Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4023

Appeals PA17-533, PA17-534, PA17-535 and PA17-536

Ministry of Natural Resources and Forestry

January 16, 2020

Summary: These four appeals are related third party appeals of an access decision made by the Ministry of Natural Resources and Forestry (the ministry). The ministry granted the requester access to the records at issue, which relate to the Bala Falls Hydro-electric Project. The four third parties appealed the ministry's decision, claiming that the ministry did not adhere to the notice requirements in section 28 of the *Act*. In addition, the appellants claimed that certain records were exempt under the mandatory exemption in section 17(1) (third party information) as well as the discretionary exemptions in section 16 (prejudice to the defence of Canada), 18(1) (economic interests of the institution) and 20 (danger to safety or health). During the inquiry, the requester raised the possible application of the public interest override in section 23 to the records.

In this order, the adjudicator finds that the ministry fulfilled the notice requirements in section 28 of the *Act*. In addition, she finds that portions of the records are exempt from disclosure under section 17(1) and that the public interest override in section 23 does not apply to this information. However, she does not allow the appellants to raise the possible application of the discretionary exemptions in sections 16, 18(1) or 20. The adjudicator orders the ministry to disclose the non-exempt information to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F.31, as amended, sections 16, 17(1)(a) and (c), 18(1)(c), (e) and (g), 20, and 28.

Orders and Investigation Reports Considered: Orders MO-2635, PO-1694-I, PO-1939, PO- 3545, PO-3601, PO-3841, and PO-3986.

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

OVERVIEW:

[1] An individual (the requester) submitted a request to the Ministry of Natural Resources and Forestry (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to any approval under the *Lakes and Rivers Improvement Act*[1] (the LRIA) for the proposed hydroelectric generating station at Bala Falls (the Bala Falls Project). The requester stated that he sought access to drawings, surveys, reports, technical notes, and applications for work permits related to this application for approval. The requester also advised that he sought records created between May 2 and August 7, 2017.

[2] The ministry identified records responsive to the request. The ministry then notified several third parties under section 28 of the *Act* to obtain their views regarding disclosure of information that may relate to them. The third parties submitted representations.

[3] After reviewing the third parties' representations, the ministry issued an access decision to the requester and third parties granting the requester partial access to the responsive records. The ministry advised the parties it would withhold portions of the records under the mandatory exemptions in section 17(1) (third party information) and 21(1) (personal privacy) and the discretionary exemptions in sections 14(1)(l) (facilitate commission of an unlawful act), 18(1)(d) (economic and other interests) and 19 (solicitor-client privilege) of the *Act*.

[4] The requester and four third parties (the appellants) appealed the ministry's decision to this office. Because this order is a joint order concerning the four third party appeals, I will identify the appellants as follows:

- Appellant A – Appeal PA17-533
- Appellant B – Appeal PA17-534
- Appellant C – Appeal PA17-535
- Appellant D – Appeal PA17-536

According to the appellants, Appellant D was accepted into the Feed-In Tariff (FIT) program for the Bala Falls Project and retained Appellants A, B and C to assist with it.

[5] As I mention below, the requester's appeal has since been closed.

[6] During the mediation process of the five appeals, the requester narrowed the scope of his appeal to pages 275 to 291 of Record A0302925 and pages 889 to 890 of Record A0303534. The ministry only applied section 17(1) of the *Act* to withhold these portions of the records. As a result, sections 14(1)(l), 18(1)(d), 19, and 21 of the *Act* were no longer at issue.

[7] The requester raised the possible application of the public interest override in section 23 to the records. Accordingly, section 23 was added as an issue in the appeals.

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[1] R.S.O. 1990, c.L.3.

[8] In their appeals, the appellants raised the application of sections 17(1), 14(1)(i) (security) and (l), 16 (prejudice defence of Canada), 18(1)(a), (c), (d) and (g) (economic and other interests) and 20 (danger to safety or health) of the *Act* to all the records the ministry notified them of.

[9] In addition, the appellants claimed the ministry should have notified them of all of the records responsive to the request because their disclosure may affect the appellants' interests. The appellants further objected to the disclosure of the records that the ministry did not notify them of. Therefore, the issue of whether the third party appellants are entitled to notice of certain records was added to the appeals.

[10] I confirm the requester did not abandon his request for the records the ministry decided to disclose to him. Because these records are subject to the four third party appeals, I will consider whether the ministry should have provided notice to the appellants and/or whether they are exempt under section 17(1) and/or the application of the discretionary exemptions claimed by the appellants.

[11] The appeals did not resolve at mediation and were transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry to resolve the issues under appeal. I am the adjudicator for these appeals and I began my inquiry by inviting the ministry and appellants to submit representations in response to a Notice of Inquiry, which summarized the facts and issues under appeal. In its representations, the ministry withdrew its section 17(1) claim to pages 275 to 291 of Record A0302925 and pages 889 to 890 of Record A0303534 and issued a revised access decision to the parties confirming its new position that these records should be disclosed. The appellants continued to claim that these records should be withheld from disclosure and so, the records were not disclosed to the requester and continue to be at issue in the third party appeals. However, given the ministry's revised access decision, the requester's appeal was closed.

[12] The appellants also submitted representations. In their representations, the appellants withdrew their section 14(1) claim. Accordingly, that exemption is no longer at issue in these appeals. The appellants also identified additional records that they believe the ministry should have notified them of, in addition to those identified during mediation. As such, I will consider whether the ministry should have notified the appellants of these additional pages.

[13] I then invited the requester to submit representations in response to the ministry and the appellants' representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The requester submitted representations. I then sought and received reply representations from the ministry and the appellants.

[14] In the discussion that follows, I find that the ministry adhered to the notice requirements in the *Act* and dismiss that part of the appeal. I find some of the records that the ministry decided to disclose are exempt from disclosure under section 17(1) of the *Act* and that the public interest override in section 23 does not apply to these records. I do not allow the appellants to raise the possible application of the discretionary exemptions in sections 16, 18(1) and 20 to the information that remains at issue. I order the ministry to disclose the non-exempt information to the requester.

RECORDS:

[15] The ministry identified 59 responsive records comprised of 952 pages. These records include correspondence, reports, draft schedules and conditions, drawings, and plans. At issue are portions of the information that the ministry has decided to disclose to the requester.

[16] In Appeal PA17-533, Appellant A claims that pages 275 to 291 of Record A0302925 and pages 889 to 890 of Record A0303534, which are duplicates of pages 290 and 291, are exempt from disclosure.[2]

[17] In Appeal PA17-534, Appellant B claims that pages 559 to 612 of Record A0303299 are exempt from disclosure.

[18] In Appeal PA17-535, Appellant C claims that the following pages are exempt from disclosure:

- Pages 2 to 5 of Record A0302912;
- Pages 15-17 of Record A0302914;
- Page 275 of Record 0302925;
- Page 301 of Record A0302971;
- Pages 355, 357 and 359 of Record A0302997;
- Pages 404-405 of Record A0303215;
- Pages 408-409 of Record A0303218;
- Pages 410-411 of Record A0303223;
- Page 419 of Record A0303231;
- Pages 444-445 of Record A0303243;
- Pages 448-449 of Record A0303248;
- Pages 600-606 of Record A0303299;
- Pages 622-624 of Record A0303340;
- Pages 763-765 of Record A0303418;
- Pages 925-926 of Record A0303545; and
- Pages 929-930 of Record A0303546.

[2] The description of the records at issue reflects Appendix B: Master Index of All Records attached to the appellants' representations.

[19] Finally, in Appeal PA17-536, Appellant D claims that the following pages are exempt from disclosure:

- Pages 2 to 5 of Record A0302912;
- Pages 8-17 of Record A0302914;
- Pages 255-256 of Record A0302923;
- Pages 275-291 of Record A0302925;
- Pages 293-294 of Record A0302926;
- Page 301 of Record A0302971;
- Page 349 of Record A0302995;
- Pages 355, 357 and 359 of Record A0302997;
- Pages 363-365 of Record A0302998;
- Pages 404-405 of Record A0303215;
- Pages 408-409 of Record A0303218;
- Pages 410-411 of Record A0303223;
- Page 419 of Record A0303231;
- Pages 444-445 of Record A0303243;
- Pages 448-449 of Record A0303248;
- Pages 452-456 of Record A0303257;
- Pages 559-612 of Record A0303299;
- Pages 622-624 of Record A0303340;
- Pages 763-765 of Record A0303418;
- Pages 795-802 of Record A0303439;
- Pages 883-884 and 889-890 of Record A0303534;
- Pages 913-914 and 921-922 of Record A0303542;
- Pages 925-926 of Record A0303545; and
- Pages 929-930 of Record A0303546.

ISSUES:

A. Did the ministry adhere to the notice requirements in section 28(1) of the *Act*?

B. Does the mandatory exemption at section 17(1) apply to the records at issue?

C. Should the appellant be allowed to raise the application of the discretionary exemptions in sections 16, 18(1) and/or 20?

DISCUSSION:

Issue A: Did the ministry adhere to the notice requirements in section 28(1) of the *Act*?

[20] During mediation, the appellants identified the following pages that they submit they were not consulted on before the ministry decided to disclose them to the requester: 257-259, 265-270, 383, 397-399, 460, 620-621, 788-793, 803-860, 875, 911, 912, 915-920, 938-945, 947-948 and 952. The ministry has not released these records to the requester. The requester confirmed that he pursues access to these records. The appellants take the position that they may have an interest in these pages to which the ministry decided to grant the requester access, but for which the ministry did not provide third-party notice in accordance with the requirements of the *Act*.

[21] Section 28(1) sets out an institution's obligation under the *Act* to provide notice of an access request in the following circumstances:

> Before a head grants a request for access to a record,
>
> > (a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; or
> >
> > (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),
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> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

In order to discharge his or her responsibilities under section 28(1)(a), a head must provide notice with respect to any responsive records that she or he has a reason to believe might contain information referred to in section 17(1) that affects the interests of a person other than the requester. In this case, the affected parties are the four appellants.

[22] In its representations, the ministry submits that it adhered to the notice requirements in subsection 28(1) and was not required to give notice to the appellants of pages 257-259, 265-270, 383, 385-386, 397-399, 460, 620-621, 788-793, 803-860, 875, 911, 912, 915-920, 938-945, 947-948 and 952, before deciding to disclose them to the requester.

[23] The ministry refers to Order PO-3545, in which the adjudicator found that notification must be based on an assessment that the records might contain or lead to inferences revealing certain types of information about a third party. In addition, the adjudicator found that the threshold for notification must be guided by section 17(1).

[24] The ministry submits that the records it did not notify the appellants of may be characterized as follows:

1. Internal ministry communications about the logistics of reviewing various plans submitted by one or more of the appellants;

2. Internal ministry communications containing high level comments about plans submitted by one or more of the appellants;

3. Internal communications and communication from the ministry to Appellant D proposing terms of a maintenance agreement; and

4. Communications from the ministry to Appellant D about granting approval under the *Lake and Rivers Improvement Act*[3] (the LRIA).

[25] The ministry submits that section 14(3) of the LRIA sets out the information that must be included in an application for approval. The ministry states that, under the LRIA, an applicant must provide:

- copies of the plans and specifications showing full details of the dam, including any spillways, sluicegates, channels and other associated structures and the maximum elevation at which the water will be held under normal operating conditions;[4]

- a report on the design of the dam and a map showing the location and size of the watershed above the dam;[5] and

- particulars of the nature of the foundation on which the dam is to be constructed with reports of all boring or test pits.[6]

Section 14(4) of the LRIA states further that the minister may require any applicant to provide any additional information that the ministry considers "pertinent."

[26] Upon consideration of the language in the LRIA, the ministry submits there is nothing confidential about the fact that an applicant is required to submit plans related to a proposed project for review by the ministry. By extension, the ministry submits that it is reasonable to assume that the review process would involve coordination among ministry staff with relevant expertise. The ministry submits that while the ministry reviewers exchanged comments on the plans, these comments do not contain or reveal proprietary technical details. The ministry submits that, at their most descriptive, these comments may identify generic plan components that would be applicable to many construction and work

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[3] R.S.O. 1990, c. L.3.
[4] Section 14(3)(a) of the LRIA.
[5] Section 14(3)(b) of the LRIA.
[6] Section 14(3)(c) of the LRIA.

plans, not just those of the appellants.

