

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4034

Appeals PA15-523 and PA16-72

Cabinet Office

March 4, 2020

Summary: A request made to Cabinet Office sought access to records relating to a film documentary. Cabinet Office's search located responsive records and it notified a third party who has an interest in the records. After considering the third party's objection to disclosure of the records, Cabinet Office issued an access decision granting access, in part. Cabinet Office relied on the mandatory exemptions at section 17(1) (third party information), 12(1) (cabinet records) and 21(1) (personal privacy) to deny access to some information and the discretionary exemption at section 19 (solicitor-client privilege) to withhold other information. The third party appealed Cabinet Office's decision resulting in Appeal PA15-523. The requester also appealed Cabinet Office's decision resulting in Appeal PA16-72. At mediation, the requester appellant also raised the issue of the possible application of the public interest override (section 23). In this order, the adjudicator upholds Cabinet Office's claims under sections 21(1) and 17(1), in part. The adjudicator does not uphold Cabinet Office's claim that sections 12(1) and section 19 apply to the withheld information. The adjudicator dismisses the third party appellant's appeal and also finds that there is no public interest in disclosure of the remaining withheld information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, sections 2 (definition of "personal information"), 12, 17, 19, 21 and 23.

Orders and Investigation Reports Considered: Orders P-984 and P-1105.

OVERVIEW:

[1] A request was made under the Freedom of Information and Protection of Privacy Act (the Act) to Cabinet Office for the following information:

1. Correspondence with [a specified party] or [a specified production company] in respect of “[a specified documentary]” during the past 6 months, and the Premier, Chief of Staff, Principal Secretary, Deputy Chiefs of Staff (all), [two named individuals] ...; and
2. Internal communications involving staff who viewed scenes from “[a specified documentary]” regarding the documentary.

[2] Cabinet Office conducted a search and located responsive records. Cabinet Office notified the specified production company under section 28(1) of the *Act*, as a party whose interests might be affected by disclosure, and invited it to provide submissions respecting certain records. Cabinet Office provided copies of the records to the specified production company with highlighting to show the portions it considered exempt and not subject to disclosure. The specified production company provided submissions to Cabinet Office in which it objected to any disclosure, arguing that section 17(1) of the *Act* applies.

[3] Cabinet Office issued its access decision on September 4, 2015, granting partial access, and withholding some information pursuant to sections 12(1), 17(1), 19 and 21(1).

[4] The specified production company (now the third party appellant) appealed Cabinet Office’s decision to the IPC and Appeal PA15-523 was opened to address the issues. The IPC also opened Appeal PA16-72 when the original requester (now the requester appellant) appealed Cabinet Office’s decision to withhold certain records.

[5] During mediation, Cabinet Office provided an index of records and efforts were made to clarify and confirm the information that was of specific concern to the third party appellant. Following receipt of comments from the third party appellant, Cabinet Office notified it a second time under section 28(1), respecting other records that had not been the subject of the first notice. As with the first notification, Cabinet Office provided highlighted copies of these records to the third party appellant, who responded, taking the position that all of the responsive records provided should be withheld from disclosure pursuant to section 17(1).

[6] Also during mediation, the requester appellant indicated that there was a public interest in disclosure based on section 23 of the *Act*.

[7] As mediation did not resolve the appeal, the files were moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. The original adjudicator responsible for both appeals commenced her inquiries by inviting representations. Representations were received from the parties and were shared in accordance with section 7 of the IPC’s *Code of Procedure and Practice Direction 7*. Some portions of the third party’s representations were withheld due to confidentiality issues. The file was then transferred to me to continue the adjudication of the appeal.

[8] In this order, I uphold Cabinet Office's application of the mandatory exemptions at section 17(1) and 21(1), in part. I do not uphold Cabinet Office's application of the mandatory exemption at section 12(1) or the application of the discretionary exemption at section 19 and I dismiss the third party appellant's appeal. I also find that there is no public interest in disclosure of the information I find exempt under section 17(1) and 21(1).

RECORDS:

[9] The records remaining in dispute in Appeals PA15-523 and PA16-72 consist of emails and attachments.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) apply to the information at issue?
- C. Does the mandatory exemption at section 12(1) apply to the records?
- D. Does the mandatory exemption at section 17(1) apply to the records?
- E. Does the discretionary exemption at section 19 apply to the records?
- F. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) and 21(1) exemptions?

DISCUSSION:

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

[10] Cabinet Office submits that records 3-5, 37, 72, 104, 113, 129, 148-150, 152, 153 and 164-166 are records that contain the personal information of affected parties. The requester appellant, throughout the inquiry, confirmed that they are not seeking access to personal email addresses and phone numbers. As a result, the information identified as personal information in records 3-5, 37, 152 and 153 are no longer at issue.¹

¹ These records remain in dispute with regard to other exemptions that were claimed by Cabinet Office pertaining to other information in these records.

[11] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

[13] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

² Order 11.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[14] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.³

[15] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[17] Cabinet Office submits that in each of the records, the names of individuals appear with other information that reveals something more personal about that particular individual. It submits that the records include personal opinions or views of individuals and views and opinions of individuals about others. Cabinet Office submits that the documentary itself was personal in nature and thus the filmmakers requested that participants reveal certain personal information about themselves. Cabinet Office submits that the records include the views of certain individuals with respect to what they were and were not comfortable with filming for the documentary. Cabinet Office submits that preferences of what they would like to be shared in the documentary reveals something personal about those individuals. Cabinet Office also submits that the some of the withheld information in the records would reveal the family status of individuals.

