Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4075

Appeal PA17-551

Ministry of Natural Resources and Forestry

October 19, 2020

Summary: The Ministry of Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a proposed hydro-electric generating station. The ministry decided to disclose some of the responsive records. A third party appealed this decision and relied on the mandatory third-party information exemption in section 17(1). The third-party appellant also sought to raise the application of the discretionary exemptions in sections 16 (prejudice defence of Canada), 18(1) (economic and other interests), and 20 (danger to safety or health). During the inquiry, the requester raised the possible application of the public interest override in section 23 of the *Act.*

In this order, the adjudicator dismisses the third-party appellant's appeal and orders disclosure of all of the records at issue. In particular, she finds that section 17(1) does not apply and she does not allow the appellant to raise the discretionary exemptions. As a result, it was not necessary for the adjudicator to consider whether section 23 of the *Act* applied to the information at issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F. 31, as amended, sections 16, 17(1), 18(1) and 20; *Lakes and Rivers Improvement Act*, R.S.O. 1990, c. L. 3.

Orders Considered: Orders P-479, P-1595, PO-1825, PO-2048, PO-2294, PO-2695, PO-3841, PO-3986 and PO-4023.

OVERVIEW:

[1] The Ministry of Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a proposed hydroelectric generating facility known as the Bala Falls Project.

[2] The ministry notified a third party of the request and then issued a decision granting the requester partial access to the responsive records it identified. The ministry denied the requester access to some of the responsive records pursuant to the mandatory exemption in section 17(1) (third party information) of the *Act*.

[3] The third party, now the appellant, appealed the ministry's decision to release the information in the responsive records.

[4] During the mediation phase of the appeal, the mediator had discussions with the original requester, the appellant and the ministry. The appellant asserted that all the information in the responsive records should be withheld pursuant to section 17(1) of the *Act*. The appellant also asserted the ministry should have applied various discretionary exemptions in the *Act*, specifically sections 14(1)(i) (security), 14(1)(l) (facilitate commission of an unlawful act), 16 (prejudice defence of Canada), 18(1)(a),(c),(d) (economic and other interests), 18(1)(g) (proposed plans, projects or policies of an institution) and 20 (danger to safety or health). The original requester continued to seek access to the records the ministry decided to disclose.

[5] Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*. Representations were sought and received from the parties. Some parts of the appellant's representations were withheld from the requester because those portions met this office's confidentiality criteria set out in *Practice Direction Number 7*.

[6] In its representations, the appellant advised that it was no longer relying on the exemption in section 14(1) of the *Act*. Consequently, section 14(1) is no longer at issue in this appeal.

[7] During the course of the inquiry, the requester raised the possible application of the public interest override in section 23 of the *Act.*

[8] In this order, I find that section 17(1) does not apply to any of the information at issue. I do not allow the appellant to raise the possible application of the discretionary exemptions in sections 16, 18(1) or 20 of the *Act* and I order the ministry to disclose the records at issue to the requester. Given my findings, it was not necessary for me to consider whether the public interest override applied to the information at issue.

RECORDS:

[9] There are 149 pages of records at issue. The appellant describes these records in

Appendix C of its representations as follows:

Record Number	Description	Page Numbers	Exemption(s) Claimed
1	E-mails with the ministry	181-182	Section 17(1)
2	E-mails with the ministry	183-184	Section 17(1)
3	Correspondence to the ministry re LRIA Phase 2 Application	2403-2476 2479-2516 2519-2548	Sections 16, 17(1), 18(c), (d) and (g), and 20
4	Correspondence to [a third party] enclosing drawing	2636-2638	Sections 16, 17(1), 18(c), (d) and (g), and 20

ISSUES:

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

B. Should the appellant be permitted to raise the discretionary exemptions in sections 16, 18(1), and/or 20 of the *Act*?

DISCUSSION:

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

[10] Section 17(1) states:

> 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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[11] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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.[2]

[12] 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

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

> *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.[3]
>
> *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

---

[1] *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.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[3] Order PO-2010.

field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[4]

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.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[7]

Representations

[14] The appellant says that the first element of the three-part test in section 17(1) is met because all of the records contain at least one of the following:

- scientific and/or technical drawings;
- scientific, technical, commercial and/or financial information related to the construction of the Bala Falls Project; and
- scientific, technical, commercial and/or financial specifications and information related to its operation, or the operation of the Bala Falls Project (or a combination thereof).

[15] The ministry says only that some of the records contain information that might meet the first part of three-part test in section 17(1). The requester did not specify whether the information at issue meets the first part of the three-part test, though they stated that they agree with the ministry's representations.