[27] In addition, the ministry submits that its correspondence relating to the proposed terms of an agreement does not contain exempt information and was not *supplied* by a third party, in confidence or otherwise. Furthermore, the ministry submits that its correspondence about the granting of LRIA approval or the approval document itself does not contain nor would it reveal technical, scientific, commercial or other types of exempt information that was supplied in confidence.

[28] The ministry states that it considered the possibility that a record that was not submitted by the appellants to the ministry (e.g. a record created by a ministry employee) may, nevertheless, contain the type of information protected by section 17(1). However, based on its review, the ministry found that each of the records it decided to not notify the appellants of fell into the category of "clear cases" identified by the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*[7] that do not require notice. The ministry submits it applied this standard, which was adopted in Order PO-3545, and the ministry decided that there was "no reason to believe that the record might contain exempted material."[8] Therefore, the ministry determined that pages 257-259, 265-270, 383, 397-399, 460, 620-621, 788-793, 803-860, 875, 911, 912, 915-920, 938-945, 947-948 and 952 did not require notification to the appellant pursuant to section 28 of the *Act*.

[29] The appellants submit that the ministry did not adhere to the notice requirements in section 28(1) of the *Act*. The appellants submit that the ministry was required to give notice to them of the pages at issue. The appellants submit that the wording of section 28(1)(a) is broad and, as noted in Order PO-3545, the word "might" in section 28(1)(a) creates a low threshold for notification.

[30] In this case, while many of the records are internal ministry communications, the appellants submit that several of the records are emails they sent, thereby meeting the *supplied* requirement of section 17(1) and would also contain scientific, technical, financial and/or commercial information.

[31] The four appellants also identified additional records that they submit they were not notified of, but should have been. Appellant A submits that the ministry should have notified it of pages 263, 268-269, 385-386 and 400-402. Appellant B submits that the ministry should have notified it of pages 260-263, 266-269, 384-387, 400-402, 404 and 461-462. Appellant C submits that the ministry should have notified it of pages 260- 263, 266-269, 384-387, 400-402, 404 and 461-462. Finally, Appellant D submits that the ministry should have notified it of pages 260-263, 266-269, 384-387, 400-402, 404, 461-462, 794, 921-922 and 946.

[32] The requester submits that the ministry was not required to give notice further than what was provided. The requester alleges that the appellants are attempting to delay and frustrate the inquiry process by raising this issue. The requester also submits that it is now academic and moot to consider whether it was necessary for the ministry to provide more notice than they did when the IPC has already decided that similar records are not exempt

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[7] 2012 SCC 3. (*MerckFrosst*).
[8] Order PO-3545 at para. 174.

under section 17(1) or if they are exempt, that they are subject to the public interest override.

[33] The requester submits that the appellants identified the records for which they claim they should have been notified, but did not provide any evidence to demonstrate how the harms they claim would reasonably be expected to result from their disclosure.

[34] In its reply representations, the ministry submits that it provided the appellants with third party notice regarding most of the records they identified in their representations. The ministry provided a table regarding each of the records identified by the appellants with its representations.

[35] With regard to Appellant A, the ministry submits that it provided notice to it under section 28 with regard to pages 263, 268 to 269, 385-386 and 400-402. The ministry attached a copy of its September 25, 2017 notification letter and clearly identified these records in the list of records it provided the appellant notice of.

[36] With regard to Appellant B, the ministry submits that page 260 of the records is an email from Appellant C to the ministry and the ministry notified Appellant C and D. However, the ministry submits that all appellants were notified of pages 261 to 263. The ministry submits that page 266 contains emails from Appellants A and C. The ministry submits that it notified Appellants A, C and D of page 266, but notified all appellants regarding pages 267 to 269. The ministry submits that page 384 is an email from Appellant C to the ministry and the ministry notified Appellant C and D. However, the ministry submits that all appellants were notified of pages 385 to 386. The ministry submits that it notified all of the appellants of pages 400-402. The ministry submits that page 404 is a letter from Appellant C to the ministry and the ministry notified Appellants C and D of this record. Finally, the ministry submits that it notified Appellants C and D of pages 461 and 462. The ministry attached a copy of its September 25, 2017 notification letter sent to Appellant B and clearly identified these records in the list of records it provided the appellant notice of.

[37] With regard to Appellant C, the ministry submits that it provided notice to it under section 28 with regard to pages 260-263, 266-269, 384-387, 400-402, 404 and 461-462. The ministry attached a copy of its September 25, 2017 notification letter sent to Appellant C and clearly identified these records in the list of records it provided the appellant notice of.

[38] With respect to Appellant D, the ministry submits that page 260 of the records is an email from Appellant C to the ministry and the ministry notified Appellant C and D. However, the ministry submits that all appellants were notified of pages 261 to 263. The ministry submits that page 266 contains emails from Appellants A and C. The ministry submits that it notified Appellants A, C and D of page 266, but notified all appellants regarding pages 267 to 269. The ministry submits that page 384 is an email from Appellant C to the ministry and the ministry notified Appellant C and D. However, the ministry submits that all appellants were notified of pages 385 to 386. The ministry submits that it notified all of the appellants of pages 400-402. The ministry submits that page 404 is a letter from Appellant C to the ministry and the ministry notified Appellants C and D of this record. The ministry submits that it notified Appellants C and D of pages 461 and 462. Finally, the ministry submits that it notified Appellant D of pages 794, 921-922 and 946. The ministry attached a copy of its September 25, 2017 notification letter sent to Appellant D and clearly

identified these records in the list of records it provided the appellant notice of.

Analysis and Findings

[39] The IPC has established that the responsibility to fulfil the notification requirements set out in section 28 rests with the institution and not this office.[9] Generally, the IPC does not play a role in reviewing that decision. However, in this case, the appellants placed this issue before this office as part of their appeals and I have reviewed the above-noted records at issue.

[40] In Interim Order PO-1694-I, the adjudicator considered the threshold for notification under section 28(1) of the *Act* and found that,

> … the word "might" in section 28(1)(a) creates a low threshold in determining whether notification is required.
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> In order to trigger the notification requirements under section 28(1)(a), a head must first have reason to believe that a record **might** contain one of the types of information listed in section 17(1) (i.e., a trade secret or scientific, technical, commercial, financial or labour relations information). If it does, the head must then consider whether disclosure of this information **might** affect the interest of a person other than the person requesting the information. In addressing this second requirement, the head should be guided by the provisions of section 17(1). For example, if the head has reason to believe that the information **might** have been supplied implicitly or explicitly in confidence, then notification is required. Similarly, if the head has reason to believe that disclosure of the record **might** result in one or more of the harms identified in section 17(1), then notification must also be given.
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> If a head concludes that a record **might** contain section 17(1)-type information, and that this information **might** have been supplied in confidence, in my view, it is not appropriate for an institution to decide that notice is unnecessary based on an assessment that the potential for harm from disclosure does not meet the threshold established by section 28(1)(a). The potential for harm is a determination that must be made in the individual circumstances of a particular request and, in my view, the notification requirements of section 28 were designed to allow affected persons an opportunity to provide input on this issue before a decision is made regarding disclosure.[10] [Emphasis in original]

[41] The Supreme Court of Canada also considered the threshold for notification of a third party in *Merck Frosst*. The Supreme Court stated that disclosure without notice is only justified in *clear cases* where the institution concludes that there is "no reason to believe that the record might contain exempted material."[11] In that case, the court noted that section 27(1) of the *Access to Information Act* (which is similar to section 28(1) in the *Act*) "does not refer to particular types of information that are or may be contained in records

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[9] Orders PO-1694-I and PO-3545.
[10] PO-1694-I at page 6.
[11] *Merck Frosst*, *supra* note 5 at para 72.

otherwise subject to disclosure."[12]

[42] The principles expressed in Order PO-1694-I and by the Supreme Court in *Merck Frosst* were adopted in Order PO-3545, in which the adjudicator considered a third party appellant's right to notice under section 28(1) of records relating to a renewable energy project. In Order PO-3545, the adjudicator considered the third party appellant's claim that the threshold for notification under section 28 is whether the information *relates* to a third party. The adjudicator did not agree with the third party appellant's submission and found that "notification must be based on an assessment that the records might contain or lead to inferences relating to certain types of information about a third party. Second, the threshold for notification must be guided by the provisions of section 17(1)."[13] The records before the adjudicator included internal ministry documents and communications with external stakeholders. Reviewing these records, the adjudicator found that any reference to the third party was consistent with publicly available information and did not give rise to a duty to notify under section 28. The adjudicator found that there was "no reason to believe that these records might contain or reveal information supplied in confidence by the third party" and accepted the ministry's submission that there was "no substantive information included in these records related to [the third party's wind farm] that is otherwise unavailable in the proponent's publicly posted documentation."[14]

[43] In Order PO-3545, the adjudicator also considered the possibility that a record that was not submitted by the third party to the ministry (such as a record created by a ministry employee) may nevertheless contain the type of information protected by section 17(1), for instance, by incorporating or describing confidential business information originally supplied by the third party.

[44] I agree with the approach taken in Orders PO-1694-I and PO-3545 and by the Supreme Court in *Merck Frosst*, and adopt the principles expressed in these decisions for the purposes of this appeal. For clarity, I will address the notice issues raised in each appeal separately.

Appeal PA17-533 – Appellant A

[45] I have reviewed the records at issue. Based on my review, pages 265, 460, 620-621, 788-793, 803-860, 875, 911-912, 915-920, 938-945, 947-948, and 952 do not contain any information that relates to Appellant A. None of these records mention Appellant A nor the information it may have supplied to the ministry. Rather, these are internal ministry records regarding the terms of a maintenance agreement or the approval under the LRIA. Upon review of these records, I find that the ministry was not required to notify Appellant A of these pages under section 28(1) of the *Act* because there is no reason to believe that they might contain exempted material.

[46] I have also reviewed the additional records identified by Appellant A in its representations, namely, pages 263, 265-270, 385-386, and 400-402. In its reply submissions, the ministry confirmed that it did notify Appellant A of these records and

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[12] *Ibid*. at para 64.
[13] Order PO-3545 at para 176.
[14] Order PO-3545 at para 177.

provided me with a copy of the notification letter, which clearly identifies these records as those for which the ministry was providing notice. I reviewed the notification letter the ministry sent to Appellant A dated September 25, 2017 and confirm that it notified Appellant A of these records.

[47] I have reviewed the remainder of the records that Appellant A submits it should have been notified of, namely, pages 257-259, 383, and 397-399. Based on my review of these records, I agree that these records consist of internal ministry communications about the logistics of reviewing the plans submitted by the appellant and other third parties. While the majority of the records consist of general statements made by the ministry employees, there is one portion of an email duplicated in these pages that contains information from page 280, which Appellant A claims is exempt under section 17(1). Although the ministry should have notified Appellant A of these portions of pages 257-279, 383 and 397-399, I find that Appellant A has already been given notice of the information given its existence in the records at issue in Appeal PA17-533, namely page 280. I will consider the application of section 17(1) of the *Act* to this portion of the email under Issue B, below.

[48] In conclusion, I find that the ministry has fulfilled its obligations under section 28(1) with regard to pages 460, 620-621, 788-793, 803-860, 875, 911, 912, 915-920, 938-945, 947-948 and 952 and it was not required to provide notice to the appellant of these pages. As indicated above, it appears the ministry did provide the appellant notice of pages 263, 265-270, 385-386, and 400-402. I will consider whether portions of pages 257-259, 383 and 397-399 relating to Appellant A are exempt under section 17(1), below.