[18] The appellants do not address the issue of personal information in their representations.

Finding

[19] Based on my review of the records for which the personal privacy exemption has been applied, I find that some of the information contains the information of affected

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

parties that fits within the definition of “personal information” in section 2(1) of the *Act*. I find that the withheld information at issue is the personal information of affected parties and includes their family status and personal opinions or views along with other information about them that would qualify as personal information under the *Act*. However, some portions of the withheld information do not constitute personal information. The information in records 129, 148, 149, 150, 164, 165, 166 does not qualify as personal information because it is information (views or opinions) given in a professional context and does not reveal anything of a personal nature.⁶ As only personal information can be withheld under the personal privacy exemption, Cabinet Office will be ordered to disclose this information to the requester appellant. For records 129, 148, 149, 150, 164, 165, 166, Cabinet Office has also claimed the exemption at section 17(1) for other information on these pages and I will consider access to this information below.

[20] I will now consider the application of section 21(1) to the information that I have found to be the personal information of the affected parties which appears in Records 72, 104 and 113.

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

[21] Since I found that the records contain the personal information of affected parties, I must consider whether section 21(1) applies to this information. Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[22] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex and requires a consideration of additional parts of section 21.

[23] The information in this appeal does not fit within any of paragraphs (a) to (e) of section 21(1) of the *Act*. Cabinet Office submits that the affected parties have not consented to the disclosure of their personal information (section 21(1)(a)). In addition, the affected parties who provided representations did not consent to the disclosure of their personal information.

Sections 21(2) and (3)

[24] The factors and presumptions at sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). Additionally, if any of paragraphs (a) to (d) of section 21(4) apply,

⁶ The information in records 129, 148, 149, 150, 164, 165, 166 is all duplicate information appearing on various emails strings.

disclosure is not an unjustified invasion of personal privacy. None of the section 21(4) paragraphs are relevant in this appeal.

[25] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. None of the parties submitted that any of the presumptions in section 21(3) apply.

Section 21(2) factors

[26] I will now consider any factors in section 21(2).

[27] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁷ The factors listed at paragraphs 21(2)(a) through (d), if present, generally weigh in favour of disclosure, while the factors listed at paragraphs 21(2)(e) through (i), if present, generally weigh in favour of non-disclosure.

Finding

[28] The requester appellant did not identify any factors favouring disclosure of the personal information at issue. In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.⁸ In the present appeal, the requester appellant did not address the application of section 21(1) to the personal information withheld, nor did it raise any factors, listed or unlisted, favouring disclosure in section 21(2). Accordingly, I find that the mandatory personal privacy exemption in section 21(1) applies to exempt the personal information in Records 72, 104 and 113 from disclosure.

Issue C: Does the mandatory exemption at section 12 apply to the records?

[29] Section 12(1) reads, in part:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

[30] The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section

⁷ Order P-239.

⁸ Orders PO-2267 and PO-2733.

12(1).⁹

[31] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.¹⁰

[32] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.¹¹

Section 12(2): exceptions to the exemption

[33] Section 12(2) reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(a) the record is more than twenty years old; or

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

Representations

[34] Cabinet Office submits that the mandatory exemption for Cabinet records applies to certain information in records 8, 9, 37, 110 and 126. Cabinet Office submits that the use of the word "including" in section 12(1) means that any record that would reveal the substance of deliberations of Cabinet or its committees qualifies for exemption and not just the types of records listed in the various subparagraphs of section 12(1).

[35] Cabinet Office submits that for records to be exempt under section 12(1), it is sufficient that it be "obvious from [a record's] contents, and the surrounding circumstances, that the document form(s) the 'substance of Cabinet deliberations.'"

[36] Cabinet Office submits that the Fiscal Preparation Committee and the Priorities and Planning Cabinet Committee, referenced in the records, are committees under section 12(1). Cabinet Office submits that in order to be considered a "committee" under section 12(1), a body must be composed of ministers where some tradition of collective ministerial responsibility and cabinet prerogative can be invoked to justify the application of this exemption. Cabinet Office submits that Order 131 adopted the following definitions of "substance" and "deliberation:"

⁹ Orders P-22, P-1570 and PO-2320.

¹⁰ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

¹¹ Order PO-2320.

"Substance" is variously defined as "essence; the material or essential part of a thing, as distinguished from form" (Black's Law Dictionary, 5th ed.), or "essential nature; essence or most important part of anything" (Oxford Dictionary). Black's Law Dictionary also defines "deliberation" as "the act or process of deliberating, the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means".

[37] Cabinet Office submits that Order PO-1725 refers to the special role of the Premier of Ontario in connection to setting the agenda of Cabinet and its deliberations when the adjudicator stated:

By virtue of the Premier's unique role in setting the priorities and supervising the policy making, legislative and administrative agendas of Cabinet, the deliberations of the Premier, unlike those of individual ministers of the Crown cannot be separated from the deliberations of Cabinet as a whole. The Premier's consultations with a view to establishing Cabinet priorities are an integral part of Cabinet's substantive deliberative processes ... [records which] reflect consultations bearing on policy making and priority setting functions may be seen as reflecting the substance of deliberations of the whole Cabinet.

[38] Cabinet Office submits that to the extent that records reflect consultations regarding the policy making and priority setting functions within the constitutionally recognized sphere of the Premier's authority as first minister, the records that it claims are exempt under section 12(1) may be seen as reflecting the substance of deliberations of the whole Cabinet. Cabinet Office submits that Order PO-1725 emphasizes the indivisibility of the Premier's deliberations from the deliberations of Cabinet as a whole.