Findings and analysis

[16] On my review of the information at issue, I am satisfied that the first part of the three-part test is met because all of the records at issue contain technical information for the purposes of section 17(1) of the *Act.*

[17] Specifically, records 1 to 4 each contain detailed information of a technical nature that was prepared by professional engineers. The technical information relates to the construction and/or operation of the Bala Falls Project and includes calculations,

---

[4] Order PO-2010.
[5] Order PO-2010.
[6] Order P-1621.
[7] Order PO-2010.

measurements, specifications, designs and plans about the infrastructure, materials, components, and mechanics of the project.

Part 2: supplied in confidence

Supplied

[18] 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.[8]

[19] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[9]

The parties' representations

[20] The appellant says that all the information at issue was supplied to the ministry by it, or by its contractors, either directly or indirectly through another federal or provincial government department.

[21] The ministry submits that the records at issue were "created or provided in the context of processing an application subject to the ministry's regulatory authority."

[22] The requester's representations do not address the issue of whether the appellant supplied the information at issue.

Findings and analysis

[23] For the reasons that follow, I find that all of the information at issue was supplied to the ministry.

[24] As noted in the chart above at paragraph eight of this decision, Record 1 consists of email communications. The first email in the chain is from the ministry to the appellant, but the content of the email relates to information that I am satisfied was supplied by the appellant to the ministry.

[25] Record 2 is also an email that was sent by the ministry. Like Record 1, it contains information that I am satisfied was originally supplied to the ministry by the appellant.

[26] Record 3 is a letter from the appellant to ministry with five separate appendices, each of which is specifically referenced in the letter. I find that this information was clearly supplied to the ministry by the appellant.

[27] Finally, Record 4 is a letter to another company from the appellant. It is not clear to me how the ministry came to have a copy of this letter, but in circumstances where the

---

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

appellant is the author of the letter and the content relates to the same information in records 1, 2 and 3, I accept that the information in Record 4 was also supplied to the ministry.

Supplied in confidence

[28] In order to satisfy the "in confidence" component of part two, a party 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.[10]

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

1. whether the information was communicated to the institution on the basis that it was to be kept confidential;

2. treated consistently by the third party in a manner that indicates a concern for confidentiality;

3. not otherwise disclosed or available from sources to which the public has access;

4. prepared for a purpose that would not entail disclosure.[11]

The parties' representations

[30] The appellant says that the information at issue was supplied in confidence. It made the following submissions about the second element of the three-part test for section 17(1) in its initial representations:

> …it is a reasonable implication that when [the appellant] or [the appellant's contractors] supply information to the ministry, either directly or indirectly through another federal or provincial governmental 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 our [the appellant], [the appellant's contractors], the ministry, and other related departments of government.

[31] The appellant repeats the test set out above in this decision at paragraph 28 for determining whether information was supplied in confidence and says that it meets this criteria because:

---

[10] Order PO-2020.
[11] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

1. The information was communicated to the institution on the basis that it was confidential, and likely would not have been communicated in the same way if there had been no expectation of confidentiality; and

2. The information was not otherwise disclosed or available from sources to which the public has access.

[32] The appellant says that both of these factors lend in favour of an expectation of confidentiality.

[33] The ministry denies that the information at issue was supplied in confidence. It says that the appellant has provided no evidence to demonstrate that it had a reasonable expectation of confidentiality in providing information to the ministry. It says that the appellant has provided no record-by-record evidence or argument about how the records were supplied in confidence to the ministry.

[34] The ministry also submits that there is no indication that it gave the appellant any explicit assurance of confidentiality. It states that "the mere act of supplying information to the ministry does not create a reasonable expectation of confidentiality" and that, "on the contrary, the ministry's obligations under FIPPA were or should have been known to the [appellant], particularly in view of the history of access requests related this project." Specifically, the ministry asserts that there were a number of previous requests that were similar to the request in the current appeal where the ministry decided to disclose information.

[35] Finally, the ministry says that it is clear that the information at issue was created or provided in the context of processing an application subject to the ministry's regulatory authority, which is not a process in which an applicant would typically expect confidentiality.

[36] The requester did not make any specific representations about whether the information at issue was supplied in confidence.

[37] In its reply representations, the appellant submits that it provided detailed record-by-record evidence and arguments with respect to how it has met all three parts of the section 17(1) test in its initial representations. It refers me to paragraphs 21 and 22 of its original representations (which are reproduced above at paragraph 30 of this decision) and asserts that a finding that the information at issue was not supplied in confidence "would mean that all communications and drawings submitted to provincial agencies or ministries must fail the third party test." The appellant asserts that this is not supported by the case law and "runs afoul of the intent and purpose" of the exemption. The appellant refers me to Orders P-479 and P-1595 as support for its assertions.