Appeal PA17-534 – Appellant B

[49] I have reviewed the records Appellant B claims the ministry ought to have notified it of. Based on my review, I find that pages 257-259, 265, 266, 270, 383, 397- 399, 460, 620-621, 788-790, 803-860, 875, 911, 912, 915-920, 938-945, 947-948 and 952 do not contain information that relates to Appellant B. None of these records contain information relating to Appellant B nor the information it may have supplied to the ministry. Rather, the majority of these records are internal ministry records relating to the Bala Falls Project generally or refer to one of the other third party appellants regarding the terms of a maintenance agreement or the approval under the LRIA. Appellant B is copied as an addressee in some of the emails, but this does not constitute information that it supplied in confidence to the ministry. Similarly, the email found at pages 791-793 is an internal ministry email that the ministry forwarded to Appellant B that contains generic template language for a maintenance agreement. Based on my review, these pages do not contain third party information relating to Appellant B. Upon review of these records, I find that the ministry was not required to notify Appellant B of these pages under section 28(1) of the *Act* because there is no reason to believe that they contain exempted material.

[50] Of the records Appellant B initially identified during mediation as requiring notice, pages 267 and 268 contain emails that were exchanged between Appellant B and a third party. However, the ministry submits that it notified Appellant B of these emails in its representations and Appellant B did not dispute the ministry's claim in its reply representations.

[51] In addition, I reviewed the records Appellant B identified in its representations, specifically pages 260-263, 266-269, 384-387, 400-402, 404 and 461-462. In its

submissions, the ministry confirmed that it notified Appellant B of pages 261-263, 267- 269, 385-386, and 400-402. The ministry also provided me with a copy of its September 25, 2017 notification letter, which clearly identifies these records as those for which the ministry was providing Appellant B notice. I reviewed the notification letter the ministry sent to Appellant B. I confirm that the ministry notified the appellant of these records.

[52] I have reviewed the remainder of the records that Appellant B submits it should have been notified of, namely, pages 260, 266, 384, 387, 404, and 461-462. Based on my review, I find that Appellant B was merely an addressee copied in the emails found in pages 260, 266, and 461-462. These pages do not contain the type of information relating to Appellant B that would be protected by section 17(1). With regard to pages 384, 387, and 404, I find that they do not mention Appellant B nor contain any information that it may have supplied to the ministry. Therefore, I find that the ministry was not required to notify Appellant B of these pages under section 28(1) of the *Act* because there is no reason to believe that they contain exempted material.

[53] In conclusion, I find that the ministry fulfilled its obligations under section 28(1) with respect to the records involving Appellant B in Appeal PA17-534.

Appeal PA17-535 – Appellant C

[54] I have reviewed the records that Appellant C submits the ministry was required to notify it of. Based on that review, I find that pages 257-259, 265, 270, 383, 397-399, 460, 620-621, 788-793, 803-860, 875, 911, 912, 915-920, 938-945, 947-948 and 952 do not contain information that relates to Appellant C. None of these records contain information relating to Appellant C nor information Appellant C may have supplied to the ministry. Rather, the majority of these records consist of internal ministry records relating to terms of a maintenance agreement or the approval under the LRIA. Upon review of these records, I find that the ministry was not required to notify Appellant C of these pages under section 28(1) because there is no reason to believe that they contain exempted material.

[55] However, I find that pages 266-269 contain emails that were exchanged between Appellant C and a third party. The ministry submits that it notified Appellant C of these emails in its representations and Appellant C did not dispute the ministry's claim in its reply representations. In addition, I reviewed the records Appellant C identified in its representations as requiring notice, specifically pages 260-263, 266-269, 384-387, 400-402, 404 and 461-462. In its submissions, the ministry confirmed that it notified Appellant C of pages 261-263, 267-269, 385-386, and 400-402. The ministry also provided me with a copy of its September 25, 2017 notification letter, which clearly identifies these records as those for which the ministry was providing Appellant C notice. I reviewed the notification letter the ministry sent to Appellant C. I confirm that the ministry notified the appellant of these records.

[56] Therefore, I find that the ministry fulfilled its obligations under section 28(1) in relation to Appellant C in Appeal PA17-535.

Appeal PA17-536 – Appellant D

[57] Finally, I reviewed the records that Appellant D claims that the ministry ought to have notified it of. Based on my review, pages 257-259, 265, 270, 383, 397-399, 460, 620-

621, 788-793, 803, 805-830, 835-860, 875, 911, 915-920, 938-945, and 952 do not contain information that relates to Appellant D. None of these records appear to contain the type of information protected by section 17(1) that Appellant D may have supplied to the ministry. Rather, these records are internal ministry records regarding the Bala Falls Project, the terms of a maintenance agreement or the approval under the LRIA. Upon review of these records, I find that the ministry was not required to notify Appellant D of these pages under section 28(1) of the *Act* because there is no reason to believe that they contain exempted material.

[58] Pages 804, 834 (which is a duplicate of 804), 912, and 947-948 contain correspondence from the ministry sent to Appellant D. Based on my review of these records, I find the ministry was not required to notify Appellant D of these pages. These pages do not contain the type of information protected by section 17(1) and I find that there is no reason to believe that these pages might contain or reveal information supplied in confidence by the third party.[15] Therefore, I find that the ministry was not required to provide Appellant D with notice of these pages.

[59] With regard to pages 266-269 of the records, the ministry submits that it notified Appellant D of these emails in its representations and Appellant D did not dispute the ministry's claim in its reply representations. In addition, I reviewed the records Appellant D identified in its representations as requiring notice, specifically 260-263, 266-269, 384-387, 400-402, 404, 461-462, 794, 921-922 and 946. In its submissions, the ministry confirmed that it notified Appellant D of these pages under section 28(1). The ministry also provided me with a copy of its September 25, 2017 notification letter, which clearly identifies these records as those for which the ministry was providing Appellant D notice. I reviewed the notification letter the ministry sent to Appellant D. I confirm that the ministry notified the appellant of these records.

[60] Therefore, I find that the ministry fulfilled its obligations under section 28(1) in relation to Appellant D in Appeal PA17-536.

Conclusion

[61] With the exception of the portions of pages 257-259, 383 and 397-399 relating to Appellant A, I find that the ministry adhered to its obligations under section 28(1) of the *Act* to all four appellants. I will consider the application of section 17(1) to pages 257-259, 383 and 397-399, below.

Issue B: Does the mandatory exemption at section 17(1) apply to the records at issue?

[62] The appellants take the position that portions of the records the ministry is prepared to disclose to the requester are exempt under section 17(1)(a) and/or (c) of the *Act*.

[63] Specifically, in Appeal PA17-533, Appellant A claims that pages 275 to 291 of Record A0302925 and pages 889 to 890 of Record A0303534, which are duplicates of pages 290

[15] Order PO-3545 at para 177.

and 291, are exempt from disclosure.[16] In addition, as discussed above, I will consider the application of sections 17(1)(a) and (c) to the portion of the email duplicated in pages 257-259, 383, and 397-399, which reflects information found in page 280.

[64] In Appeal PA17-534, Appellant B claims that pages 559 to 612 of Record A0303299 are exempt from disclosure.

[65] In Appeal PA17-535, Appellant C claims that the following pages are exempt from disclosure:

- Pages 2 to 5 of Record A0302912;
- Pages 15-17 of Record A0302914;
- Page 275 of Record 0302925;
- Page 301 of Record A0302971;
- Pages 355, 357 and 359 of Record A0302997;
- Pages 404-405 of Record A0303215;
- Pages 408-409 of Record A0303218;
- Pages 410-411 of Record A0303223;
- Page 419 of Record A0303231;
- Pages 444-445 of Record A0303243;
- Pages 448-449 of Record A0303248;
- Pages 600-606 of Record A0303299;
- Pages 622-624 of Record A0303340;
- Pages 763-765 of Record A0303418;
- Pages 925-926 of Record A0303545; and
- Pages 929-930 of Record A0303546.

[66] Finally, in Appeal PA17-536, Appellant D claims that the following pages are exempt from disclosure:

- Pages 2 to 5 of Record A0302912;
- Pages 8-17 of Record A0302914;

[16] The description of the records at issue reflects Appendix B: Master Index of All Records attached to the appellants' representations.

- Pages 255-256 of Record A0302923;
- Pages 275-291 of Record A0302925;
- Pages 293-294 of Record A0302926;
- Page 301 of Record A0302971;
- Page 349 of Record A0302995;
- Pages 355, 357 and 359 of Record A0302997;
- Pages 363-365 of Record A0302998;
- Pages 404-405 of Record A0303215;
- Pages 408-409 of Record A0303218;
- Pages 410-411 of Record A0303223;
- Page 419 of Record A0303231;
- Pages 444-445 of Record A0303243;
- Pages 448-449 of Record A0303248;
- Pages 452-456 of Record A0303257;
- Pages 559-612 of Record A0303299;
- Pages 622-624 of Record A0303340;
- Pages 763-765 of Record A0303418;
- Pages 795-802 of Record A0303439;
- Pages 883-884 and 889-890 of Record A0303534;
- Pages 913-914 and 921-922 of Record A0303542;
- Pages 925-926 of Record A0303545; and
- Pages 929-930 of Record A0303546.

[67] The relevant portions of section 17(1) 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,

> (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;

Section 17(1) is designed to protect the confidential informational assets of businesses or other organizations that provide information to government institutions.[17] 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.[18]

[68] For section 17(1) to apply, the party claiming the application of the exemption, in this case, the appellants, 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) and/or (c) of section 17(1) will occur.

Requirement 1: type of information

[69] All four appellants make substantially similar representations regarding the part 1 of the section 17(1) test. The appellants submit that the records at issue contain at least one of the following:

- scientific, technical, commercial and/or financial information;

- scientific and/or technical drawings; scientific, technical commercial and/or financial information relating to the construction of the Bala Falls Project; and

- scientific, technical, commercial and/or financial specifications and information relating to the appellants' operations and/or the Bala Falls Project.

[70] Previous orders of this office have defined these terms as follows:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the

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[17] *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.) [*Boeing Co.*].
[18] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[19]

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.[20]

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[21] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[22]

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.[23]

[71] The ministry submits that the records contain technical information within the meaning of section 17(1).

[72] On my review of the records at issue, I am satisfied that the information claimed to be exempt under section 17(1) contains technical and/or commercial information for the purposes of section 17(1) of the *Act*. I find that the technical drawings and specifications contained in the records are technical information within the meaning of the *Act*. In addition, I find that the correspondence between the appellants and/or the ministry contain commercial information as it relates to the appellants' services in relation to the Bala Falls Project. Therefore, I find the first requirement for the application of section 17(1) is satisfied.

Requirement 2: supplied in confidence

[73] The requirement that it be shown that the information was *supplied* to the institution reflects the purpose of section 17(1) of protecting the informational assets of third parties.[24]

[74] 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

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[19] Order PO-2010.
[20] Order PO-2010.
[21] Order PO-2010.
[22] Order P-1621.
[23] Order PO-2010.
[24] Order MO-1706.

with respect to information supplied by a third party.[25]

[75] In order to satisfy the *in confidence* component of part two, the party resisting disclosure must establish the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. The expectation of confidentiality must have an objective basis.[26]

[76] 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 appellant prior to being communicated to the ministry
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[27]

[77] The appellants submitted substantially similar arguments regarding part 2 of the section 17(1) test. The appellants submit that the *supplied in confidence* requirement is met because

> … it is a reasonable implication that when [the appellants] supply information to the [ministry], either directly or indirectly through another federal or provincial government department in the context it has shown such intention in this case, that such supply would not be intended to be shared with the public, and would remain confidential as between [the appellants, the ministry,] and other related departments of government.

The appellants submit that the information at issue was communicated to the ministry on the basis that it was confidential and to be kept confidential. The appellants also submit that the information likely would not have been communicated to the ministry in the same way if there was no expectation of confidentiality. In addition, the appellants submit that the information in the records was not otherwise disclosed or available from publicly accessible sources, both of which are factors that lend in favour of an expectation of confidentiality.

[78] In addition, Appellants C and D submit that while pages 622-624 of Record A0303340 is a ministry memorandum, it should be considered to have been *supplied in confidence* to the ministry because disclosure of this record would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by Appellants C and D to the ministry.