[39] Cabinet Office also submits that the IPC, in Order PO-2989, established that records that have never been placed before Cabinet or its committees may be exempt under the introductory wording of subsection 12(1), if the institution can show that "disclosing the record would reveal the substance of the deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations." Cabinet Office submits that this test requires that the institution provide evidence that establishes a link between information in the record at issue and actual Cabinet deliberations.

[40] Cabinet Office submits that the third party appellant attended meetings with the Premier in order to obtain footage which included the Premier's meeting with Cabinet or with a committee of Cabinet. Cabinet Office submits that any record that permits the drawing of accurate inferences with respect to any deliberations of the Premier would allow for the drawing of accurate inferences of Cabinet deliberations. It is on this basis that Cabinet Office submits that the information should be withheld under the

mandatory exemption at section 12(1).

[41] Cabinet Office submits that disclosure of the withheld information would reveal the substance of the deliberations of Cabinet or its committees or would permit the drawing of accurate inferences with respect to Cabinet or committee deliberations. It submits that the withheld records include email correspondence between the third party appellant and staff of the Premier in regards to the filming of the Premier during specific meetings. Cabinet Office submits that as such, portions of the records reveal the topic and substance of the deliberations that took place at these meetings with the Premier, the Executive Council and/or a Cabinet committee.

[42] The third party appellant did not address this exemption in its representations.

[43] The requester appellant submits that it is not proven that disclosure of the withheld information would reveal the substance of Cabinet deliberations. This appellant submits that it is not enough that a record reveal Cabinet deliberations took place for it to be exempt under section 12(1); it must meet both of two criteria that are implied in the text:

1. reveal: the disclosure must be revelatory, as opposed to simply showing again the existence of a known policy option that is known to be up for discussion, or Cabinet deliberations whose substance and outcome are already publicly known; and,
2. substance: the disclosure must be substantive, as opposed to trivial. The disclosure must reveal Cabinet deliberations that are substantive enough to warrant an exemption that is consistent with the purposes of the *Act* and its meaning when read as a whole.

[44] The requester appellant submits that the section 12(1) exemption does not apply to disclosures that reveal nothing new or substantive about Cabinet deliberations. They submit that the fact that Cabinet Office would allow cameras and a documentary crew into a Cabinet meeting at all, proves that some information from a Cabinet meeting can be safely disclosed without violating Cabinet confidentiality.

[45] This appellant also submits that "Cabinet deliberations" cannot be defined overly broadly. They submit that Cabinet Office's submission seems to suggest that pretty much anything the Premier or his/her staff says, whether in a Cabinet meeting or not, is a Cabinet deliberation, and that this does not reflect what the *Act* says when read as a whole. The appellant submits that such an expansive interpretation would fatally undermine the purposes of the *Act*.

[46] The appellant submits that the only information that should be exempt under section 12(1) is information that is revelatory and substantial with respect to bona fide Cabinet deliberations.

[47] Cabinet Office was provided with a copy of the requester appellant's representations and provided a reply. Cabinet Office did not further address its application of the mandatory exemption at section 12(1).

Analysis and finding

[48] In order for the exemption in section 12(1) to apply to a document, the record in question, if disclosed, would have to reveal the substance of deliberations of the Executive Council or its committees.

[49] From Cabinet Office's representations, it relies on the introductory wording of section 12(1), submitting that disclosure of the withheld information would reveal the substance of deliberations of Cabinet or its committees.

[50] Concerning the introductory wording of section 12(1), the term "including" means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1).¹²

[51] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory working of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.¹³

[52] In order to meet the requirements of the introductory wording of section 12(1), Cabinet Office must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.¹⁴ Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;¹⁵ and
- "substance" generally means more than just the subject of the meeting.¹⁶

[53] The records at issue consist of email communications.

[54] Based on my review of the withheld information and the representations of the parties, I am not satisfied that the records are exempt under the introductory wording of section 12(1) as submitted by Cabinet Office. In its representations, Cabinet Office

¹² Orders P-22, P-1570 and PO-2320.

¹³ Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.

¹⁴ Order PO-2320.

¹⁵ Order M-184.

¹⁶ Orders M-703 and MO-1344.

submits that for a record to be exempt under section 12(1), it is sufficient that it be "obvious from [its] contents, and the surrounding circumstances, that the document form(s) the 'substance of Cabinet deliberations.'" While I do not disagree with this statement, in my review of the records none of the withheld information forms the substance of Cabinet deliberations.

[55] I do not agree with Cabinet Office that the withheld information in the records reflects consultations regarding the policy making and priority setting function of the Premier's office that may be seen as reflecting the substance of deliberations of the whole Cabinet. I am not convinced that disclosure of the withheld information would reveal the substance of the deliberations of Cabinet or its committees nor would it permit the drawing of accurate inferences with respect to Cabinet or committee deliberations. While I agree with Cabinet Office that some of the withheld information, if disclosed, would reveal the topic of such deliberations, I find that the information would not reveal the substance of the deliberations which is a necessary element of the section 12(1) exemption.

[56] Accordingly, I will order Cabinet Office to disclose the information that was withheld under section 12(1) in records 8, 9, 37, 110 and 126 to the requester appellant.

Issue D: Does the mandatory exemption at section 17 apply to the records?

