellant for the purpose of section 17(1). Order MO-3335 is instructive in the circumstances of this appeal. In that order, Adjudicator Hamish Flanagan extensively analyzed the meaning of *supplied* for the purpose of the municipal equivalent of section 17(1). He stated:

> In Order 16, former Commissioner Sidney Linden considered the meaning of *supplied* in dealing with a request for annual audit inspection reports prepared by inspectors under the *Meat Inspection Act*. In that case, he found that an inspector's assessment of a meat packer's operation, was not *supplied* by the affected persons, but rather, that the ministry obtained the information itself through inspections required by statute. The Commissioner quoted from the then recent decision in *Canada*

Packers Inc. v. Canada (Minister of Agriculture)[17] to support this position. In *Canada Packers* the requesters made an access request for federal government meat inspection team audit reports about certain meat packing plants. The third party, Canada Packers Inc., resisted disclosure of these reports. The court discussed the meaning of the phrase *supplied to a government institution* in s. 20(1)(b) *Access to Information Act* [sic] and MacGuigan J. (as he then was) made clear that the portions of the audit reports in issue that comprised judgments were not supplied, saying the following:[18]

> Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore paragraph 20(1)(b) is irrelevant in the cases at bar.

In addition to inspector or auditor judgments not being considered to be supplied, factual information in an inspection report may also not be supplied because it is obtained through independent inquiry by the auditor, rather than being supplied in confidence by the inspected entity. Viewed this way, the inspector of their own initiative takes or gathers information from the entity or its information systems, and uses this information to complete the inspection report. The inspector is not merely reviewing information supplied to the inspector by the inspected entity. To do the latter could undermine the rigor of the inspection, which requires independent inquiry and fact gathering to inform an independent assessment of an entity. Order PO-1707 illustrates the application of this analysis to records. It dealt with a request for, among other records, an inspection report prepared by a ministry employee pertaining to an appellant's coke oven operation.

. . .

In Order PO-1707, after considering the interpretation of the term *supplied in confidence* and reviewing the records and the representations, the adjudicator concluded that the appellant did not provide the information in the inspection report to the ministry. Rather, the appellant provided access to its premises in order to enable the ministry's employees to conduct an investigation into the appellant's coke ovens.

Despite these considerations, which suggest information in an inspection report is commonly not supplied, the content rather than the form of the

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[17] [1989] 1 F.C. 47.
[18] At para. 12 (F.C.J.).

> information is the important factor.[19] It is not simply that information is in an inspection or audit report that means that the information is not *supplied,* but that such a report is generally comprised of either an inspector or auditor's judgment or information obtained by the inspector's own inquiry. Even in *Canada Packers*, as the excerpt quoted above records, some information in the audit reports was found to be supplied.
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> Order MO-1893 illustrates how some information in a report can be supplied even when most is not. The record in issue was an audit report. After considering Order 16 and the quote from *Canada Packers* above, most information was found not to reveal or contain information *supplied* by the appellant. This included the portions of the audit report discussing the results of the institution's auditors' review and testing of the appellant's records, and interviews with the appellant's employees. Information in the report that was found to be supplied comprised internal audit reports that had been completed by the appellant and appended to the institution's report and the parts of the institution's report where the contents of the appellant's own reports were reproduced.

[37] Another relevant order is PO-2599, in which Adjudicator Daphne Loukidelis found that contractual performance reports prepared by the institution were not supplied by the third party appellant to the institution. These contractual performance reports, she found, were the results of monitoring the appellant's performance of its contractual responsibilities. She stated:

> In my view, the information contained in the records about the call centre contract between the Ministry and the appellant represents the Ministry's subjective and objective evaluation of the contract performance and compliance. It is not information *supplied* by the appellant to the Ministry, as required by section 17(1). Moreover, I am also satisfied that none of the information in the [records] would *reveal or permit the drawing of accurate inferences with respect to the information supplied by* the appellant to the Ministry. . .