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[25] Orders PO-2020 and PO-2043.
[26] Order PO-2020.
[27] Order PO-2043.

[79] For similar reasons, Appellant D submits that pages 255-256 of Record A0302923 and pages 795-802 of Record A0303439 should be considered to be *supplied in confidence*. With regard to pages 795-802 of Record A0303439, Appellant D acknowledges that this record is a contract involving itself and the ministry. While contracts are not normally considered to have been *supplied*, Appellant D submits that the disclosure of the information in these pages would permit accurate inferences to be made with respect to underlying non-negotiated confidential information it supplied to the ministry. Similarly, Appellant D submits that the information in pages 255-256 of Record A03032923 would permit accurate inferences to be made with respect to underlying non-negotiated confidential information it supplied to the ministry, particularly the drawing at page 256.

[80] The ministry submits that the appellants did not provide sufficient evidence to demonstrate that the information in the records was provided to the ministry in confidence.

[81] The requester submits that the appellants did not explicitly mark the records as confidential and did not provide sufficient evidence to demonstrate that the records were supplied in confidence to the ministry.

[82] In reply, the appellants reiterate the arguments they made in their original representations. The appellants refer to Order PO-2043, submitting that the fact that the information was not otherwise available or disclosed from sources to which the public has access is a strong factor lending in favour of confidentiality. The appellants submit this is especially true where there a publicly-accessible website with a significant amount of information available, including technical drawings. The appellants submit that none of the information at issue is displayed on the public website, which indicates that it was intended to be kept confidential. The appellants further submit that to adopt the reasoning of the ministry and the requester would mean that all communications and drawings submitted to provincial agencies or ministries must fail the second part of the section 17(1) test, which "runs afoul of the intent and purpose" of the exemption. The appellants also argue that this is clearly a case where the records were implicitly provided to the ministry in confidence, given the sensitive nature of the records. The appellants submit that they have consistently opposed the disclosure of this type of information and that the ministry treats these records as confidential.

[83] The appellants also argue that the ministry did not communicate that the process being engaged in was a public one, where an applicant would not typically expect confidentiality. The appellants submit that the process was a business relationship, involving the exchange of information and fees in return for regulatory approval. The appellants affirm that the fact that this was an approval process does not negate an expectation of confidentiality and it would be "absurd" to claim that such a process would involve a default presumption of non-confidentiality.

[84] The records at issue in Appeal PA17-533 are comprised of technical drawings and an emergency plan. These records are found at pages 275-291 and 889-890. In addition, I will consider whether a portion of page 280 reflected in pages 257-259, 383, and 397-399 is exempt from disclosure under sections 17(1)(a) and (c). I note that pages 275-291 and 889-890 are also at issue in Appeal PA17-536. Based on my review of the records, I find that Appellant A supplied the information contained in these records to the ministry. In addition, I am satisfied that the appellant had an implicit and reasonable expectation that these records were supplied *in confidence* given the nature of the records, which consist of

technical drawings and an emergency plan, and the circumstances in which they were provided to the ministry. As a result, the records at issue in Appeal PA17-533 have met the requirements of the second part of the three- part test in section 17(1) of the *Act*.

[85] The sole record at issue in Appeal PA17-534 is a memorandum prepared by Appellant B regarding the Muskoka River Water Management Plan Amendment, at pages 559 to 612 of Record A0303299. I note that this record is also at issue in Appeal PA17-536. Based on my review of that record as a whole, I find that the record was supplied to the ministry by Appellant B. In addition, I accept the appellant had an implicit and reasonable expectation that the memorandum was supplied to the ministry *in confidence* given the nature of the information contained in the record as well as the context in which the appellant provided it to the ministry. As a result, the record at issue in Appeal PA17-534 meets the requirements of the second part of the three-part test in section 17(1) of the *Act*.

[86] The records at issue in Appeal PA17-535 consist of portions of 16 records, including correspondence between Appellant C and the ministry, technical drawings, and a memorandum sent from the ministry to Appellants C and D. I note that a number of these records are also at issue in Appeal PA17-536. Based on my review, I accept that the majority of these records were supplied in confidence by Appellant C and/or Appellant D to the ministry or contain information that was supplied in confidence by Appellant C and/or Appellant D. In addition, I accept that Appellant C and/or Appellant D had an implicit and reasonable understanding that the information contained in the majority of these records was supplied to the ministry *in confidence* given the nature of the records at issue and the context in which they were created and provided to the ministry. Accordingly, I find that the majority of the records at issue in Appeal PA17-535 meet the requirements of the second part of the three-part test in section 17(1) of the *Act*.

[87] The records at issue in Appeal PA17-536 consist of portions of 24 records, many of which are at issue in the other three appeals. These records include correspondence between Appellant D and the ministry, technical drawings, memoranda and work permits. Based on my review, I accept that the majority of these records were supplied in confidence by Appellant D and/or the other three appellants (where relevant) to the ministry or contain information that was supplied in confidence by Appellant D and/or the other three appellants. In addition, I accept that Appellant D and/or the other three appellants had an implicit and reasonable expectation that the information contained in the majority of these records was supplied to the ministry *in confidence* given the nature of the records at issue and the context in which they were created and provided to the ministry. Accordingly, I find that the majority of the records at issue in Appeal PA17-536 meet the requirements of the second part of the three-part test in section 17(1) of the *Act*.

[88] However, I find that pages 408-409 of Record A0303218 at issue in Appeals PA17-535 and PA17-536 do not contain information that was supplied in confidence by either Appellant C or D. Pages 408 and 409 are Ontario Provincial Standard Drawings the ministry sent to Appellant C. Neither Appellant C nor D made representations specifically addressing whether they prepared and supplied the information contained in these pages to the ministry. In the absence of such representations and upon review of pages 408 and 409, I find that these records were not supplied in confidence within the meaning of section 17(1) of the *Act*. Therefore, section 17(1) does not apply to these pages. However, I will consider Appellants C and D's claim that these pages are exempt under sections 16, 18 and/or 20

below.

[89] In addition, I find that page 349 of Record A0302995 does not contain information that was supplied in confidence to the ministry. Appellant D claims that this record is exempt from disclosure under section 17(1), but did not provide any specific representations regarding the information it supplied to the ministry in confidence. Page 349 of Record A0302995 is a portion of an email sent by the ministry to Appellant D regarding and quoting two terms from a Work Permit issued by the ministry to Appellant D. Based on my review, this page does not appear to contain any information supplied by Appellant D in confidence to the ministry. Therefore, I find that the information contained in page 349 was not supplied in confidence within the meaning of section 17(1) of the *Act*. Therefore, section 17(1) cannot apply to it because each of the three requirements for its application must be met. However, I will consider Appellant D's claim that this page is exempt under sections 16, 18 and/or 20 below.

Part 3: harms

[90] The parties resisting disclosure must provide evidence about the potential for harm. They must demonstrate a risk of harm that is well beyond the merely possible or speculative although they 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.[28]

[91] The need for public accountability in the expenditure of public funds is an important reason behind the need for sufficient evidence to support the harms outlined in section 17(1).[29] 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 the harms in the *Act*.[30]

[92] The appellants submit substantially similar general arguments regarding the harms they submit can reasonably be expected to result from the disclosure of the records that remain at issue. Referring to *Merck Frosst*, the appellants submit that they only need "to establish that the future risk is somewhere between possible and probable." The appellants submit that they do not need to prove there is a 50% or more risk of a consequence occurring; there could be less than a 50% risk of a consequence occurring and they would still meet the third part of the section 17(1) harms test.

[93] The appellants submit that the disclosure of the records at issue would likely reveal premature construction plans that could delay or jeopardize the building of the Bala Falls Project if someone were to use the information to intentionally sabotage construction or erect road blocks to certain construction activities. The appellants submit that this would result in significant prejudice to their competitive position and result in undue economic losses caused by an inability to fulfil their contractual obligations. The appellants submit that Appellant D has reported that it received "what may reasonably be apprehended as verbal and/or written threats to sabotage the Bala Falls Project." [31] Given these

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[28] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras 52-54.
[29] Order PO-2435.
[30] *Ibid*.
[31] Appellant A's representations at para 35.

circumstances, the appellants submit that their competitive positions could reasonably be expected to suffer significant prejudice through the loss of future retainers with other contracting partners if their proprietary information were released to competitors or the general public.

[94] In addition to these general arguments, Appellants C and D provided the IPC with representations regarding the harms that they submit could reasonably be expected to result from the disclosure of the specific records they claim to be exempt from disclosure. Overall, Appellants C and D reiterate similar arguments to those summarized above, but I will refer to these arguments when I consider the records in detail, below.

[95] The ministry submits that the appellants did not provide it with sufficient evidence to demonstrate that the disclosure of the records could reasonably be expected to result in the harms in section 17(1)(a) and (c).

[96] The requester submits that the IPC has clearly stated that the parties claiming the application of section 17(1) need to provide detailed evidence to demonstrate that the harm will reasonably result from the disclosure of the records at issue. In this case, the requester submits that the appellants failed to provide such evidence and only made broad claims. The requester submits that the appellants did not provide any evidence or examples of how their claimed harms could actually result from the disclosure of the records at issue. Furthermore, the requester submits that the appellants' representations are speculative and lacking in detail.

[97] In their reply representations, the appellants reiterate their original representations and each provide an affidavit sworn by an employee. Appellant A provided an affidavit sworn by its Project Director, who submits that the greatest injury to Appellant A's financial interests and competitive position would reasonably be expected to result from the use of the information, techniques and designs included in the drawings at issue in Appeal PA17-533. The Project Director submits that the disclosure of this information would provide its competitors with insight into the planning, drawing and construction methods used by Appellant A and the adjustments made over time.

[98] Appellant B provided an affidavit sworn by its Regional Manager, who submits that the disclosure of the records at issue in Appeal PA17-534 would prematurely reveal engineering plans and policies, decisions and negotiations. Appellant B's Regional Manager submits that this could lead to public confusion and misinformation, thereby further delaying the building of the Bala Falls Project and significantly jeopardize Appellant B's ability to fulfil its existing contractual obligations and adhere to construction deadlines. Appellant B's Regional Manager submits that the delay would result in a waste of resources which have already been used to advance the Bala Falls Project and expose Appellant B to a risk of undue financial loss for both breach of contract and diminution of profits.

[99] Appellant C provided an affidavit sworn by its Manager, Hydropower and Dams, who submits that disclosure of the records at issue in Appeal PA17-535 would provide its competitors with insight into the planning, design, construction and operating strategy of Appellant C and the adjustments made thereto over time. Appellant C's Manager notes that the records contain detailed and sensitive drawings and information relating to the construction of the Bala Falls Project and confidential discussions related to outstanding issues and approvals required for the Bala Falls Project. He further states that the disclosure

of any of the records at issue in Appeal PA17-535 could reasonably be expected to result in prejudice to the competitive position of Appellant C in the marketplace because its competitors will understand Appellant C's business approach and leverage that knowledge to their advantage. Appellant C's Manager also submits that the disclosure of the records could cause delay to the building of the Bala Falls Project and jeopardize Appellant C's ability to fulfil its existing contractual obligations and adhere to construction deadlines.

[100] Appellant D provided an affidavit sworn by its Vice President, who makes similar arguments as the other affiants regarding the disclosure of the records to competitors and the use these competitors could make of the records at issue in Appeal PA17-536 to their advantage and to the disadvantage of Appellant D. The Vice President submits that the correspondence between Appellant D and the ministry contains unique information that reflects the business concerns, needs, interests, strengths and weaknesses of Appellant D that would affect its competitive position and could reasonably be expected to interfere with future contractual negotiations, if disclosed.

[101] All four affiants note that there has been "extremely vocal and demonstrated resistance from members of the public against the Bala Falls Project." These affiants submit that the records, if disclosed, will likely be exploited by activists who are closely monitoring the commencement of the Bala Falls Project.