[57] In appeal PA16-72 the original requester seeks access to information that was withheld in Cabinet Office's access decision under section 17(1) and involves information in records 3-5, 8-9, 21, 25, 37, 40, 64, 66, 69, 72, 104, 110, 113, 118, 126, 127, 129, 134-136, 143-145, 147-150, 152, 153, 157-159 and 162-166.

[58] The third party appellant, who disagrees with Cabinet Office's decision to disclose any information, seeks to withhold records 3-5, 7-9, 11, 14, 21, 25, 33, 40, 42, 44, 45, 48, 52, 53, 60, 63, 65-67, 72, 85, 86, 91-94, 97-100, 102, 104, 109, 112-114, 116, 118- 120, 122, 126, 129-136, 144, 145, 147-160, 163-167.

[59] The third party appellant objects to Cabinet Office disclosing this information and the information withheld in appeal PA16-72 in its entirety.

[60] Section 17(1) states, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

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

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[61] 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

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

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

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and

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.

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁹

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 observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.²⁰

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.²¹

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.²² The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.²³

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.²⁴

Representations

[64] Cabinet Office provided representations concerning its access decision where it denied access to some information pursuant to the mandatory exemption at section 17(1). Cabinet Office submits that the information that it withheld is “commercial” information. Cabinet Office submits that the information was provided by the third party appellant in the context of the creation of the documentary film, and includes references to the contractual agreement which set out the terms on which the third party appellant was engaged to produce the documentary film. Further, Cabinet Office submits that the information also includes commentary about footage of the

¹⁹ Order PO-2010.

²⁰ Order PO-2010.

²¹ Order PO-2010.

²² Order PO-2010.

²³ Order P-1621.

²⁴ Order PO-2010.

documentary film and specific steps to be taken during production. Cabinet Office submits that the information is directly connected to the commercial activity in which the third party appellant is engaged, namely the production of the documentary film.

[65] The third party appellant submits that the information in the records includes sensitive commercial, financial and technical information concerning the film. They submit that the records are predominantly commercial records that refer to its editorial control over the film. The third party appellant submits that taken together the records constitute a discussion and exchange of commercial information between itself and the Premier's staff.

[66] The third party appellant also submits that the information in the records contains financial information as they discuss matters of significance with grave financial consequences.

[67] Finally, the third party appellant submits that the record contain technical information as they discuss various "cuts" of the film and the process by which those cuts will be vetted and approved by various parties.

[68] The requester appellant also provided representations in this appeal and submits that it is not enough that the information have some relation to a commercial activity for it to be commercial information under the *Act*. It suggests that this would fatally undermine the purposes of the *Act* by expanding the application of section 17 to unreasonable limits. The requester appellant submits that the information must be informational assets with clear value, relating solely to the buying, selling or exchange of merchandise or services.

[69] An affected party identified in the access request and mentioned throughout the records was invited to provide representations but declined to do so.

Analysis and finding

[70] After a review of the records, I agree with Cabinet Office that some of the information that it withheld constitutes commercial information as defined in past orders. This includes the severed information in Appeal PA15-72 including records 3, 4, 5, 21, 25, 69, 118, 134, 135, 136, 143, 149 (in part), 153, 157, 158 and 159. I find that the remainder of the information withheld by Cabinet Office does not constitute information described in section 17(1). Also, in reviewing the batch of records that the third party appellant argues should be withheld because it constitutes commercial, financial and technical information in Appeal PA15-523, I find that only records 112 and 130 contain commercial information. The remaining records which the third party appellant objected to disclosing do not contain commercial information, nor do they contain technical or financial information, discussed below.

[71] As stated, technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied science or mechanical

arts and financial information is information relating to money and its use or distribution and must contain or refer to specific data. The third party appellant, although claiming that the records contain technical information, did not address how the information it seeks to withhold meets the definition of technical information and in my review of the records, I find that they do not qualify as such. The third party appellant also submits that the withheld information constitutes financial information, however, it does not address how the information meets the definition of financial information and in my review of the records, I find that they do not qualify.

[72] Finally, after my review of all of the information withheld under this exemption, I find that only the records mentioned above would meet the definition of commercial information because they contain information that relates to the buying selling or exchange of merchandise or services. I find that the remaining information does not qualify as commercial information.

Part 2: supplied in confidence

Supplied

[73] The requirement that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.²⁵

[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 with respect to information supplied by a third party.²⁶

[75] The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.²⁷

In confidence

[76] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.²⁸

²⁵ Order MO-1706.

²⁶ Orders PO-2020 and PO-2043.

²⁷ This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

²⁸ Order PO-2020.

[77] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.²⁹

Representations

[78] Cabinet Office refers to Orders PO-2020 and PO-2043 where it submits the IPC held that information may qualify as “supplied” if it was directly provided to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party. Cabinet Office submits that the information withheld under section 17(1) was provided directly from the third party appellant in correspondence. It submits that the information was not mutually generated or negotiated, as would be the case in a contract for goods or services. The Cabinet Office submits that the information was provided directly by the third party to specific individuals within Cabinet Office.

[79] Cabinet Office also submits that the third party appellant had a reasonable expectation of confidentiality at the time the information was provided. Cabinet Office refers to the confidentiality obligations referenced by the third party appellant with respect to the documentary film and related information. Cabinet Office refers to the third party submission that speaks to its contract with a specified party and that in providing information to the government it intended and expected that the information would be treated as confidential.