[38] Adopting and applying the reasoning and analysis of Adjudicator Flanagan in Order MO-3335 and Adjudicator Loukidelis in Order PO-2599, I find that the Batch 1 records are monthly compliance reports that were compiled and prepared by the ministry, and were not supplied by the appellant. Ministry staff used information they gathered from on-site visits and in writing from the *green bag* documentation, and, in turn, authored the reports. Further, I note that the records also contain observations made by ministry staff and that the analysis of the data was conducted by ministry staff.

[39] The appellant relies on the *Merck Frosst* case (referred to above) in which the Supreme Court of Canada dealt with the federal equivalent of section 17(1), holding

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[19] *Merck Frosst*, cited in note 15.

that whether confidential information has been supplied to a public body is a question of fact, and that it is the content rather than the form of the information that must be considered. The Court went on to state that the exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. As previously stated, the appellant's representations on the issue of whether the Batch 1 records were supplied state:

> The first set of compliance reports [range of dates] that was generated by the Ministry was *supplied* in that the information provided to the Ministry by [the appellant] either onsite or in writing via the *green bag* documentation is revealed in or can be accurately inferred from the reports . . .

[40] In the Notice of Inquiry that was sent to the appellant by the office, it refers to the burden of proof when exemptions are being claimed, and states the following:

> Under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. There is a general legal principle that the burden of proof rests with the party asserting the position. However, where the institution has not denied access, but a third party opposes it, the burden of proof rests with that third party to establish that the exemption in section 17(1) of *FIPPA* applies.

[41] The appellant's position appears to be that all of the information in all of the records in Batch 1 were supplied by it to the ministry. I do not accept the appellant's argument that it supplied all of the information found in these records. While some of the information may have been supplied by the appellant to the ministry, I find that the appellant's representations are not sufficiently detailed as to what specific information in these reports it supplied to the ministry. As previously stated, I find that these records contain observations made by ministry staff and analysis of data collected by ministry staff. Under these circumstances, it is not entirely clear what information in the records was in fact provided to the ministry by the appellant, and it is not clear from my review of the records themselves.

[42] Consequently, in the absence of sufficient evidence from the appellant and on my review of the records, I find that Batch 1 of the records was not supplied to the ministry by the appellant for the purposes of section 17(1). Accordingly, Batch 1 of the records has not met part two of the three-part test and is, therefore, not exempt from disclosure under section 17(1). However, for the sake of completeness, I will go on to consider the application part three of the three-part test to Batch 1 of the records.

[43] Turning to Batch 2 of the records, which were prepared by the appellant, with one exception, I am satisfied that they were supplied to the ministry by the appellant. These compliance reports were prepared by the appellant. From my review of the records in Batch 2, it appears that the ministry's role was solely that of recipient. I am

also satisfied, based on the appellant's representations, that these records were supplied to the ministry in confidence by the appellant.

[44] However, I also find that there are portions of some of the records in Batch 2 that do not meet the requirements of part two of the three-part test. Portions of the contract entered into between the ministry and the appellant are reproduced in some of the records. Past orders of this office have consistently held that the contents of a contract involving an institution and a third party will not normally qualify as having been supplied for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than supplied by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that was originated from a single party.[20]

[45] There are two exceptions to this general rule which are described as the *inferred disclosure* and *immutability* exceptions. The inferred disclosure exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information by the third party to the institution.[21] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[22]

[46] In this case, I find that the terms of the actual contract between the ministry and the appellant that are re-produced in some of the Batch 2 records are the product of negotiations between the two parties. I further find that the appellant has not established the application of the inferred disclosure or immutability exceptions to these excerpts. Lastly, I note that these excerpts from the contract between the appellant and the ministry are publicly available, as they are posted on Infrastructure Ontario's website.[23] Consequently, I find that the portions of the Batch 2 records that re-produce portions of the publicly available contract between the appellant and the ministry do not qualify has having been supplied to the ministry and, therefore, do not meet part two of the two-part test.

[47] Accordingly, I find that the Batch 2 records, with the exception of the contractual terms, were supplied in confidence to the ministry by the appellant, meeting the second part of the three-part test. I will now consider whether the remaining information at issue in Batch 2 of the records meets part three of the three-part test.