Analysis and Findings

Appeals PA17-533 and PA17-536: Record A0302925 pages 275-291 and Record A0303534 pages 889-890 (duplicates of pages 290-291)

[102] These pages consist of technical drawings and an emergency plan for the Bala Falls Project. In Order PO-3986, the adjudicator considered similar arguments regarding technical drawings that related to the Bala Falls Project. Specifically, the appellant in Order PO-3986 submitted that its competitive position could reasonably be expected to be significantly prejudiced by revealing sensitive and detailed technical drawings and information to market competitors, which could result in the potential loss of future retainers with other contracting partners. The adjudicator in Order PO-3986 accepted these arguments and found that section 17(1)(a) applied to the technical drawings before her. The adjudicator stated,

> In my view, these pages contain proprietary information belonging to the appellant, which meets the third part of the three-part test in section 17(1)(a). The sole reason that I have come to this conclusion is because I find that the disclosure of the format and substance of these technical drawings, as well as the format of the technical information could reasonably be expected to be used by a competing engineering firm to prejudice the appellant's competitive position with respect to future projects they might be competing for.
>
> With respect to the requester's position that the public override applies, I find that the public interest override in section 23 does not apply to the technical information that I have found to be exempt under section 17(1). While I agree with the requester and the appellant that there is a significant public interest in the Bala Falls project, and in particular, the impacts of it on the

> community, I find that the disclosure of the detailed technical information at issue in this record would not address the public interest in the project as a whole. I also note that a significant amount of information has already been disclosed by the ministry regarding this project, and that a significant amount of information is available to the public online about this project. In sum, I find that there is not a compelling public interest in the disclosure of the technical drawings and detailed technical information that I have found to be exempt under section 17(1).[32]

[103] I adopt this analysis for the purposes of these appeals. Based on my review of the records, I find that the technical drawings at pages 275 to 278, 283 to 285, 287 to 291 and 889 to 890 (which appear to be duplicates of pages 290 and 291) are exempt from disclosure under section 17(1)(a). These pages contain proprietary information belonging to Appellant A and I am satisfied that their disclosure could reasonably be expected to result in prejudice to Appellant A's competitive position. I am satisfied that Appellant A provided sufficient evidence to demonstrate that its competitors could reasonably be expected to use the information contained in these technical drawings to make competitive adjustments and garner a competitive advantage for themselves to the detriment of the appellant. Therefore, I am satisfied that these pages are exempt from disclosure under section 17(1)(a).

[104] In addition, I find that the public interest override in section 23 does not apply to the technical drawings that I have found to be exempt under section 17(1) of the *Act*. I find that the reasoning in Order PO-3986 is applicable to the drawings before me, and I find that the disclosure of these technical drawings would not address the public interest in the project as a whole. Furthermore, a significant amount of information has already been disclosed by the ministry in response to this and related requests and a significant amount of information is publicly available online. Therefore, I am not satisfied that there is a compelling public interest in the disclosure of the technical drawings at issue in these appeals.

[105] However, I find that the emergency plan found at pages 279 to 281 and cover pages of two appendices at pages 282 and 286 of the records do not meet part three of the three-part test in section 17(1)(a) and are, therefore, not exempt from disclosure under this exemption. Similarly, I find that the portion of page 280 that is reflected in pages 257-259, 383, and 397-399 is not exempt under section 17(1)(a). Past orders of this office have found that in order for section 17(1)(a) to apply, the risk of harm to the third party must be in relation to the competitive or negotiating position of the third party. While Appellants A and D made representations on the application of the exemption to the technical drawings and information that I found exempt, they did not provide specific evidence to support their claim that the disclosure of the information in the emergency plan and cover pages could reasonably be expected to result in the harm contemplated by section 17(1)(a). The harm is not self-evident from my review of the records. Therefore, I find that the appellants have not established that the disclosure of this information could reasonably be expected to significantly prejudice their competitive or negotiating position.

[106] With regard to section 17(1)(c), Appellants A and D argue that the disclosure of the

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[32] Order PO-3986, paras 50-51.

information that remains at issue would prematurely reveal construction plans and premature policies, decisions and negotiations that could lead to public confusion and misinformation, which could result in further delay to the project and jeopardize the appellant's ability to fulfil its contractual obligations. However, the appellants do not provide specific information as to how the disclosure of the information in the emergency plan and the cover pages of two appendices could reasonably be expected to result in undue economic loss caused by an inability to fulfil their contractual obligations. Based on my review of the records that remain at issue, I find Appellants A and D's arguments regarding section 17(1)(c) to be speculative. I find that the appellants have not provided sufficient evidence to demonstrate that disclosure of the information remaining at issue could reasonably be expected to cause them undue financial loss. Therefore, I find that the emergency plan found at pages 279 to 281 and cover pages of two appendices at pages 282 and 286 of the records are not exempt under section 17(1). Further, I find that the portion of page 280 that is reflected in pages 257-279, 383, and 397-399 of the records is not exempt from disclosure under section 17(1)(c).

Appeals PA17-534 and PA17-536: Record A0303299 pages 559-612 (pages 600-606 are also at issue in Appeal PA17-535)

[107] This record is a memorandum Appellant B prepared regarding the Muskoka River Water Management Plan Amendment. The main portion of the memorandum is found on pages 559-566 and there are eight appendices from pages 567 to 612. I find that the analysis in Order PO-3986 regarding technical drawings (reproduced above) is equally applicable here and find that the technical drawings relating to Appellant D found on pages 600-606 are exempt from disclosure under section 17(1)(a). These pages contain proprietary information belonging to Appellant D and I am satisfied that the disclosure of them could reasonably be expected to result in prejudice to Appellant D's competitive position. I am satisfied that Appellant D provided sufficient evidence to demonstrate that its competitors could reasonably be expected to use the information contained in these technical drawings to make adjustments and garner a competitive advantage for themselves to the detriment of the appellant. Therefore, I am satisfied that these pages are exempt from disclosure under section 17(1)(a).

[108] For similar reasons to those set out above, I also find that the public interest override in section 23 does not apply to the technical drawings at pages 600-606.

[109] However, I find that the memorandum itself, the title pages of the appendices and the appendices themselves (with the exception of pages 600-606) have not met part three of the three-part test in section 17(1)(a) and are, therefore, not exempt from disclosure under this exemption. As noted above, past orders of this office have found that in order for section 17(1)(a) to apply, the risk of harm to the third party must be in relation to the competitive or negotiating position of the third party. Based on my review of the memorandum and the portions of the appendices that remain at issue, I find that Appellant B and Appellant D did not provide specific evidence to support their claim that the disclosure of this information could reasonably be expected to result in the harms contemplated by section 17(1)(a). The information contained in the memorandum appears to be general in nature and a number of the appendices contain correspondence from the ministry and other government agencies regarding the Bala Falls Project. In addition, I note that page 599 appears to be a map created by the government, which could not

reasonably be expected to cause the harms contemplated by section 17(1)(a), if disclosed. Neither Appellant B nor Appellant D provided specific representations regarding the harms that could reasonably be expected to result to their competitive or negotiating position, if these records are disclosed. Nor do I find that the harms in section 17(1)(a) are self-evident on my review of these pages of the records. Therefore, I find that Appellants B and D have not established that the disclosure of this information could reasonably be expected to significantly prejudice their competitive or negotiating position.

[110] Similarly, Appellants B and D have not provided sufficient evidence to support their position that pages 559-599 and 607-612 are exempt from disclosure under section 17(1)(c). Appellants B and D argue that the disclosure of the information that remains at issue would prematurely reveal construction plans and premature policies, decisions and negotiations that could lead to public confusion and misinformation, which could result in further delay to the project and jeopardize the appellant's ability to fulfil its contractual obligations. However, the appellants do not provide specific information as to how the disclosure of the memorandum and remaining portions of the appendices at issue could reasonably be expected to result in undue economic loss caused by an inability to fulfil their contractual obligations. Based on my review of pages 559-599 and 607-612, I find Appellants B and D's arguments regarding section 17(1)(c) to be speculative. I find that the appellants have not provided sufficient evidence to demonstrate that the disclosure of the information remaining at issue could reasonably be expected to cause them undue financial loss. Therefore, I find that the records are not exempt under section 17(1).

Appeals PA17-535 and PA17-536: Record A0302912 pages 2-5

[111] Pages 2 to 5 of Record A0302912 are a letter prepared by Appellant C that was sent to the ministry regarding the Bala Falls Project. Appellant D submits that the disclosure of this letter would likely reveal confidential data that was collected on behalf of Appellant D. Both Appellants C and D submit that the disclosure of the record would prematurely reveal positions, plans and procedures respecting the Bala Falls Project and could reasonably result in a delay to the project. Based on my review of the record and the representations of the parties, I find that I have not been provided sufficient information to demonstrate how the disclosure of the information contained in pages 2 to 5 could reasonably be expected to result in harm to Appellants C or D's competitive or negotiating position. Therefore, I find that section 17(1)(a) does not apply to pages 2-5 of Record A0302912.

[112] For similar reasons, I find that section 17(1)(c) does not apply to pages 2-5. Neither Appellants C nor D have submitted specific representations to support their position that the disclosure of these pages could reasonably be expected to result in undue economic loss caused by an inability to fulfil their contractual obligations.

Appeal PA17-536: Record A0302914 pages 8-17 (pages 15-17 are also at issue in Appeal PA17-535)

[113] Pages 8 to 17 of Record A0302914 consist of email correspondence between the ministry and Appellant D (pages 8-13), technical drawings prepared by Appellants C and/or D (pages 14-15), and a letter from Appellant C to Appellant D regarding the Bala Falls Project (pages 16-17). Following the analysis in Order PO-3986, reproduced above, I find that the technical drawings at pages 14 and 15 are exempt from disclosure under section 17(1)(a) of the *Act*. In addition, I find that the public interest override in section 23 of the

Act does not apply to override the application of section 17(1)(a) to these technical drawings.

[114] However, I find that the correspondence found at pages 8-13 and 16-17 is not exempt under sections 17(1)(a) or (c). Based on my review of these records, I am not satisfied that Appellants C or D have provided sufficient evidence to demonstrate that the disclosure of these records could reasonably be expected to result in significant prejudice to their competitive positions, interfere with negotiations, or result in undue economic loss to them. Both Appellants C and D reiterated their general arguments regarding the harms that could reasonably be expected to result from the disclosure of these pages. However, in the absence of specific representations regarding the harms that can reasonably be expected to result from the disclosure of the information contained in pages 8-13 and 16-17, and since the harms are not self-evident from my review of the information, I find that these pages are not exempt from disclosure under sections 17(1)(a) or (c) of the *Act*.

Appeal PA17-536: Record A0302923 pages 255-256

[115] Page 256 of Record A0302923 is a technical drawing. Following Order PO-3986 and the analysis adopted above, I find that section 17(1)(a) applies to page 256 of the records. I am satisfied that the disclosure of page 256 could reasonably be expected to result in prejudice to Appellant D's competitive position. I am satisfied that Appellant D provided sufficient evidence to demonstrate that its competitors could reasonably be expected to use the information contained in this technical drawing to make competitive adjustments and garner a competitive advantage for themselves to the detriment of the appellant. Therefore, I am satisfied that page 256 is exempt from disclosure under section 17(1)(a). In addition, I find that the public interest override in section 23 does not apply to page 256 for reasons similar to those articulated above.

[116] Page 255 of Record A0302923 is a ministry form that appears to have been prepared by a ministry employee, rather than Appellant D. Appellant D submits that the record contains underlying non-negotiated confidential information it supplied to the ministry. Appellant D submits that the harms that could reasonably be expected to result from the disclosure of this record include the delay of the Bala Falls Project and interference with Appellant D's negotiating position with the ministry by revealing the timing and approach used in its communications. Appellant D also submits that the disclosure of page 255 would provide its competitors with an advantage in future negotiations, which would result in significant prejudice to its competitive position. Based on my review of page 255, I find that Appellant D did not provide sufficient evidence to demonstrate a reasonable expectation that the harms in section 17(1)(a) and/or (c) will occur if this record is disclosed. As stated above, the record appears to have been prepared by a ministry employee and contains general information or questions that Appellant D is asked to respond to. In light of the nature of the record and in the absence of more detailed representations from Appellant D, I find that neither section 17(1)(a) nor (c) applies to the page 255.