[80] Cabinet Office also submits that the nature of the communications about the documentary film were treated as confidential internally. Cabinet Office also submits that there was a general understanding that the details about the production of the documentary film were limited to specific individuals and that information about the production would not have otherwise been made available and was not prepared for the purpose of disclosure.

[81] The third party appellant submits that it supplied the withheld information to Cabinet Office explicitly and implicitly in confidence. The third party submits that it is

²⁹ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

subject to confidentiality obligations regarding the film and related information by way of its contract with a specified party. The third party appellant submits that the information supplied to Cabinet Office with the understanding and belief that all email exchanges were to be kept confidential as the agreement between itself and the Premier's office contained explicit language that articulated the terms are private and confidential. The third party appellant submits that these were private exchanges discussing matters with considerable legal and commercial consequences.

[82] The requester appellant submits that the third party appellant's representations mention a confidentiality agreement in its contract with a specified party, but based on descriptions of the agreement, it seems that this agreement was required by a specified party, and not the third party appellant. They submit that the agreement was intended to protect a specified party and the government, and not the appellant.

[83] The requester appellant submits that it has not been proven that this information was "supplied in confidence" by the third party appellant. They submit that to the extent the third party appellant produced any of this information, it was simply supplied, the "confidence" was required by a specified party and the government, not the third party.

Finding

[84] As discussed above, I find that commercial information appears in records 3, 4, 5, 21, 25, 69, 112, 118, 130, 134, 135, 136, 143, 149 (in part), 153, 157, 158 and 159

[85] After my review of this withheld information, I find the records do not establish that there was an explicit expectation of confidentiality between Cabinet Office and the third party appellant. However, it is clear from the records that there was an implied expectation of confidentiality given the information, and a reference to a confidentiality agreement between the third party appellant and another affected party. Therefore, I find that the records were supplied to Cabinet Office with an expectation of confidentiality and part 2 is met for most of the records that I have found contain commercial information.

[86] However, I do not agree that a draft agreement contained in Record 5 and an interim agreement contained in Record 25, that were provided to Cabinet Office by the third party were "supplied" to Cabinet Office. Despite Cabinet Office's submission that the draft agreement was not negotiated, it is clear from reviewing the information in the records that information in the draft agreement was in fact negotiated between Cabinet Office and the third party. In my review of the agreements at issue, I note a number of emails that reference the two agreements and the content in these emails is evidence that this is not third party information. Cabinet Office and the third party appellant have not satisfied me that the agreements were supplied by the third party to Cabinet Office.

[87] As a result, I find that the draft agreement and the interim agreement were not supplied to Cabinet Office and therefore the exemption at section 17(1) cannot apply to this information. I note that in Order P-1105, the adjudicator found that a draft agreement was not supplied to the ministry by a corporation because the cover letter indicated that the draft agreement had been re-worked. The adjudicator held that without contrary evidence, “the agreements represent various stages of the ‘give and take’ of negotiations between the Ministry and the Corporation.”

[88] In any event, while I find that the two agreements were not supplied by the third party to Cabinet Office, even if they were supplied, the information does not meet part 3 of the test (see below).

Part 3: harms

[89] The party resisting disclosure must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.³⁰

[90] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.³¹

Representations

[91] Cabinet Office submits that the mandatory third party information exemption in section 17(1) applies to protect certain information contained in the records, which detail the commercial information of the third party appellant in the context of the production of the documentary film. Cabinet Office relies and defers to the third party appellant’s representations which address the harms if the information is disclosed.

[92] The third party appellant submits that it needs to protect the interests of a specified party and its own employees involved with the responsive records. It submits that its commercial information and business dealings would be negatively affected if the withheld information were to be publicly released. It refers to the non-disclosure and confidentiality clauses amongst the parties involved. It also submits that the responsive records include contractual provisions of a commercial nature.

[93] The third party appellant submits, in the confidential portion of its

³⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

³¹ Order PO-2435.

representations, that the harms under section 17(1)(a) would occur if the withheld information were disclosed. These confidential portions of the third party appellant representations, although not set out here, will be considered in making my finding on harms under section 17(1)(a).

[94] Under section 17(1)(a), the third party appellant speaks to the harm of its competitive position if the withheld information is released. It submits that if the information is released, it would be “incredibly detrimental and devastating” to the third party. It submits that there are over 100 documentary producers in Canada trying to sell ideas to a relatively small number of CRTC licensed television networks. It submits that these networks license and program documentary productions, the core business of the third party, and of those networks, the main buyers of socially relevant documentaries are two specified networks. The third party submits that these broadcasters and a few other marginal buyers, receive hundreds of pitches each year, of which only a small percentage are commissioned.

[95] The third party appellant submits that the decision making criteria of broadcasters are almost entirely subjective based on content, relationships and the creative material. It submits that this gives broadcasters broad discretion in their choice of which projects to license and from whom. It submits that releasing the withheld information would critically, perhaps permanently, damage its competitive position within the industry.

[96] The third party appellant further submits that the release of the withheld information could reasonably ruin its prospects of obtaining licenses for future documentaries and result in it losing a significant amount of revenue. It submits that it is reasonably foreseeable that in such circumstances it would have to curtail its operations and lay off employees – with the added consequence of reducing its output which would jeopardize its underlying business model and effectively devalue the company.

[97] The third party appellant submits that releasing the withheld information would interfere with contractual relations between itself, key creative personnel and a specified party. It submits that releasing the withheld information would force it to breach its contractual obligations with a specified party and other key creative members of its team who worked on the film given the confidentiality provisions. The appellant submits that the release of the withheld information could cause it to lose substantial business and economic opportunities and cause its employees serious harm. Further, the appellant submits that its reputation in the film and television community would be gravely tarnished and confidence in the company would be lost with regard to its ability to abide by its contractual obligations regarding confidentiality and discretion.