[38] The appellant also submits that at no point did the ministry communicate to it verbally or in writing that the process being engaged in was a public process where an applicant would not typically expect confidentiality. The appellant submits that the process it participated in resembled a business relationship involving the exchange of information and fees in return for regulatory approvals. The appellant asserts that the fact that it was an approvals process does not negate an expectation of confidentiality.

[39] Specifically, the appellant argues that "it would be absurd to claim that such a process should involve a default presumption of non-confidentiality—in a business-like transaction, any default presumption should be that the information being exchanged is confidential, especially in light of the exemptions set out in the *Act.*" In support of this argument, the appellant relies on Orders PO-2294 and PO-2695.

Findings and analysis

[40] For the reasons that follow, I am not persuaded by the appellant's representations that any of the information was supplied in confidence to the ministry and as a result, I find that the appellant has not met part two of the three-part test in section 17(1) of the *Act.*

[41] First, I find insufficient support in the appellant's representations that the information was "communicated to the institution on the basis that it was confidential," either explicitly or implicitly. In my view, the appellant's assertions alone, without further supporting evidence, are insufficient to establish the "in confidence" element of part two of the three-part test in section 17(1), particularly when the ministry denies that the information was supplied in confidence.

[42] In making this decision, I have considered the ministry's submission that the information at issue was created or provided in the context of processing an application subject to the ministry's regulatory authority, which it says is not a process in which an applicant would typically expect confidentiality. Based on my review of each of the records, I accept the ministry's representation that the information was supplied to it as part of an application process and for the reasons that follow below, I find that this factor weighs in favour of a decision that the records at issue were not supplied in confidence.

[43] Records 1 and 2 are emails between the appellant, the ministry and two other companies. The emails relate to the Bala Falls Project. More specifically, they relate to an application referred to by the appellant in its representations as the "LRIA Phase 2 Application." Based on my review of the records, I understand this to be an application that the appellant, or another third-party company associated with the appellant, made under the *Lakes and Rivers Improvement Act* (the *LRIA*).[12]

[44] Record 3 is an eight-page letter with five appendices attached. Each appendix is specifically referred to in the letter. Some of the attached appendices have multiple parts. In its representations, the appellant refers to Record 3 as "Correspondence with the [ministry] re LRIA Phase 2 Application." Based on my review of Record 3, it is clear to me that the letter and appendices were provided by the appellant to the ministry in support of an application under the *LRIA*.

[45] Record 4 is a letter from the appellant to another company that also relates to the *LRIA* Application. As noted above, there is no indication in the letter of how the ministry came to have a copy of this letter and the appellant has not provided any specific information about the circumstances under which it was provided.

---

[12] *Lakes and Rivers Improvement Act*, R.S.O. 1990, c. L. 3.

[46] Based on my review of the records, and considering the appellant's representations, I find that all of the records at issue were supplied to the ministry as part of an application process under the *LRIA.*

[47] Previous orders of this office have considered whether records supplied to an institution as part of an application process under the *LRIA* were supplied in confidence and concluded that they were not. Specifically, Orders PO-1825 and PO-2048, which I will outline below, both dealt with claims from third-party appellants that records related to applications made by third parties under the *LRIA* were supplied in confidence.

[48] In Order PO-1825 Adjudicator Cropley considered whether records related to a proposed watercourse diversion/realignment, including construction drawings and correspondence, provided to the ministry to obtain work permits under the *LRIA* were supplied in confidence*.* She noted that the *LRIA* is silent on the issue of whether information obtained pursuant to that authority is confidential and concluded that in this regard, there is no "express" expectation of confidentiality. To be clear, the adjudicator specified that the *LRIA* does not indicate, imply or lead the reader to reasonably conclude that any part of the process, including the submission of required materials and information, would be received or treated confidentially by the ministry.

[49] Adjudicator Cropley concluded that the fact that there was no express expectation of confidentiality neither assisted nor detracted from the affected party in that appeal's position that the records were supplied "implicitly" in confidence. She noted the affected party's argument that a party entering into a private business relationship would maintain confidentiality of the client's information and/or records prepared within that relationship. However, she concluded that the affected party's expectation of confidentiality within a business relationship did not assist her in determining whether there was a reasonable expectation of confidentiality at the time the records were submitted to the ministry as part of an application process.