Part 3: harms

[48] The party resisting disclosure must provide detailed and convincing evidence

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[20] This approach was approved by the Divisional Court in *Boeing Co.*, cited in note 3 and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[21] Order MO-1706, cited in *Miller Transit*.
[22] *Miller Transit* at para. 34.
[23] In particular, the Key Performance Indicators and penalties.

about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[24]

[49] 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 the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[25]

[50] In applying section 17(1) to government contracts, 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).[26]

[51] As previously stated, the appellant is claiming that section 17(1)(a), (b) and (c) apply. With respect to a reasonable expectation of harm, the appellant submits, first, that the standard of proof harm was established by the Supreme Court of Canada in the *Merck Frosst* case, namely the civil standard of the balance of probabilities. In other words, the appellant submits that the party claiming an exemption under section 17(1) must show that the risk of harm is considerably above a mere possibility, but does not have to establish on the balance of probabilities that the harm will in fact occur.[27]

Section 17(1)(a)

[52] The appellant states that it has several major competitors that are involved in similar projects across Canada. It argues that disclosure of the information supplied to the ministry within the compliance reports can reasonably be expected to cause harm to the appellant and, by extension, the affected party. For example, the appellant submits, information in the reports may be used by competitors to gain an unfair advantage in future proposals to the ministry. In addition, other potential business partners of the appellant or the affected party could reasonably be expected to use this information to gain an unfair advantage in their future contract negotiations with those parties.

[53] The appellant further submits that the compliance reports reveal its business strategies with respect to the management of performance in accordance with the project agreement based on key performance indicators. Competitors, it argues, would be able to fully analyze the appellant's overall performance and its contract delivery strategies, and use this information to put forward competing offers in a bid for services of a similar nature to those provided to the ministry.

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[24] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[25] Order PO-2435.
[26] Order PO-2435.
[27] 2012 SCC 3, paras. 95 and 199.

[54] The appellant goes on to submit that the second set of compliance reports (the ones generated by it) reveal proprietary and audit mechanisms, including the *ISO 9001* quality management certification systems and performance management techniques, the disclosure of which would allow competitors to copy these mechanisms, without having invested the necessary resources.

[55] The appellant also details other examples where the disclosure of certain information in the records could reasonably be expected to cause the harms detailed in section 17(1)(a) as follows:

- Compliance monitoring summaries, deficiency statistics, alleged performance failures, error rates and notifiable incident reporting – the disclosure of alleged performance failures is likely to be mis-used by competitors to unfairly portray the appellant as having failed to meet its obligations to the ministry. It could also be misconstrued in the absence of information relating to how any deficiencies were addressed and rectified by the appellant;

- Evaluation of the appellant's operations in accordance with key performance indicators (KPIs) – the disclosure of this information would provide competitors with highly detailed data pertaining to the appellant's strengths and weaknesses, which could be misused to lobby the appellant's clients or potential clients to implement heavy penalties in the appellant's weaker areas or to modify the bid scoring process;

- Customer satisfaction surveys – the appellant argues that it has been accepted that information relating to survey research undertaken to establish customer preferences is sensitive commercial information[28] and is commercially valuable to competitors. The disclosure of this information would make it available free of charge to the benefit of the appellant's competitors;

- Current negotiations – the appellant is currently in the process of negotiating with the ministry, and the disclosure of the information in the records will limit and erode the appellant's ability to continue the negotiations in an effective manner; and

- Interference with the appellant's negotiating position with respect to purchasers of services – the appellant submits that disclosure of the information at issue is likely to cause significant prejudice and interference with its contract negotiations with parties other than the ministry by exposing its overall business strategies relating to the contract, KPI performance and the penalty regime that it is subject to under the contract. In particular, a potential client could refer to what the appellant accepted as a KPI and penalty regime with the ministry, and then set it as a benchmark for the terms they are willing to negotiate.

[28] See Order P-1281 and *Saskatchewan Liquor and Gaming Authority, Re*, 2005 CanLII 39920 (SK IPC). I note that Order P-1281 does not deal with customer satisfaction surveys.

[56] The requester submits that the appellant has not provided detailed and convincing evidence about the potential for harm and that while the appellant lists what it believes to be possible sources of harm, its justification relies on conjecture. The requester further submits that there is no evidence that the possible scenarios outlined by the third party would occur.