Appeal PA17-536: Record A0302926 pages 293-294

[117] Pages 293-294 are email correspondence between Appellant D and the ministry regarding the Bala Falls Project. Based on my review of the emails, they appear to contain direction from the ministry regarding the project. While some of the information may reflect

the information submitted by Appellant D to the ministry, Appellant D did not provide specific representations explaining that this is the case nor did it provide specific evidence regarding the harms that could reasonably be expected to result from the disclosure of these pages. In the absence of such representations, I am not satisfied that the disclosure of pages 293-294 could reasonably be expected to result in either significant prejudice to the competitive position of Appellant D, or interference with Appellant D's contractual or other negotiations, or result in undue loss to Appellant D. Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 293- 294 from disclosure.

Appeals PA17-535 and PA17-536: Record A0302971 page 301

[118] Page 301 of Record A0302971 is an email chain between Appellant C and the ministry regarding specific wording in relation to the Bala Falls Project. While Appellants C and D both claim the application of sections 17(1)(a) and (c), I find that the information contained in this email is general in nature and could not, if disclosed, reasonably be expected to result in the harms contemplated by these exemptions. Therefore, I find that neither section 17(1)(a) nor (c) applies to page 301.

Appeals PA17-535 and PA17-536: Record A0302997 pages 355, 357 and 359

[119] Pages 355 and 357 are portions of an email chain between the ministry, Appellant C, and Appellant D relating to a technical drawing on page 359. For the reasons discussed above, I find that the technical drawing on page 359 is exempt from disclosure under section 17(1)(a). I am satisfied that the disclosure of page 359 could reasonably be expected to result in harm to Appellant C's competitive position. I am satisfied that Appellant C provided sufficient evidence to demonstrate that its competitors could reasonably be expected to use the information contained in this technical drawing to make competitive adjustments and garner a competitive advantage for themselves to the detriment of the appellant. Therefore, I am satisfied that page 359 is exempt from disclosure under section 17(1)(a). In addition, I find that section 23 does not apply to page 359 for reasons similar to those articulated above.

[120] However, I find that neither section 17(1)(a) nor (c) applies to pages 355 and 357. Based on my review of the emails on these pages, I find that Appellants C and D did not provide sufficient information to demonstrate a reasonable expectation of the harms contemplated by sections 17(1)(a) and (c). The emails in pages 355 and 357 are general in nature and do not appear to contain the level of detail that the third party information exemptions are meant to protect. In any case, Appellants C and D did not provide specific information regarding that harms that could reasonably be expected to result from the disclosure of the information contained in these pages of the record. Therefore, I find that neither section 17(1)(a) nor (c) applies to pages 355 and 357.

Appeal PA17-536: Record A0302998 pages 363-365

[121] Pages 363-364 of Record A0302998 are a Work Permit issued by the ministry to Appellant D and page 365 is a technical drawing. For the reasons discussed above, I find that the technical drawing on page 365 is exempt from disclosure under section 17(1)(a) and is not subject to the application of the public interest override in section 23.

[122] However, I find that Appellant D has not provided sufficient evidence to support its

claim that the disclosure of the ministry-issued work permit could reasonably be expected to result in the harms contemplated by sections 17(1)(a) and (c). Upon review, I find that the information contained in the Work Permit is general in nature and does not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant D, or interference with Appellant D's contractual or other negotiations, or result in undue loss to Appellant D. Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 363- 364 from disclosure.

Appeals PA17-535 and PA17-536: Record A0303215 pages 404-405

[123] The letter sent by Appellant C to the ministry at pages 404-405 of the records relates to the LRIA Approval for the Bala Falls Project. Appellants C and D reiterate the arguments they submitted in support of the application of sections 17(1)(a) and (c) to this record. Upon review, I find that the letter does not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant C or D, or interference with Appellant C or D's contractual or other negotiations, or result in undue loss to Appellant C or D. In any case, I find that Appellants C and D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by sections 17(1)(a) and (c). Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 404-405 from disclosure.

Appeals PA17-535 and PA17-536: Record A0303223 pages 410-411

[124] The email chain found in pages 410-411 is between the ministry and Appellant C. Appellant D is copied on the correspondence. Appellants C and D reiterate the arguments they submitted in support of the application of sections 17(1)(a) and (c) to this email chain. However, upon review, I find that the information contained in these emails relates primarily to administrative issues. I find that these emails do not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant C or D, or interference with Appellant C or D's contractual or other negotiations, or result in undue loss to Appellant C or D. In any case, I find that Appellants C and D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by section 17(1)(a) or (c). Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 410-411 from disclosure.

Appeals PA17-535 and PA17-536: Record A0303231 page 419

[125] Page 419 contains a portion of an email chain between the ministry and Appellant C, with Appellant D copied on the correspondence. I note that the ministry withheld portions of the first email under sections 17(1) and 21(1). The requester does not take issue with the ministry's severances; accordingly, these portions are not at issue in these appeals. Appellants C and D reiterate the arguments they submitted in support of the application of sections 17(1)(a) and (c) to page 419. However, upon review, I find that the information contained in these emails does not include any specific technical or commercial information relating to either Appellant C or D. I find that these emails do not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant C or D, or interference with Appellant C or D's contractual or other negotiations, or result in undue loss to Appellant C or D. In any case, I find that Appellants C and D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by sections 17(1)(a) and (c). Therefore, I find that

neither section 17(1)(a) nor (c) applies to exempt page 419 from disclosure.

Appeals PA17-535 and PA17-536: Record A0303243 pages 444-445

[126] Pages 444-445 contain an email chain between Appellant C and the ministry. Appellants C and D reiterate the arguments they submitted in support of the application of sections 17(1)(a) and (c) to these pages. Upon review of these emails and the appellants' representations, I find that Appellants C and D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by these exemptions. I find that these emails do not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant C or D, or interference with Appellant C or D's contractual or other negotiations, or result in undue loss to Appellant C or D. Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 444-445 from disclosure.

Appeals PA17-535 and PA17-536: Record A0303248 pages 448-449

[127] Pages 448-449 contain an email chain between Appellant D and the ministry, with Appellant C copied in the correspondence. Appellants C and D reiterate the arguments they submitted in support of the application of sections 17(1)(a) and (c) to these pages. Upon review of these emails and the appellants' representations, I find that Appellants C and D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by these exemptions. I find that these emails do not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant C or D, or interference with Appellant C or D's contractual or other negotiations, or result in undue loss to Appellant C or D. Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 448-449 from disclosure.

Appeals PA17-536: Record A0303257 pages 452-456

[128] The email correspondence found in pages 452-456 is between Appellant D and the ministry, with a number of other government employees and Appellant C copied on the correspondence. Appellant D reiterates the arguments it submitted in support of the application of sections 17(1)(a) and (c) to these pages. Upon review of these emails and the appellant's representations, I find that Appellant D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by these exemptions if these pages are disclosed. I find that these emails do not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant D, or interference with Appellant D's contractual or other negotiations, or result in undue loss to Appellant D. Therefore, I find that sections 17(1)(a) and (c) do not apply to exempt pages 452-456 from disclosure.

Appeals PA17-535 and PA17-536: Record A0303340 pages 622-624

[129] Pages 622-624 consist of a memorandum prepared by the ministry sent to Appellants C and D that contains a number of the ministry's questions and comments regarding drawings that appear to have been prepared by the appellants. These drawings do not form part of this memorandum nor do they appear to be attached to the memorandum in the copies of the records provided by the ministry. Appellants C and D reiterate the arguments they submitted in support of the application of sections 17(1)(a) and (c) to these pages.

While I accept that this ministry memorandum contains information that would reflect the underlying non-negotiated confidential information supplied by Appellants C and D, I find the appellants have not provided sufficient evidence to support their position that section 17(1)(a) or (c) apply. Based on my review, I find that the memorandum does not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant C or D, or interference with Appellant C or D's contractual or other negotiations, or result in undue loss to Appellant C or D. I remind the parties that I have upheld the appellants' section 17(1) claim to withhold the technical drawings. Based on my review of this memorandum, it does not appear to contain information that would reveal specific details from the technical drawings that could, if disclosed, reasonably be expected to result in the harms contemplated by sections 17(1)(a) or (c). In the absence of specific evidence demonstrating that this is the case, I find that neither section 17(1)(a) nor (c) applies to exempt pages 622-624 from disclosure.

Appeals PA17-535 and PA17-536: Record A0303418 pages 763-765

[130] The email correspondence at pages 763-765 is between Appellant C, Appellant D, and the ministry. Appellants C and D reiterate the general arguments they submitted in support of the application of sections 17(1)(a) and (c) to these pages. Upon review of these emails and the appellants' representations, I find that Appellants C and D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by these exemptions. I find that these emails do not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellants C or D, interference with Appellants C or D's contractual or other negotiations, or result in undue loss to Appellants C or D. Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 763-765 from disclosure.

Appeal PA17-536: Record A0303439 pages 795-802

[131] Pages 795-802 form a draft Bala Falls Dams Owner/Operator Responsibility Agreement. Appellant D reiterates the general arguments it submitted in support of the application of sections 17(1)(a) and (c) to these pages. Upon review of this draft agreement, I find that Appellant D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by these exemptions. The draft agreement contains general terms regarding the maintenance responsibilities relating to various components of the Bala Falls Project. I find that the agreement does not contain any particularly sensitive technical information that could reasonably be expected to result in the harms contemplated by section 17(1)(a) or (c), if it were disclosed. In any case, I find that Appellant D did not provide sufficient evidence to demonstrate that pages 795-802 contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant D, or interference with Appellant D's contractual or other negotiations, or result in undue loss to Appellant D. Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 795-802 from disclosure.

Appeal PA17-536: Record A0303534 pages 883-884

[132] Pages 883-884 contain email correspondence between the appellants and the ministry relating to cofferdam calculations. Appellant D reiterates the general arguments it submitted in support of the application of sections 17(1)(a) and (c) to these pages. Upon

review of these emails and the appellant's representations, I find that Appellant D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by these exemptions. I find that these emails do not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant D, or interference with Appellant D's contractual or other negotiations, or result in undue loss to Appellant D. Therefore, I find neither section 17(1)(a) nor (c) applies to exempt pages 883-884 from disclosure.

Appeal PA17-536: Record A0303542 pages 913-914 and 921-922

[133] The pages at issue in Record A0303542 contain a Work Permit issued under the LRIA (pages 913-914) and an Application for Work Permit submitted by Appellant D to the ministry (pages 921-922). Appellant D reiterates the same, non-specific arguments it submitted in support of the application of sections 17(1)(a) and (c) to these pages. For reasons similar to those above for pages 363-364 of Record A0302998, I find that Appellant D did not provide sufficient evidence to support its claim that the disclosure of the ministry-issued work permit could reasonably be expected to result in the harms contemplated by sections 17(1)(a) and (c). Upon review, I find that the information contained in the Work Permit is general in nature and does not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant D, or interference with Appellant D's contractual or other negotiations, or result in undue loss to Appellant D. Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 913-914 from disclosure.

[134] For similar reasons, I find that Appellant D did not provide sufficient evidence to support its claim that the disclosure of the work permit application at pages 921-922 could reasonably be expected to result in the harms contemplated by sections 17(1)(a) or (c). Upon review, I find that the work permit application does not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant D, or interference with Appellant D's contractual or other negotiations, or result in undue loss to Appellant D. Therefore, I find that section 17(1)(a) and (c) do not apply to exempt pages 921-922 from disclosure.

Appeals PA17-535 and PA17-536: Record A0303545 pages 925-926

[135] Pages 925-926 contain portions of an email chain between the ministry and Appellant C, with two other appellants copied on the correspondence. I note that the second email on page 925 appears to be a duplicate of the email at issue in page 419. However, it appears that pages 925 and 419 are not consistently severed. The ministry withheld portions of the first email under sections 17(1) and 21(1) from page 419, but only withheld one portion of page 925 under section 21(1). The requester does not take issue with the ministry's severances from page 419; accordingly, these portions are not at issue in these appeals. I accept that the ministry likely intended to sever page 925 in the same manner as it did for page 419.