[98] The third party appellant also submits that the harms in section 17(1)(c) would occur if the withheld information is disclosed. It submits that it needs to ensure that the relationship with a specified party continues to be based on trust, professionalism and

adherence to the clauses contained in their agreement. The appellant submits that if the withheld information were to be released it is highly likely that a specified party would choose not to work with it going forward as this specified party would perceive that trust between the two companies would be eroded, especially considering that there is an incredible amount of competition from so many other documentary film producers in Canada who are all vying for the attention of the specified party to broadcast their films.

[99] The third party appellant submits that releasing the withheld information would result in it losing a significant amount of revenue as it would not be seen as a trustworthy business partner in such a competitive landscape and the specified party would likely choose to work with other producers. The third party submits that in such an event, it would have to lay off employees and reduce its output, which would jeopardize its underlying business model and devalue the company to its shareholders.

[100] The requester appellant submits that disclosure of the withheld information by Cabinet Office is not disclosure by the third party appellant in violation of any confidentiality agreement. The requester appellant submits that the third party appellant is not bound by the *Act* and the information is being held by Cabinet Office, not the third party appellant. The requester appellant submits that the decision to disclose will be based on the requirements of the law and has nothing to do with any action or non-action by the appellant, and it would be unreasonable to infer otherwise. The requester appellant submits that there is insufficient detailed evidence that disclosure would cause any of the harms listed in section 17(1).

Analysis and finding

[101] As noted, the third party claiming an exemption under section 17(1) 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.

Section 17(1)(a) and (c)

[102] The remaining records in dispute under this exemption in the third party appellant's appeal are records 112 and 130. The remaining records in dispute under this exemption in the requester's appeal are records 3, 4, 5, 21, 69, 118, 134, 135, 136, 143, 149 (in part), 153, 157, 158 and 159

[103] I do not agree with the third party appellant that the harms are met with regard to the information that Cabinet Office is prepared to disclose to the requester appellant. I also do not agree that harms are met for most of the information that Cabinet Office is seeking to withhold from the requester appellant. In my view, I have not been provided with sufficient evidence to satisfy me that the disclosure of most of the withheld records could reasonably be expected to prejudice significantly the third party appellant's competitive position or interfere significantly with its contractual or other

negotiations, nor that disclosure would result in undue loss or gain to any person.

[104] Based on my review of the records and the parties' representations, I find that neither the harm in section 17(1)(a) nor that in section 17(1)(c) has been established for the information withheld in records 3, 4, 5, 21, 25, 69, 112, 130, 143, 153 and in part to record 118, 134, 135 and 149. I find that the third party appellant's representations have not sufficiently established the harms to its competitive position, or undue loss or gain to itself or competitors. Moreover, I find that the third party appellant's confidential representations also do not establish the harms in sections 17(1)(a) and (c). The information the third party appellant would like withheld in the emails is largely administrative details about the documentary including emails concerning the broadcasting of the documentary, logistics regarding the filming and other emails dealing with the actual filming. The third party appellant has not adequately addressed how disclosure of this information could reasonably be expected to result in the harms to its negotiating and competitive position or undue loss.

[105] However, I am prepared to find that disclosure of the information withheld on records 118, 134, 135, 136, 157, 158 and 159 could reasonably be expected to result in significant prejudice to the third party appellant's competitive position under section 17(1)(a). In my review of the information withheld by Cabinet Office, I agree with the third party appellant and find that harms are met with regard to part of the information in records 118, 134, 135, 136, 157, 158 and 159³². After reviewing the representations and the records, I find that disclosure of the information withheld under section 17(1) in parts of these records could reasonably be expected to significantly prejudice the competitive position of a third party. I accept the third party appellant's submission that disclosure of these portions of the withheld information could reasonably be expected to prejudice its interests *vis-à-vis* its competitors by revealing commercial information and potentially that of another specified party. I further agree with the third party appellant and find that the information in these records, if disclosed, could reasonably be expected to interfere with contractual relations between the third party and another specified third party.

[106] I also find that disclosure of this same information could reasonably be expected to result in undue loss to the third party appellant under section 17(1)(c). I agree that it is reasonable to expect that if this information is disclosed it may result in undue loss to the third party appellant as its relationship with the specified third party, in a highly competitive environment, may be eroded. Therefore, I find that part of the withheld information in records 118, 134, 135, 136, 157, 158 and 159 withheld under section 17(1) should not be disclosed to the requester appellant.

Issue E: Does the discretionary exemption at section 19 apply to the records?

[107] Section 19 of the *Act* states as follows:

³² The information in dispute in these records is an identical email which appears in various email strings.

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[108] Section 19 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[109] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[110] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.³³ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³⁴ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.³⁵

[111] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.³⁶

[112] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.³⁷ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.³⁸

³³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

³⁴ Orders PO-2441, MO-2166 and MO-1925.

³⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

³⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

³⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

³⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

Loss of privilege

Waiver

[113] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.³⁹

[114] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.⁴⁰

[115] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.⁴¹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.⁴²

Branch 2: statutory privileges

[116] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital “for use in giving legal advice or in contemplation of or for use in litigation.” The statutory exemption and common law privileges, although not identical, exist for similar reasons.