Section 17(1)(b)

[57] The appellant submits that if the information at issue is disclosed, it may consider refusing to supply the ministry with similar information in the future. It goes on to state that the information was specifically required by the ministry under the project agreement and that the ministry's continued access to this information is in the public interest. Conversely, the appellant argues, the only interest served by the disclosure of the information is that of competitors and other entities who will unfairly benefit from an improved negotiating position at the appellant's expense. The appellant states:

> The FIPPA is not designed to be used in this manner for competitive purposes, to the detriment of citizens benefitting from essential services provided to public sector institutions by private companies.

Section 17(1)(c)

[58] The appellant submits that the disclosure of the information at issue would cause undue harm to it and undue gain to its competitors, given the information is not otherwise disclosed or available to the same extent from other sources. The disclosure of this information, the appellant argues, can reasonably be expected to weaken its position in negotiating contractual terms with future clients, resulting in financial loss to it.

[59] The appellant further argues that disclosure of the compliance reports is likely to generate misleading and unfair media reports that will damage the appellant's reputation with respect to the driving test services it offers, resulting in a decrease in revenue. It states that in the past, media outlets have used information obtained from similar records to generate negative media reports and have published incorrect and misleading statements.[29]

[60] The appellant relies on *Canada (Information Commissioner) v. Canada (Prime Minister)*[30] in which the Federal Court found that press coverage of a confidential record is relevant to the issue of expectation of probable harm from its disclosure. The appellant goes on to state:

> While harm that is expected to flow from negative media reporting will not always be sufficient to justify the application of the section 17(1)(c)

[29] The appellant provided references to two articles regarding it that were published by a major media outlet (the requester).
[30] 1992 CanLII 2414 (FC), [1993] 1 FC 427 (TD).

> exemption, each instance of potential disclosure must be considered in light of the specific, relevant factors and overall context. In those cases in which inspection reports identifying deficiencies were disclosed (see, for example, *Les Viandes du Breton Inc. v. Canada (Department of Agriculture)*, the Court noted that these reports provided a full context to allow the reports to be properly assessed, including a description of the remedial measures taken by the inspected facility.

[61] In this case, the appellant argues the compliance reports at issue provide no context that would allow the seriousness of the deficiencies identified in them to be properly assessed. In particular, the reports generated by the ministry contain several areas that the appellant states it contested, but the reports do not provide the context of the background discussions with respect to these areas, and were not subsequently updated to reflect the areas that were disputed and then agreed upon by the ministry. Similarly, the appellant submits, the reports it authored do not provide the background root cause analysis or any quality management responses that it had submitted in response to the identified non-compliance.

[62] With respect to the appellant's position that the compliance reports lack context, the requester (a media outlet) states that its practice is to always submit questions to those it reports on, including providing the opportunity for the appellant to explain any deficiencies in the compliance reports. Further, the requester submits that any belief that a media organization would misconstrue or inaccurately report information in records of this nature is unfounded.[31]

Analysis and findings

[63] In order for me to find that the exemption in section 17(1) applies, the appellant must establish that harm could reasonably be expected to occur in the event of disclosure. As noted above, the party resisting disclosure must provide sufficient evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kid of evidence is needed will depend on the type of issue and the seriousness of the consequences.[32]

[64] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [33] the Supreme Court of Canada addressed the meaning of the phrase *could reasonably be expected to* in two other exemptions under the *Act,*[34] and found that it requires a *reasonable expectation of probable harm*.[35] As well, the Court observed that *the reasonable expectation of probable harm formulation . . .*

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[31] The requester cites *Matol Botanique International Ltee v. Canada (Ministry of National Health and Welfare) et al.* (1994), 84 F.T.R. 168 at p. 178.
[32] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.
[33] 2014 SCC 31.
[34] The law enforcement exemptions in sections 14(1)(e) and 14(1)(l) of the *Act*.
[35] See paras. 53-54.

should be used whenever the could reasonably be expected to language is used in access to information statutes.