[50] Adjudicator Cropley then moved on to consider the purpose of the *LRIA* in relation to whether the affected party's expectation of confidentiality was reasonably held. The adjudicator specified the following:

> In my view, the purposes of the *Lakes and Rivers Improvement Act* as set out in section 2 of that *Act* are relevant in determining whether the primary affected party's expectation of confidentiality was reasonably held. This section states:
>
> > The purposes of this *Act* are to provide for,
> >
> > (a) the management, protection, preservation and use of the waters of the lakes and rivers of Ontario and the land under them;
> >
> > (b) the protection and equitable exercise of public rights in or over the waters of the lakes and rivers of Ontario;
> >
> > (c) the protection of the interests of riparian owners;

(d) the management, perpetuation and use of the fish, wildlife and other natural resources dependent on the lakes and rivers;

(e) the protection of the natural amenities of the lakes and rivers and their shores and banks; and

(f) the protection of persons and of property by ensuring that dams are suitably located, constructed, operated and maintained and are of an appropriate nature with regard to the purposes of clauses (a) to (e).

In my view, the purpose of the legislation is to protect the public interest generally in ensuring the preservation and proper management of the natural environment, as well as protecting the interests of other property owners, while establishing procedures for enabling private property owners to deal with their property (in part). Although this *Act* recognizes that property owners may wish to alter the natural environment on property they own, the overall intent of the legislation is to protect the greater public interest in the desirability of taking such action and in the manner in which it is done.

I do not accept the appellant's argument that because the *Lakes and Rivers Improvement Act* does not require a public meeting or notice to neighbours, that "the *Act* itself dictates that the matter is private and not open to public view". On the contrary, I find that the public accountability component of the *Lakes and Rivers Improvement Act* is consistent with openness.

I also note that sections 10 - 12 of the *Lakes and Rivers Improvement Act* provide that an applicant is entitled to request an inquiry into a decision of the Minister that he or she intends to refuse an approval under that *Act.*

In particular, section 11(8) indicates that the parties to an inquiry include, among others, "any person whom the inquiry officer determines has a direct interest and should be added as a party". Section 11(9) refers to disclosure requirements during an inquiry which includes, in part, "all documents that the party proposes to use at the inquiry". Section 11(13) provides that sections 6 - 16, 21, 21.1, 22 and 23 of the *Statutory Powers Procedure Act* (the *SPPA*) apply, with necessary modifications, to an inquiry.

Section 9 of the *SPPA* provides generally that hearings shall be open to the public except in certain specific circumstances.

It is arguable that unless the applicant chooses to request an inquiry, none of these provisions are relevant. However, in my view, the availability of them goes to the heart of the reasonableness of an applicant's expectations and the basis upon which these expectations are formed. Viewed objectively, the provisions relating to dispute resolution when combined with the public interest underlying the *Lakes and Rivers Improvement Act* refute the argument that the records were prepared for a purpose that would not entail disclosure. I find that they do not form a basis upon which an applicant could

> reasonably expect that confidentiality would be maintained or could be supported.
>
> Further on this issue, the agent indicates that, at least in the early stages of development, neighbours were contacted and given an opportunity to have input into the design. The agent does not indicate whether possible designs were shown to the neighbours. However, in my view, discussions with individuals outside the client/agent relationship on issues of design which may have ultimately made their way into the final drawings is not consistent with an expectation of confidentiality.
>
> Based on the totality of the submissions on this issue, I am not convinced that, at the time the records were supplied to the Ministry, there was any communication between the parties with respect to expectations of confidentiality. Nor am I convinced that there was any objective basis for a reasonable expectation on the part of the affected parties that the records were submitted to the Ministry in confidence. Therefore, I find that the Ministry and affected parties have failed to satisfy the second requirement of the section 17(1) test for the records at issue.

[51] In Order PO-2048 Assistant Commissioner Liang applied Adjudicator's Cropley's analysis to plans and drawings prepared by an engineer and provided to the ministry in relation to a stream diversion project under the *LRIA.* Assistant Commissioner Liang noted that, in that case, even though the proponent of the project's engineer requested that the information be kept confidential, no information was provided about any expectations of confidentiality at the time the information was provided to the ministry. Assistant Commissioner Liang determined that, given the statutory context of the *LRIA* in which the application was made, which is silent on the issue of confidentiality, and the absence of any evidence about any express or implicit understandings regarding confidentiality between the ministry and the proponents, there was no sufficient basis to find a reasonable expectation of confidentiality within the meaning of section 17(1).