Representations

[117] Cabinet Office submits that the information withheld under section 19 is subject to the statutory privilege arising from section 19(b) because the briefings contain legal advice given by Crown counsel. Cabinet Office refers to *Ontario (Attorney General) v. Big Canoe*⁴³ and submits that the Divisional Court held that the test for records to qualify for the exemption under section 19(b) was whether the record fit within the plain meaning of the wording of the exemption: namely that a particular record was prepared for Crown counsel for use in giving legal advice.

[118] Cabinet Office submits that the withheld information in the records reveal that legal advice was sought from Crown counsel with regard to a contract between parties and that the information reveals contents of Crown counsel’s legal advice with respect

³⁹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁴⁰ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

⁴¹ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

⁴² *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

⁴³ [2006] O.J. No. 1812.

to particular documents and subject matter. As such, it is submitted that disclosure of the withheld information would reveal contents of the legal advice from Crown counsel to the clients. Therefore, Cabinet Office submits that the legal advice and opinions contained in the records were produced by Crown counsel for the purpose of providing legal advice to the clients, thereby meeting the test for statutory solicitor-client privilege in section 19(b).

[119] Neither the third party nor the requester appellants addressed this exemption in their representations.

Analysis and Finding

[120] After a review of the records for which Cabinet Office has claimed the section 19 exemption, I do not agree that they all contain information that is subject to the statutory privilege arising from section 19(b).

[121] I find that the only record that contains information that is subject to the statutory privilege arising from section 19(b) is Record 64. I find that Record 64 contains information concerning advice from external counsel that qualifies for exemption under section 19 as its disclosure would reveal the legal opinion. However, in my review of this record, I also find that the solicitor-client privilege has been waived as the information was communicated to a party that is not employed by Cabinet Office or its external legal counsel. I also note that none of the parties argued the “common interest” exception to waiver with regard to the information that was disclosed.

[122] Based on my review of the remainder of the withheld information, I do not find that the information qualifies as information that is subject to solicitor-client communication privilege. Cabinet Office has not established that the withheld information was prepared by or for Crown counsel or external counsel for use in giving legal advice or in contemplation of or for use in litigation under branch 1 or branch 2 and does not contain any legal advice or opinion. I do not agree with Cabinet Office’s submission that the information in these records fit within the plain meaning of the wording of the exemption.

[123] Accordingly, I will order Cabinet Office to disclose the information it withheld under section 19.

Issue F: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) and 21(1) exemptions?

[124] Having upheld Cabinet Office’s exemption claims under section 17(1) and 21(1) to some of the records, I must consider the possible application of section 23 to the following records:

- Withheld information found to be exempt under section 21(1): records 72, 104 and 113

- Withheld information found to be exempt under section 17(1): records 118, 134 and 135

[125] Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

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

[127] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.⁴⁴

[128] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act’s* central purpose of shedding light on the operations of government.⁴⁵ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.⁴⁶

[129] A public interest does not exist where the interests being advanced are essentially private in nature.⁴⁷ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.⁴⁸

[130] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.⁴⁹

[131] Any public interest in *non*-disclosure that may exist also must be considered.⁵⁰ A

⁴⁴ Order P-244.

⁴⁵ Orders P-984 and PO-2607.

⁴⁶ Orders P-984 and PO-2556.

⁴⁷ Orders P-12, P-347 and P-1439.

⁴⁸ Order MO-1564.

⁴⁹ Order P-984.

⁵⁰ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.⁵¹

Representations

[132] Cabinet Office submits that there has already been significant public disclosure in the context of this appeal, as many of the records requested were disclosed or partially disclosed. Cabinet Office submits that the withheld information is limited to discrete portions of personal or third party information, which do not address a compelling public interest. Cabinet Office submits that the information that has not been withheld is available to the public to consider and can be used to inform commentary and choices about the decisions of the government.

[133] Cabinet Office submits that the personal information at issue includes the private views and opinions of individuals and information about their family status. It submits that preserving such personal information of individuals is important, particularly when this information is provided with an expectation of confidentiality. It submits that the third party information includes commercial information supplied by the third party appellant to Cabinet Office in confidence and that disclosure of this information may lead third parties to be reluctant to conduct business with government in the future due to the risk of disclosing commercially sensitive information.

[134] The third party appellant submits that nothing in the records would “serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.” The third party appellant submits that the withheld information in the requested records does not meet this test nor can the requester point to any “compelling” reason to release the information.

[135] The requester appellant submits that to the surprise of all involved, the documentary captured a moment in late 2014 and early 2015 when the then-Premier was facing intense scrutiny of her actions and those of her staff and Liberal party officials during a by-election in Sudbury. It submits that those actions became the subject of two OPP investigations, one of which resulted in charges under the *Elections Act*.⁵²

[136] The requester appellant points to a news article that dealt with the documentary and reported that the Premier’s office “[o]ver the course of the filming [had] concerns that the project was deviating from [the] original parameters.” The article noted that as part of the OPP investigation, the OPP requested to view footage from the documentary.

⁵¹ Orders PO-2072-F, PO-2098-R and PO-3197.

⁵² The appellant notes that the court case was concluded on October 24, 2017.

[137] The requester appellant submits that the public became similarly interested in what the documentary contained, and whether the government had placed limits on what would be broadcast on the provincially-owned and publicly-funded station that had commissioned the documentary.

[138] The requester appellant submits that a reasonable person might suspect that the project was now in jeopardy, putting pressure on the project's producers and sponsors to find a solution that would address the Premier's concerns.