[65] In order to meet that standard, the Court explained that:

> As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence *well beyond* or *considerably above* a mere possibility of harm in order to reach that middle ground; paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and *inherent probabilities or improbabilities or the seriousness of the allegations or consequences* . . .

[66] This is the standard of proof that I will apply in this appeal.[36]

[67] In applying this standard to the section 17(1) exemption, one must also be *mindful of the difficulty of establishing a reasonable expectation of future harm*.

Section 17(1)(a)

[68] In respect of the harm in section 17(1)(a), I must determine whether disclosure of the record could reasonably be expected to significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization.

[69] The appellant made several arguments to support its position that disclosure of the information at issue could reasonably be expected to cause the harms contemplated in section 17(1)(a). I do not accept the appellant's arguments in this regard. The first is that disclosure of the information could reasonably be expected to significantly prejudice the appellant's competitive position with respect to contract negotiations with both the ministry and other parties. One of the appellant's concerns is that if the information at issue is disclosed, a competitor would know what the appellant accepted as key performance indicators and a penalty regime and could, in turn, set those parameters as a benchmark for the terms they are willing to negotiate. In fact, as I have previously stated, the key performance indicators and the penalty regime are already in the public domain, as they included in the contract between the appellant and the ministry and are posted on Infrastructure Ontario's website, and I find that these portions of the records were negotiated, rather than supplied in confidence for the purpose of section 17(1).

[70] The appellant further submits that it is currently in the process of negotiating with the ministry, and the disclosure of the information at issue will limit and erode the appellant's ability to continue the negotiations in an effective manner. I find that this

[36] See also Order PO-3116, in which I noted that there is nothing in the *Merck Frosst* decision that necessitates a departure from the requirement that a party provide sufficient evidence of harm in order to satisfy its burden of proof under section 17(1).

argument is speculative and vague. The ministry is in possession of the records (and the information contained therein) and has an ongoing contractual relationship with the appellant. I am not persuaded that the disclosure of these records would significantly prejudice the appellant's competitive position with respect to its ongoing negotiations with the ministry.

[71] The appellant also argues that if disclosed, competitors could use the appellant's information to analyze the appellant's overall performance, its contract delivery strategies, and its strengths and weaknesses and, in turn, use this information to put forward competing offers in bids for services of a similar nature to those provided to the ministry, by unfairly portraying the appellant as having failed to meet its obligations to the ministry, in the absence of information relating to how any deficiencies were addressed and rectified by the appellant. I am not persuaded by this argument. While the disclosure of the information at issue could subject the appellant to a more competitive bidding process for future contracts, I find that the appellant has not established that the risk of harm (that is, significant prejudice to its competitive position) is considerably above a mere possibility for the purpose of section 17(1)(a).

[72] Taking all of the appellant's arguments into consideration and for these reasons, I find that Batch 1 of the records and the remaining information at issue in Batch 2 of the records is not exempt from disclosure under section 17(1)(a) of the *Act*.

Section17(1)(b)

[73] Regarding the possible application of section 17(1)(b), I find that it does not apply in these circumstances. It is important to note that the information contained in both Batch 1 and Batch 2 of the records was provided by the appellant to the ministry as part of its ongoing commercial relationship and its contractual obligations. While I agree with the appellant that it is in the public interest that this information continued to be provided to the ministry, I do not accept the appellant's argument that it may consider refusing to supply the information to the ministry in the future. First, the appellant is contractually obligated to continue to provide the compliance reports to the ministry for the duration of the contract. Second, in my view, irrespective of the disclosure scheme mandated by the *Act*, the appellant would continue to have a strong incentive to provide this information to the ministry with a view to securing contracts in the future.

[74] For this reason, and based on the very general nature of the argument advanced by the appellant, I find that section 17(1)(b) does not apply to the information at issue in both batches of records.

Section 17(1)(c)

[75] With one exception, I find that the information at issue is not exempt under section 17(1)(c). As was the case with the exemption in section 17(1)(a), I find that while the disclosure of the records may result in a more competitive bidding process in the future, the appellant has not provided sufficient evidence that a more competitive

bidding process would result in undue loss to it that is more than a mere possibility.