[52] I make the same finding here. The appellant has not offered any specific evidence that would allow me to conclude that it had a reasonable expectation of confidentiality when it supplied the information at issue to the ministry. I have also not found anything in the records themselves that would assist the appellant's case.

[53] I am also not persuaded by the appellant's assertion that there was an implicit understanding that the information at issue was supplied in confidence because the process the appellant participated in "resembled a business relationship." In its reply representations, the appellant asserted that "in a business-like transaction, any default presumption should be that the information being exchanged is confidential, especially in light of the exemptions set out in the *Act.*" I reject the appellant's argument and adopt the conclusion reached by Adjudicator Cropley, outlined above at paragraph 49 of this decision.

[54] Finally, while this factor weighed less heavily in my analysis, I have taken note of Adjudicator Cropley's finding that discussions with outside individuals on issues of design,

which may have ultimately made their way into final drawings, is not consistent with an expectation of confidentiality. I note that there is an abundance of information available publicly on the Bala Falls Project's website. The website indicates that there were four public meetings regarding the design of the project. Based on the agenda and meeting minutes, which are posted on the website, it appears that the public was provided information about the design and plans for the project and was given the opportunity to provide feedback, which was then considered by the project's proponents and seemingly incorporated into the design. I agree with Adjudicator Cropley that discussions with individuals outside the client/agent relationship on issues of design which may have ultimately made their way into the final drawings is not consistent with an expectation of confidentiality.

[55] Furthermore, despite the appellant's assertion in its representations that the information at issue was not otherwise disclosed or available to the public and that this was a factor that weighed in favour of an expectation of confidentiality, I note that some of the information available on the Project's website appears similar to the information the appellant seeks to have withheld. During the course of this inquiry, the appellant was provided an opportunity to make representations about why it continued to assert that section 17(1) applied to the information at issue, given the similarity of some of the information available online. The appellant declined to make any further representations. Absent any explanation from the appellant on this issue, I find that this is a factor that weighs in favour of a finding that the information was not supplied in confidence.[13]

[56] I also confirm that I have carefully reviewed the orders referred to by the appellant in its representations, specifically, Orders P-479, P-1595, PO-2294 and PO- 2965, and do not find them helpful for the reasons that follow.

Order P-479

[57] The information at issue in Order P-479 related to a development application for a sewer project made under the *Environmental Protection Act* and the adjudicator concluded that some of the records at issue were supplied in confidence. However, in that case, the ministry stated in its representations that some of the information was supplied to it implicitly in confidence. The ministry provided evidence that when a proponent submitted an application under the *Environmental Protection Act*, its staff traditionally kept the information confidential.

[58] In my view, Order P-479 is of limited relevance to the current appeal before me because in this case, the ministry does not allege that any of the records were supplied in confidence, implicitly or otherwise.

Order P-1595

[59] In Order P-1595, the information at issue was comprised of applications for approval related to a crematorium at a cemetery, as well as calculations, drawings and an

[13] See paragraph 29, above.

engineering assessment. The Ministry of the Environment determined that some of the information could be released to the requester, but the appellant objected based on the exemption in section 17(1) of the *Act.*

[60] At inquiry, the ministry submitted, and the adjudicator accepted, that the appellant had a "reasonably held expectation that some of the records were being supplied by it in confidence." As a result, the second part of the test was met for those records. However, the adjudicator determined that the appellant's expectations regarding the confidentiality of a number of other records at issue was not reasonable because the *Environmental Protection Act* required that information in those records be made public.

[61] I am not persuaded that the adjudicator's determinations in P-1595 are relevant in this case for the same reasons that I concluded the findings in Order P-479 were not relevant. To be clear, in Order P-1595, the ministry submitted that some of the information was supplied to it in confidence. The ministry in the current case did not make the same representation and as a result, I find that the circumstances are not analogous.

Order PO-2294

[62] Order PO-2294 arose from a request to the Ontario Securities Commission for records related to a Regulatory Escrow Trust Agreement. The OSC disclosed the majority of a 41-page agreement. Fifteen pages, predominately from the schedules to the agreement, remained at issue. In finding that the information at issue was supplied in confidence, the adjudicator noted that OSC confirmed that it treated the type of information supplied to it as confidential to outside parties. Accordingly, the adjudicator concluded the record at issue was supplied to the OSC with a reasonably-held implicit expectation that it would be treated in confidence, thereby satisfying part 2 of the section 17(1) test. Again, the circumstances in the current appeal are not the same.

Order PO-2695

[63] Finally, with regard to the last decision the appellant refers me to in support of its assertions that the information at issue was supplied in confidence, Order PO-2965, I note that this is another case where the institution submitted that the third parties had a reasonable expectation that the records at issue were supplied in confidence. Again, this is not the case in the current appeal and as a result, I do not find this decision to be of any assistance to me.