[136] Appellants C and D reiterate the arguments they submitted in support of the application of sections 17(1)(a) and (c) to pages 925-926. However, upon review, I find that the information contained in these emails does not include any specific technical or commercial information relating to either Appellant C or D. I find that these emails do not contain information that, if disclosed, could reasonably be expected to result in either

significant prejudice to the competitive position of Appellant C or D, or interference with Appellant C or D's contractual or other negotiations, or result in undue loss to Appellant C or D. In any case, I find that Appellants C and D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by sections 17(1)(a) or (c). Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 925-926 from disclosure.

Appeals PA17-535 and PA17-536: Record A0303546 pages 929-930

[137] Pages 929-930 contain an email chain between the ministry, Appellant C and Appellant D. Appellants C and D reiterate the arguments they submitted in support of the application of sections 17(1)(a) and (c) to pages 929-930. However, upon review, I find that Appellants C and D did not provide sufficient evidence to demonstrate a reasonable expectation of the harms contemplated by sections 17(1)(a) or (c). I find that these emails do not contain information that, if disclosed, could reasonably be expected to result in either significant prejudice to the competitive position of Appellant C or D, or interference with Appellant C or D's contractual or other negotiations, or result in undue loss to Appellant C or D. Therefore, I find that neither section 17(1)(a) nor (c) applies to exempt pages 929-930 from disclosure.

Conclusion

[138] In conclusion, I find that the technical drawings found at the following pages of the record are exempt from disclosure under section 17(1)(a): 14-15, 256, 275-278, 283-285, 287-291, 359, 365, 600-606, and 889-890.

[139] However, I find that the remainder of the records for which the third party appellants claim sections 17(1)(a) and (c) are not exempt from disclosure under either of these provisions. I will now consider the third party appellants' claim that some of these records are exempt from disclosure under sections 16, 18(1) and 20.

Issue C: Should the appellants be allowed to raise the application of the discretionary exemptions in sections 16, 18(1) and/or 20?

[140] All four appellants take the position that the discretionary exemptions in sections 16, 18 and 20 apply to some of the information that remains at issue. To be clear, the appellants claim one or more of the discretionary exemptions to the following pages:

- Pages 2 to 5 of Record A0302912 (subject to section 18(1)(c) in Appeals PA17-535 and PA17-536);
- Pages 8-13 and 16-17 of Record A0302914 (subject to sections 16, 18(1)(c), (e) and (g), and 20 in Appeals PA17-535 and PA17-536);
- Page 255 of Record A0302923 (subject to sections 16, 18(1)(c), (e) and (g), and 20 in Appeal PA17-536);
- Pages 279-281, 282 and 286 of Record A0302925 and the portion of the duplicated email in pages 257-259, 383, and 397-399 that reflects the information contained in page 280 (subject to sections 16, 18(1)(c), (e) and (g), and 20 in Appeals PA17-533 and PA17- 536);

- Pages 355 and 357 of Record A0302997 (subject to sections 16, 18(1)(c), (e) and (g), and 20 in Appeals PA17-535 and PA17-536);

- Pages 408-409 of Record A0303218 (subject to sections 16, 18(1)(c), (e) and (g), and 20 in Appeals PA17-535 and PA17-536);

- Pages 559-599 and 607-612 of Record A0303299 (subject to sections 16, 18(1)(c), (e) and (g), and 20 in Appeals PA17-534 and PA17-536);

- Pages 622-624 of Record A0303340 (subject to sections 18(1)(c), (e), and (g) in Appeals PA17-535 and PA17-536); and

- Pages 795-802 of Record A0303439 (subject to sections 16, 18(1)(c), (e) and (g), and 20 in Appeal PA17-536).

[141] Some exemptions in the *Act* are mandatory; if a record qualifies for exemption under a mandatory exemption, the head of an institution *shall* refuse to disclose it. However, a discretionary exemption uses the word *may* and in choosing that language, the Legislature expressly contemplated that the head of the institution retains the discretion to claim such an exemption to support its decision to deny access to a record. The ministry did not claim the discretionary exemptions the appellants claim apply to the records.

[142] A number of past orders have considered the issue of whether a party other than the institution can claim a discretionary exemption.[33] Generally, where a third party raises the possible application of a discretionary exemption, the adjudicator must consider the situation before her in the context of the purposes of the *Act* to decide whether the appeal might constitute the "most unusual of circumstances" in which such a claim should be allowed.

[143] The appellants submit substantially similar representations in support of their claim that they should be allowed to raise the application of the discretionary exemptions in sections 16, 18(1) and 20 to the records that remain at issue. The appellants submit that this case qualifies as a "rare exception" to the general presumption that third parties are not entitled to raise the possible application of discretionary exemptions. In support of this position, the appellants refer to Order PO- 3601, which states that it may be necessary to consider the application of a discretionary exemption not originally raised by an institution where, "for example, release of a record would seriously jeopardize the rights of a third party."[34]

[144] The ministry states the IPC has considered the issue of discretionary exemptions claimed by an affected party in a number of orders, including the recent Order PO- 3841. The ministry submits that these orders have held that discretionary exemptions are meant to protect the institution's interests and a third party's request to claim a discretionary exemption would only be considered "in the most unusual of cases."[35] The ministry specifically refers to Order MO-2635, in which the adjudicator explained the rationale as follows:

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[33] Most often cited are Orders P-1137 and PO-1705. See also Orders MO-2635, MO-2792 and PO-3489.
[34] Order PO-3601 at para 89, quoting from Order M-430.
[35] See Orders P-1137, P-777, PO-3512 and PO-3032.

> … the Legislature expressly contemplated that the head of the institution is given the discretion to claim, or not claim, these exemptions… The affected party has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary approach of permitting an affected party to claim a discretionary exemption when the head has elected not to do so.

In this case, the ministry submits that the appellants have not provided evidence to demonstrate there is an extraordinary and rare situation that would justify their discretionary exemption claims. The ministry submits that the appellants did not provide sufficient evidence to support their general allegations of potential harms, which is essential to successfully claim the application of the discretionary exemptions. Finally, the ministry submits that it considered all of the claimed discretionary exemptions when reviewing the records and found no basis to conclude there is a potential for the specific types of harm which the exemptions are intended to prevent or that the circumstances are such that they warrant a third party claim for them.

[145] The appellants state that they do not agree with the findings made in Order PO-3841 and the subsequent Orders PO-3870-R and PO-3850, which adopted similar reasoning. The appellants further submit that these orders dealt with different responsive records and different supporting evidence and the IPC's orders are not binding.

[146] The requester submits that this question has already and recently been considered by the IPC in relation to the same types of records for the same project. Specifically, the requester states that the adjudicator in the related Order PO-3841 determined that the appeal was not a "rare exception" and does not satisfy the "unusual circumstances" threshold.

Sections 16 and 20

[147] Section 16 of the *Act* states,

> A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

[148] Section 20 of the *Act* states,

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[149] The appellants submits that they have satisfied the "unusual circumstances" threshold to raise the application of section 16 because of the "unique nature and context of the Bala Falls Project." The appellants submit that, in a "heightened era of security and national defence, there is a more pressing and immediate need to protect structures such as the ones proposed for the Bala Falls Project." The appellants submit that the records contain extremely detailed information that relates to the technical elements of the structures. The appellants submit that the security of the Bala Falls Project and other

surrounding structures could be jeopardized if the information at issue falls in the wrong hands. This would, in turn, reasonably jeopardize the broader defence of Canada. The appellant submits that "it is not difficult to see how release of this information would aid in potential targeted acts of terrorism or sabotage."

[150] Similarly, the appellants submit that section 20 should apply because there is a "tangible risk to the safety and health of the individuals who are responsible for securing the structures, the individuals who are involved in the construction of the Bala Falls Project, and any and all individuals who will remain and operate the Bala Falls Project once it is completed and operational." The appellants submit that the IPC has held in previous orders, such as Order PO-3474, that the term *individual* in section 20 is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization. The appellants submit that the potential consequences of an act of terrorism or sabotage targeted at either the individuals or the structures that form the Bala Falls Project would be grave and far- reaching.

[151] The requester submits that the appellants failed to provide sufficient evidence to demonstrate how an act of terrorism or sabotage targeted at either the individuals or the structures that form the Bala Falls Project could be facilitated by the disclosure of the records at issue. In addition, the requester submits that the ministry's North Bala Dam is adjacent to the proposed Project site, so any risk to this structure or individuals would certainly be of concern to the ministry. However, the requester states that the ministry does not have these concerns since it did not raise the application of these exemptions.

[152] In reply, the appellants provided two affidavits to support their position that they should be permitted to raise sections 16 and 20. The appellants submit that the affiants provided sufficiently detailed and convincing evidence of harm well beyond the merely speculative.

[153] The first affiant is an Assistant Professor at a Canadian university, who has published on the topic of terrorism, domestic sabotage and counter-terrorism strategies. The affiant submits that several international and domestic terrorist organizations threaten Canadian national security and some of these groups target critical infrastructure, including the energy sector. The affiant states that hydro-electric dams fall within the energy infrastructure sector and would be considered potential targets of digital and/or physical terrorism and sabotage. The affiant further submits that since October 2014, Canada's National Terrorism Threat Level has remained at medium, suggesting that a violent act of terrorism could occur. The affiant describes actual and thwarted acts of terrorism that have taken place in Canada, as well as international acts of terrorism that targeted critical energy infrastructure. With regard to the records that remain at issue, the affiant submits that the release of detailed engineering drawings of the proposed hydro-electric facility to members of the Canadian public may result in the online publication and dissemination of this information, increasing the overall security risk to the facility in the process. The affiant submits that the information at issue could prove useful to individuals or groups intent on attacking or disrupting the facility.

[154] The second affiant is the president of a security planning company, which provides security management and public safety consulting services to clients across Canada. He submits that the electrical utility industry is a prime target for terrorists. He further submits that the North American Electric Reliability Corporation has published guidelines that

address potential risks that apply when deciding whether information should be made available to government agencies, third parties or the public. The affiant submits that the dissemination of sensitive information, such as technical, mechanical, electrical, topology and architectural drawings, should only be disclosed to authorities and trusted parties in confidence. The affiant submits that the disclosure of data, documents, logs, drawings and other records to the public would result in a "location vulnerability that would result in an increase in the probability of success of known and unknown threats assisting an attack to potentially and successfully damage, sabotage and exploit the dam and the bulk electricity system of the Bala Falls Project."

Analysis and Findings

[155] Similar arguments to those raised by the appellants here were made in recent orders dealing with the Bala Falls Project. Most recently, the adjudicator in Order PO- 3986 considered whether to accept a third party appellant's attempt to raise these discretionary exemptions in relation to records concerning the Bala Falls Project. The adjudicator considered the jurisprudence of this office, which accepts that there may be "rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal."[36] However, decisions such as Order P-1137 have held that, "Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be the most unusual of situations that an affected person could raise the application of an exemption which has not been claimed by the head of an institution." The adjudicator in Order PO-3986 adopted the reasoning in these orders and I will as well.

[156] The issue before me, therefore, is whether this is one of those "most unusual of situations" where the appellants should be permitted to raise sections 16 and 20. Based on my review of the parties' representations, the records and the situation before me in the context of the *Act*, I find that this is not one of those "most unusual of situations" where the appellants should be permitted to raise these discretionary exemptions.

[157] Upon review of the ministry's representations, I am satisfied that it considered all of the available discretionary exemptions, including sections 16 and 20, and found no basis to conclude that there is a potential for the specific types of harm which these exemptions are intended to protect. In addition, I am satisfied the ministry considered the circumstances and found they were not such that they warranted a third party claim for sections 16 and 20. In my view, the ministry exercised its discretion against claiming the exemptions in sections 16 and 20.