[76] In addition, with respect to the appellant's position that the requester would generate misleading and unfair media reports, causing the appellant undue loss, I do not accept the appellant's argument on this harm. The fact that the records may contain information which could be misleading does not, in and of itself, fit within the harms contemplated in section 17(1)(c).[37] I find that the appellant's submissions on this particular issue are speculative at best.

[77] I now turn to the information that I find is exempt from disclosure under section 17(1)(c). One of the records is an HST invoice, which contains the bank account number of the appellant. I am satisfied that disclosure of the banking information could reasonably be expected to result in undue loss to the appellant, and relying on previous orders of this office, I find that the information on its face provides clear and convincing evidence of a reasonable expectation that the disclosure of it may lead to the kind of harm that is contemplated in section 17(1)(c) of the *Act*. As disclosure under the *Act* to the requester is disclosure to the world, I will not order the disclosure of this banking information.

[78] Consequently, I find that the appellant has not met part three of the three-part test, with the exception identified above, and that the remaining information at issue in both batches of records is not exempt under section 17(1). Even if I had found that the appellant had established any of the harms contemplated in section 17(1)(a), (b) or (c), I would have found the public interest override in section 23 applies to the information at issue. Section 23 states:

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

[79] The requester argues that there is a compelling interest in the disclosure of the records because the public must be assured that the conditions in which drivers are tested are safe, that the skills being tested are appropriate to real-world driving conditions, and that the government is getting value for money.

[80] The appellant submits that the requester's argument is without merit, and that a compelling public interest has, in fact, been found *not* to exist where matters are only indirectly connected to the purpose for which they are sought and would not shed a significant amount of light on the matter.[38] The appellant reiterates that the information contained in the records does not allow for a proper assessment of the safety of the DriveTest Centres because it lacks the proper context which would include background discussions and the appellant's quality management responses to any identified deficiencies. It also asserts that the requester's interest amounts to a *fishing expedition* to obtain material to sustain additional reporting on the issues relating to the

[37] See for example, Order MO-1452.
[38] See Order PO-1878.

requester's investigation into the administration of driving tests by the appellant.

[81] The appellant further submits that even if there was a compelling public interest in the information in the records, it does not clearly outweigh the purpose of the exemption in section 17(1), which is designed to protect highly sensitive commercial information. There is, the appellant argues, a compelling public interest in ensuring that companies do not have to relinquish highly sensitive commercial information in order to enter into contractual arrangements with government institutions that benefit not only the company, but also the economy of Ontario. It goes on to argue that there is a compelling public interest in the non-disclosure of the information, as its disclosure would weaken its competitive position, causing harm to the public that benefits from the appellant's provision of essential public services.

[82] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption. In my view, the provision of drive testing services to Ontarians is of such importance that there is a compelling public interest in the assessing the effectiveness of these services provided by the appellant at Ontario's DriveTest Centres pursuant to its contract with the ministry; a contract paid by taxpayers. I also find that had the exemption in section 17(1) applied, this compelling public interest would have clearly outweighed the purpose of the exemption in section 17(1).

[83] In sum, I uphold the ministry's decision and dismiss the appeal. I find that only one portion of one record in Batch 2 is exempt from disclosure under section 17(1)(c). I find that the remainder of the Batch 2 records and all of the Batch 1 records are not exempt from disclosure under section 17(1). In addition to the portion of Batch 2 that is exempt from disclosure under section 17(1), the following information is not to be disclosed to the requester, as it was previously removed from the scope of the request:

- The personal information of DriveTest customers, such as names, contact information and drivers' licence numbers;
- The names of the driver examiners; and
- Information relating to leases.

ORDER:

1. I order the ministry to disclose Batch 1 of the records to the requester in their entirety by **November 9, 2017** but not before **November 3, 2017**.
2. I order the ministry to disclose Batch 2 of the records, in part to the requester by **November 9, 2017** but not before **November 3, 2017**. The banking information on the HST invoice, as well as the information referred to in paragraph 83 of this order is not to be disclosed to the requester.

3. I reserve the right to require the ministry to provide me with copies of the records it discloses to the requester.

Original Signed by: October 5, 2017

Cathy Hamilton
Adjudicator