[64] For all of the reasons stated above, I am not convinced that at the time the records at issue were supplied to the ministry there was any communication between the parties with respect to expectations of confidentiality. I am similarly not convinced that there was any objective basis for a reasonable expectation on the part of the appellant that the records were submitted to the ministry in confidence. It is also not clear to me that the appellant has consistently treated the information as confidential, nor am I satisfied that the public does not otherwise have access to the information. Therefore, I find that the appellant has failed to satisfy the second requirement of the section 17(1) test for the records at issue.

[65] As stated above, in order for section 17(1) to apply, the appellant must satisfy all three parts of the test. Given my conclusion regarding the second part of the three-part test, it is not necessary for me to consider whether there is a reasonable expectation of harm. I will, however, consider the appellant's assertion that it should be permitted to raise discretionary exemptions not applied by the ministry.

Issue B: Should the appellant be permitted to raise the discretionary exemptions in sections 16, 18(1), and/or 20 of the Act?

[66] The appellant submits that the discretionary exemptions in sections 16 (prejudice defence of Canada), 18(1) (economic and other interests) and/or 20 (danger to safety or health) apply to some of the records at issue and says that the ministry should have applied these exemptions.

[67] 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.

[68] A number of past orders have considered the issue of whether a party other than the institution can claim a discretionary exemption.[14] 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.

The appellant's representations

[69] The appellant submits that this case qualifies as a rare exception to the general presumption that third parties are not entitled to raise the application of discretionary exemptions. The appellant agrees that the threshold for raising discretionary exemptions has been established by previous orders to be in the "most unusual of circumstances" and asserts that it satisfies this threshold because of the "unique nature of and context of the Bala Falls Project."

[70] The appellant also draws my attention to Order PO-3601, where the adjudicator noted that on rare occasions, the Commissioner or the Commissioner's delegate may decide to consider the application of a discretionary exemption not originally raised by an institution if the release of a record would seriously jeopardize the rights of a third party.

[71] With regard to section 16, the appellant submits that this provision is intended to protect vital public security interests and that its application must be approached in a sensitive manner, given the difficulty of predicting future events affecting the defence of

[14] Most often cited are Orders P-1137 and PO-1705. See also Orders MO-2635, MO-2792 and PO-3489.

Canada and other countries.

[72] The appellant then proceeds by offering arguments in support of its submission that sections 16 and 20 apply to the information at issue. For example, it says 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 appellant asserts that the potential consequences of an act of terrorism or sabotage target at either the individuals or the structures that form the Bala Falls Project would be grave and far-reaching.

[73] The appellant argues that there is a tangible risk to the safety and health of individuals who are responsible for securing the structures and those who are involved in the construction and operation of the project.

[74] The appellant asserts that the potential consequences of an act of terrorism or sabotage would be grave and far reaching. It then refers me to a number of news articles and publications that it says demonstrate legitimate national security and defence concerns with respect to hydro-electric generating facilities. It says that these articles were previously submitted to the adjudicator in Appeal PA17-36.

[75] With regard to section 18(1), the appellant submits the following:

> First, it is clear that section 18 of the *Act* is an exemption designed to protect institutional interests. [The appellant] submits that this appeal satisfies the "unusual circumstances" threshold because the [ministry], by failing to apply the section 18 exemption to the records at issue, puts in jeopardy the very goals that the Province of Ontario seeks to achieve through the FIT Program.

[76] The appellant says that the FIT Program was intended to encourage and promote greater use of renewable energy sources. It says that the proponent of the Bala Falls Project was accepted into the FIT Program and that there was a connection between the Province of Ontario's interests in promoting economic development and the FIT Program. I understand the appellant to be arguing that by disclosing the information at issue, the objectives of the FIT Program would somehow be thwarted.

[77] The appellant also makes the following assertions about how the disclosure of the information at issue could reasonably be expected to prejudice the economic interests and/or the competitive position of the ministry and the Province of Ontario:

1. The ministry relies on communication and collaboration with market participants in order to "administer legislation" and perform its duties. Disclosing sensitive information would generate a negative response throughout the marketplace and market participants would be incentivized against providing complete and frank information to the ministry;

2. Disclosure of the records at issue could jeopardize or delay the building of the Bala Falls Project, resulting in a waste of resources which have already been used to advance the project;

3. Economic opportunities in the resource sector could be lost; and

4. Energy companies may be less likely to invest in renewable energy as a whole.

[78] Finally, the appellant argues that because it was working in partnership with the Province of Ontario through the FIT Program, the Province of Ontario has an economic interest in that relationship and the resulting savings for taxpayers. The appellant submits that the protection of private information is "inexplicably tied to the protection of institutional information", and that as such, it would be inequitable to prohibit the appellant from raising the applicability of discretionary exemptions to the records at issue.