[139] The requester appellant submits that at one time, a specified party announced that it was terminating its agreement with the third party appellant and sets out the specified party's statement. According to the appellant, the chain of events leading to the cancellation raises serious questions about whether the Premier or her office intended to use a publicly funded documentary for self-promotional purposes, or put inappropriate pressure on either the third party appellant or a specified party to effectively censor a documentary that could have included embarrassing or incriminating footage from a political scandal that had gripped the province.

[140] The requester appellant submits that there are serious questions of compelling public interest and to whatever extent an exemption may apply, the disclosure of information that can provide further clarity or answers to these serious questions outweighs the purpose of any exemption.

[141] Cabinet Office was provided a chance to reply to the requester appellant's representations. Cabinet Office continues to submit that there is no compelling public interest in the disclosure of the withheld information. Cabinet Office refers to the Court of Appeal in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*⁵³ and submits that there are two requirements that must be met for the public interest to apply:

- There must be a compelling public interest in disclosure of the information; and,
- This interest must clearly outweigh the purpose of the exemption.

[142] Cabinet Office refers to Order P-984 where the IPC determined that a compelling public interest exists when the information in the record serves the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices. Cabinet Office also refers to several IPC orders that held that where there is a compelling public interest in non-disclosure, disclosure cannot be considered "compelling," and where there has already been significant disclosure made through another forum, a compelling public interest may not be found.⁵⁴

⁵³ (1999), 118 O.A.C. 108 (C.A.).

⁵⁴ Orders PO-2072-F, PO-2098-R, P-1190, PO-1805, P-532 and P-568.

[143] Cabinet Office submits that where it claimed an exemption in the records, the severances to the records have been made to withhold discrete portions of personal or third party information. Cabinet Office submits that there is no compelling public interest for the disclosure of information of such a nature. Further, Cabinet Office submits that it has decided to grant access to the remaining portions of the records not subject to an exemption, however, some of those records have not been disclosed on account of the appeal launched by the third party appellant. Cabinet Office submits that the amount of information that has been withheld is very limited and that the information which it is prepared to disclose as per its access decision, addresses any public interest considerations.

[144] Cabinet Office submits that if a compelling public interest in disclosure is found to exist, that interest does not clearly outweigh the purposes of the mandatory exemptions at section 17 and 21. Cabinet Office submits that the personal information supplied by individuals was supplied in confidence and includes their private views and opinions and information about their family status. Cabinet Office submits that preserving such personal information of individuals is important, particularly when this information is provided with an expectation of confidentiality.

[145] Cabinet Office notes that the requester appellant in its representations suggests that full disclosure of the records is necessary for government scrutiny, however, Cabinet Office submits that disclosure of the withheld information for which sections 17 and 21 would apply, would not assist in providing insight into government decisions.

[146] On balance, Cabinet Office submits that it has determined that the public interest in preserving the confidentiality of this information is important and outweighs any remaining public interest in disclosure of the discrete severed portions of the records sought by the requester appellant.

[147] The requester appellant provided further representations in sur-reply. The appellant submits that they are not interested in private personal information that is irrelevant to the public interest noting that since they have no way of independently determining what is and is not irrelevant or personal, they have expressed a preference for maximum disclosure.

[148] The requester appellant submits that based on the third party appellant's representations, it does appear that at least some of the information they ask to be withheld is indeed responsive to a compelling public interest.

Analysis and finding

[149] As noted above, for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption for which the record was withheld.

[150] I will first consider whether there is a compelling public interest in disclosure of each record. If so, I will go on to consider whether this interest clearly outweighs the purpose of the exemption.

[151] As noted by Adjudicator Big Canoe in Order P-984, the word “compelling” has been defined as “rousing strong interest or attention.” According to the adjudicator, “the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act’s central purpose of shedding light on the operations of government.”

[152] After reviewing the exempt information in these records, I am not convinced that there is a compelling interest in disclosure. The requester appellant submits that following a news article on the documentary concerning the former Premier, the public became interested in what the documentary contained, and whether the government had placed limits on what would be broadcast on the provincially-owned and publicly-funded station that had commissioned the documentary. Based on my review of the records, the exempt information would not address the interest referenced by the appellant. The requester appellant also refers to an announcement by a specified party where it indicated that it was terminating its agreement with the third party appellant. The requester appellant submits that the chain of events leading to the cancellation raises serious questions about whether the former Premier or her office intended to use a publicly funded documentary for self-promotional purposes or put inappropriate pressure on either the third party appellant or a specified party. The information that I have found to be exempt under section 21 and section 17 would not address the public interest identified by the requester appellant.

[153] Moreover, even if there were a compelling public interest in this information it does not clearly outweigh the purpose of the section 21(1) and 17(1) exemptions.

[154] As a result, I find that the public interest override does not apply.

ORDER:

1. Appeal PA15-523 is dismissed.
2. I uphold Cabinet Office’s decision in appeal PA16-72, in part.
3. I order Cabinet Office to disclose to the requester appellant all of the information it decided to disclose and also the information it decided to withhold except the information in records 72, 104, 113, 118, 134, 135, 136, 157, 158 and 159 by **April 8, 2020** but not before **April 3, 2020**. To be clear, highlighted portions of the records should not be disclosed.
4. The remainder of appeal PA16-72 is dismissed.

5. I reserve the right to require that Cabinet Office provide me with a copy of the records disclosed to the requester appellant in accordance with Order Provision 3.

Original signed by: _____

Alec Fadel
Adjudicator

March 4, 2020 _____