[158] I also reviewed the appellants' representations and the records remaining at issue, which consist of various types of correspondence, memoranda, plans, ministry- issued forms and related documents, and a draft agreement regarding the maintenance of the Bala Falls Project. Based on this review, I am not satisfied that this qualifies as one of those unusual cases where an appellant could raise the application of an exemption that was not claimed by the head of the institution.

[159] I acknowledge that one of the "most unusual of cases" where a discretionary

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[36] Order P-257.

exemption can be claimed by a third party is where the release of a record could seriously jeopardize the rights of a third party. Based on my review of the parties' representations, I agree with the ministry and am not satisfied that this case is one of the "most unusual of cases" where I should allow the appellants to claim the application of sections 16 and 20. Even if I were to allow the appellants to raise section 16 and 20, I find, for the following reasons, that they do not apply to the information that remains at issue.

[160] In order for section 16 to apply, the party raising it must provide detailed evidence about the potential for harm. The party 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 the seriousness of the consequences.[37] However, section 16 is intended to protect vital public security interests. As such, it must be approached in a sensitive manner, given the difficulty of predicting future events affecting the defence of Canada and other countries.[38]

[161] The IPC has applied section 16 to exempt records containing detailed technical information about the operations of a nuclear facility.[39] I have already found that the technical drawings in the records are exempt under section 17(1) of the *Act*. The appellants' representations focus primarily on the harms that could reasonably be expected to result from the disclosure of this technical information. On my review, I find that the appellants did not provide sufficient evidence to demonstrate a reasonable expectation of harm from the disclosure of the information that remains at issue. I find that the information that remains at issue is too general in nature to trigger a reasonable expectation that its disclosure could prejudice the defence of Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism.

[162] Similar to section 16, the party claiming the application of section 20 must provide detailed evidence about the potential for harm. The party 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 the seriousness of the consequences.[40] An individual's subjective fear, while relevant, may not be enough to justify the exemption.[41] Furthermore, as the appellants argued, the term *individual* is not necessarily confined to a particular individual and may include any member of an identifiable group or organization.[42]

[163] Based on my review of the records remaining at issue, I find that the appellants have not established a reasonable basis for believing that an individual or a group of individuals' safety will be endangered by disclosing the information that remains at issue. In Order PO-1939, the adjudicator found that it is necessary to demonstrate that there is clear and direct evidence that the behaviour in question (sabotage, espionage or terrorism in this case) is

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[37] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra* note 24 at paras 52-54.
[38] See Order PO-2500.
[39] Order PO-2500.
[40] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra* note 24 at paras 52-54.
[41] Order PO-2003.
[42] Order PO-1817-R.

tied to the information at issue.[43] I have already found that the technical drawings are exempt under section 17(1). The only information that remains at issue consists of general correspondence and other documentation relating to the Bala Falls Project. The appellants did not provide sufficient evidence to demonstrate that the information remaining at issue is the type of information that could, if disclosed, reasonably be used to facilitate an act of sabotage or terrorism that would harm an individual or a group of individuals. Accordingly, I find that the exemption in section 20 does not apply to the information that remains at issue.

Sections 18(1)(c), (e) and (g)

[164] The relevant portions of section 18(1) state,

> A head may refuse to disclose a record that contains,
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> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
> >
> > (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[165] The appellants submit that it is clear that section 18(1) of the *Act* is designed to protect institutional interests. However, in this case, the appellants submit that the "unusual circumstances" threshold has been met because the ministry, by failing to apply section 18(1) to the records, "puts in jeopardy the very goals that the Province of Ontario seeks to achieve through the FIT [Feed-In Tariff] program."[44] The FIT program was initiated to encourage and promote the greater use of renewable energy sources, including waterpower for electricity generating projects. Appellant D applied for and was accepted into the FIT program and retained the other three appellants to assist with the Bala Falls Project.

[166] The appellants acknowledge that the FIT program is now closed and no new projects will begin. In any case, the appellants submit that the FIT program closure has no impact on existing projects that were accepted and are part of the program. Furthermore, the appellants submit that the province continues to maintain an interest in ensuring that the existing projects for which significant resources have been expended, both on the part of proponents such as the appellant and the province itself, are carried through and realized.

[167] The appellants submit that section 18(1)(c) applies because the disclosure of the information that remains at issue could reasonably be expected to prejudice the economic interests and/or competitive position of the ministry. Specifically, the appellants submit that

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[43] See, for example, Order PO-3972.
[44] The FIT program refers to the Feed-In Tariff Program, which has since been discontinued.

the disclosure of the information at issue would generate a negative response in the marketplace whereby market participants and ministry partners, in an attempt to protect their proprietary and commercial interests, are incentivized against providing complete and frank information to the ministry. In addition, the appellants submit that the disclosure of the information at issue could jeopardize or delay the building of the Bala Falls Project, resulting in a waste of resources that were already used and/or the use of additional resources. Finally, the appellants submit that disclosing the information at issue may jeopardize or unduly delay the construction of the Bala Falls Project and severely inhibit the fulfilment of the ministry's mandate.

[168] The appellants submit that section 18(1)(e) applies to the records at issue because the information contained in the records reveals positions, plans, procedures, criteria and/or instructions to be applied to negotiations carried on or to be carried on by or on behalf of the ministry or the province. The appellants take the position that disclosure of the information at issue would severely hinder the ministry's ability to continue negotiations on the Bala Falls Project and/or similar renewable energy or other similar projects in the future. The appellants submit that the records at issue reveal the parties' plans and strategic thinking during the negotiations. The appellants submit that the negotiations have not concluded and the disclosure of the information would impair the ministry's ability to continue negotiating effectively.

[169] For similar reasons, the appellants submits that section 18(1)(g) applies to the information that remains at issue because it contains and/or reveals plans, policies and projects of the ministry where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision regarding the Bala Falls Project. In addition, the records at issue contain plans, policies or projects of the ministry, where the disclosure could reasonably be expected to result in undue financial benefit or loss to the appellant.

[170] Finally, the appellants argue that the expansion of public-private partnerships necessitates a change in the application of the provisions of the *Act*, particularly where there is a disparity between the broad protections afforded to institutional interests and the few protections available for private third parties who work with institutions. The appellants submit that the *Act* needs to reflect the evolving relationship between institutions and private third parties, and the realities that result from such collaborations. The appellants assert that they are working in partnership with the province in part to help further the province's mandate and objectives. Therefore, the appellants submit that the protection of private information is inextricably tied to the protection of institutional information. As such, it would be "inequitable" to prohibit them from raising the application of section 18(1) to the information that remains at issue.

[171] As previously stated, the ministry submits that it considered all of the claimed discretionary exemptions in its review of the records. The ministry submits that it did not find any basis to conclude that there is potential for the specific types of harm which the respective exemptions are intended to prevent, or that the circumstances are such that they warrant a third party claim for these discretionary exemptions.

[172] The requester submits that the appellants did not provide any details regarding the negotiations that are ongoing nor did it provide any explanation as to how the negotiations could be hindered and why. The requester also submits that if the records could result in

premature disclosure of pending policy decisions, the ministry would clearly be aware of this and would have raised the application of the exemption. However, the requester submits that the ministry did not identify this concern in its representations. As a result, the requester submits that the appellants' section 18(1) claims should be dismissed.

[173] At reply, the appellants submit that the circumstances warrant a finding that this is a "most unusual of circumstances" and they should, therefore, be permitted to raise the application of the discretionary exemption in section 18(1).

Analysis and Findings

[174] As stated above, the IPC has considered similar arguments in recent decisions concerning the Bala Falls Project. Most recently, the adjudicator in Order PO-3986 considered whether to accept a third party appellant's attempt to raise section 18(1) in relation to records concerning the Bala Falls Project. The adjudicator considered the jurisprudence of this office, which accepts that there may be "rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal."[45] However, decisions such as Order P-1137 have held that, "Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be the most unusual of situations that an affected person could raise the application of an exemption which has not been claimed by the head of an institution." The adjudicator in Order PO-3986 adopted the reasoning on these orders and I will as well.

[175] The issue before me, therefore, is whether this is one of those "most unusual of situations" where the appellant should be permitted to raise section 18(1). Based on my review of the parties' representations, the records and the situation before me in the context of the *Act*, I find that this is not one of those "most unusual of situations" where the appellants should be permitted to raise these discretionary exemptions. I find that the appellants' concerns regarding disclosure of the remaining information at issue were addressed in my consideration of the application of section 17(1) of the *Act*. The appellants have not provided sufficient evidence to support a finding that compelling circumstances exist that would justify the extraordinary measure of permitting it to claim the discretionary exemptions in section 18(1) when the ministry elected not to do so.

[176] In addition, I am satisfied the ministry considered section 18(1) and found that there was no basis to conclude there is a potential for the specific types of harms which section 18(1) is intended to prevent, or that the circumstances were such that they warrant a third party claim for this exemption. Given the nature of the section 18(1) exemption, I find the ministry is in the best position to determine whether section 18(1) ought to be raised to withhold the records at issue. Upon review of the parties' representations and the information remaining at issue, I am satisfied that these appeals do not constitute the most unusual of circumstances that would warrant a third party claim of section 18(1). In my view, the ministry has exercised its discretion against claiming section 18(1) of the *Act*.

[177] The appellants submit that the manner in which the province operates and conducts business has changed since the *Act* was first enacted, the application of the *Act* should

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[45] Order P-257.

reflect the evolving relationship between institutions and third parties. The appellants also submit that the protection of private information is tied to the protection of institutional information. As a result, the appellants submit that it would be inequitable to prohibit the appellant from raising the application of discretionary exemptions, such as section 18(1) of the *Act*. In Order PO-3986, the adjudicator considered these arguments and found as follows:

> The appellant's assertion that the protection of private information is inextricably linked to the protection of institutional information because of the nature of public-private partnerships is not supported by any evidence. Simply because a third party might be in a partnership with a public institution does not mean that they have the same interests. This argument is inconsistent with the Legislature's intention of having two separate exemptions, namely section 17(1) and 18(1) of the *Act*.
>
> The mandatory exemption in section 17(1) is available to third parties to claim, and it is specifically designed to provide for the exemption of third party information, provided that the three-part test in section 17(1) is met. Section 18(1) is designed to protect an institution's economic interests and, barring an exceptional circumstances, which the appellant has not established in this case, is to be claimed solely by the institution.

I adopt this analysis for the purposes of these appeals. Based on my review of the appellants' representations and the information that they claim to be subject to section 18(1), I find the appellants have not established that this is an exceptional circumstance where I should allow them to claim section 18(1) when the ministry has not.

[178] Therefore, I find that this is not one of the "most unusual of cases" in which a third party should be permitted to claim the application of the discretionary exemption in section 18(1) of the *Act*.

Conclusion

[179] In conclusion, I find that some of the information, specifically the technical drawings, is exempt from disclosure under the mandatory exemption in section 17(1). The information that remains at issue is not exempt from disclosure under section 17(1) and I do not permit the appellants to raise the application of the discretionary exemptions in sections 16, 18(1) or 20.

ORDER:

1. I find that the ministry fulfilled its obligations under section 28(1) in relation to Appellant A in Appeal PA17-533 (with the exception of a duplicated portion of an email in pages 257-259, 383 and 397-399), Appellant B in Appeal PA17-534, Appellant C in Appeal PA17-535, and Appellant D in Appeal PA17-536.

2. I find that the technical drawings at pages 14-15, 256, 275-278, 283-285, 287- 291, 359, 365, 600-606, and 889 to 890 (which appear to be duplicates of pages 290 and 291) are exempt from disclosure under section 17(1)(a).

3. I find that the remainder of the records at issue in Appeals PA17-533 (including the duplicated portion of an email in pages 257-259, 383 and 397-399 that reflects information in page 280), 534, 535 and 536 are not exempt under section 17(1) of the *Act* and the appellants are not permitted to raise the application of the discretionary exemptions in sections 16, 18(1) or 20. I order the ministry to disclose these pages to the requester by **February 21, 2020** but not before **February 16, 2020**.

4. In order to verify compliance with Order Provision 3, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the requester.

Original signed by
Justine Wai
Adjudicator

January 16, 2020