The ministry's representations

[79] The ministry submits that the appellant has not provided evidence that there is an extraordinary and rare situation justifying non-disclosure of the records. The ministry says that in its review of the records at issue, it considered all of the claimed discretionary exemptions and found no 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.

[80] The ministry also asserts that the considerations for determining whether an extraordinary and rare situation exists were thoroughly and recently canvassed in Order PO-3841. The ministry submits that Order PO-3841 was based on the same proposed project and similar types of records.

The requester's representations

[81] The requester did not make any representations about whether the appellant should be permitted to raise the discretionary exemptions in sections 16, 18(1), and/or 20. However, they referred me to paragraphs 146 to 164 of Order PO-3841, where Adjudicator Smith provides reasons for her decision that the third-party appellant in that appeal did not establish that it was rare exception to the general presumption that affected parties are not entitled to raise the possible application or discretionary exemptions.

[82] The appellant submits that it does not agree with the findings made in Order PO-3841 regarding the ability of third party appellants to raise the applicability of discretionary exemptions and asserts that the evidence provided by the third party in Order PO-3841 should have been sufficient to support a finding that the third-party appellant could raise the discretionary exemptions. Specifically, the appellant says that the third-party appellant in Order PO-3841 provided detailed, comprehensive submissions and evidence that releasing the records at issue "would seriously jeopardize or affect the rights of a third party" and that as a result, that decision was flawed. I understand the appellant to be asserting that I should not follow, or rely, on the analysis in the adjudicator's decision in Order PO-3841 for this appeal.

[83] With regard to its ability to raise the discretionary exemptions in sections 16 and 20, the appellant refers me to Order PO-2500, which it says is an example where the IPC previously applied section 16 to detailed technical information about the operations of a

nuclear facility. It says that it has provided affidavits demonstrating that there is a threat to Canada's energy sector, including hydro-electric dams, from terrorist groups.

[84] The appellant says that the affidavit evidence it provided demonstrates that this case meets the "most unusual of circumstances" threshold for being able to raise the applications of sections 16 and 20 of the *Act.*

[85] The appellant also submits that it disagrees with the adjudicator's decision in Order PO-3841 that "the position taken by the appellant with respect to section 18(1) is one that is fundamentally concerned with protecting its own interests." It reiterates its original representation that disclosing the information at issue would hinder the free flow of information between the ministry and those who interact with it and generate a negative response throughout the marketplace. It asserts that the fact that it has an interest in the information not being disclosed does not diminish the fact that such an interest belonging to the ministry also exists.

Findings and analysis

[86] I have considered all of the appellant's representations and I find that this is not one of those unusual situations where it should be permitted to raise discretionary exemptions.

[87] First, while I note the appellant's submission that the Bala Falls Project is "unique," it has not explained what specifically makes the project unique or why this case should be an exception to the general presumption that third parties are not entitled to raise the possible application of discretionary exemptions. I also note that rather than explaining what specifically makes the Bala Falls Project unique, such that the criteria for unusual circumstances would be met, the appellant has instead, focused its representations on why it believes the discretionary exemptions apply.

[88] As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record.[15] In Order P-1137, Adjudicator Fineberg made the following comments about whether an affected party may raise a discretionary exemption when it was not claimed by the institution which received the request for access to information:

> The *Act* includes a number of discretionary exemptions within sections 13 to 22 which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

---

[15] Order PO-3601.

> The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third-party information. The mandatory exemptions in sections 21(1) and 17 of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
>
> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[89] I note the ministry's submission that during its review of the records at issue it considered all of the claimed discretionary exemptions and found no 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.

[90] I have considered the appellant's representations and find they have not established the unique circumstances that would provide a basis for a finding that the appellant should be permitted to raise the discretionary exemptions. In my view, rather than providing an explanation of why these circumstances are one of the rare situations where a third party should be permitted to raise a discretionary exemption, the appellant has simply explained why it believes the institution should have applied the exemptions. In the absence of any extraordinary, unusual or rare circumstances, I find that this discretion must be left to the institution.

[91] I also note the ministry's submission that the considerations for determining whether an extraordinary and rare situation exists were thoroughly and recently canvassed in Order PO-3841, which dealt with the same proposed project and similar types of records. I have reviewed Order PO-3841, which arose from Appeal PA16-128 and I agree that the proposed project, the records, and the representations from the third-party appellant in that appeal are substantially similar to this appeal. As the requester noted, the adjudicator in Order PO-3841 provided detailed reasons for her decision that the appellant was not permitted to raise the discretionary exemptions.

[92] Following Order PO-3841, two further orders, Order PO-3986 and PO-4023 were released. These orders dealt with five appeals that also related to the same project, had similar records at issue, and substantially similar representations from the third-party

appellants. In each of these appeals, the third-party appellants asserted that they should be permitted to raise the discretionary exemptions in section 16, 18(1) and 20 of the *Act.* In Orders PO-3986 and PO-4023, the adjudicators concluded that the third- party appellants had not established that they should be permitted to raise any of the discretionary exemptions.

[93] The adjudicators in Orders PO-3841, PO-3986 and PO-4023 all concluded, as I did above, that the ministry had considered whether any of the discretionary exemptions should be applied and determined that they should not. Furthermore, I agree with the adjudicator in Order PO-3986, who stated the following at paragraph 91:

> Discretionary exemptions all indicate that the head [of an institution] "may refuse to disclose…" In other words, the Legislature expressly contemplated that the head of the institution is given the discretion to claim, or not claim, these exemptions… The appellant has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary measure of permitting it to claim the discretionary exemptions in sections 16, 18(1) and 20 when the head has elected not to do so.

[94] Furthermore, I note that in its representations, the appellant referred me to a third-party appellant's representations and evidence in Appeal PA17-36. PA17-36 was another appeal from a third party relating to the same project, with similar records and representations from the appellant. During the course of this inquiry, it came to my attention that Appeal PA17-36 had been closed without an order and that the records at issue were to be released by the ministry. I wrote to the appellant to determine whether the appellant continued to object to the disclosure of the information at issue in this appeal, given the status of PA17-36. I also referred the appellant to Orders PO- 3841, PO-3986 and PO-4023, which I said addressed similar arguments such as those the appellant was advancing in the current appeal with respect to similar records at issue.[16] The appellant advised this office that it continued to object to the disclosure of the records at issue. The appellant was then invited to provide additional representations in support of its continued objection to the records at issue in this inquiry being disclosed. The appellant provided no additional representations.

[95] I have also considered the appellant's reply representations and, in my view, its assertion that Order PO-3841 is flawed does not assist it in this appeal. Order PO-3841 is a final order and it is relevant to this matter only insofar as it relates to the same project, concerns similar records, and had similar representations. I cannot reconsider Order PO-3841 in this appeal.[17] In any event, the appellant has mischaracterized the question before me. The issue is not whether the release of the records at issue would jeopardize or affect the rights of a third party. The issue is whether the appeal might constitute the "most unusual of circumstances" such that a third party should be permitted to raise discretionary

---

[16] For example, see Orders PO-3841, PO-3986, and PO-4023.
[17] See Order MO-3511, beginning at para. 42.

exemptions in the *Act.*

[96] As I stated above, it is my view that in this case, the appellant has not established that this is one of the "unusual circumstances" where it should be permitted to raise discretionary exemptions where the ministry has not done so.

[97] Finally, I note that I have also considered Order PO-2500, which the appellant relied on as support for its assertion that sections 16 and 20 apply to the information at issue. While the appellant is correct that the section 16 exemption was applied to some of the records at issue in Order PO-2500, that case is not analogous to the current one. The institution in Order PO-2500 applied the discretionary exemption. This was not a case where a third party was seeking to apply a discretionary exemption and therefore it is not relevant.

[98] In circumstances where the appellant has not offered sufficient evidence to demonstrate that there is something unique, unusual or rare about the circumstances of this appeal, I find that it is not permitted to raise the discretionary exemptions in sections 16, 18(1) or 20 of the *Act.*

[99] Given my findings that section 17(1) does not apply and that the appellant is not permitted to raise the discretionary exemptions in sections 16, 18(1) or 20 of the *Act*, it is not necessary for me to consider whether the public interest override at section 23 of the *Act* applies to the records.

ORDER:

1. I uphold the ministry's decision to partly disclose the records to the requester. The appeal is dismissed.

2. I order the ministry to disclose the severed records to the requester by **November 24, 2020** but not before **November 19, 2020**.

3. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the requester.

4. The timeline noted in order provision 2 may be extended if the ministry is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any requests for extension.

Original signed by: October 19, 2020

Meganne Cameron
Adjudicator