

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4079

Appeal PA18-158

Ministry of Natural Resources and Forestry

October 29, 2020

**Summary:** This order deals with an access request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Natural Resources and Forestry (the ministry) for records relating to a named individual and a specified business. The ministry granted access, in part and withheld other records either in whole or in part, claiming a number of exemptions, including a number of discretionary exemptions, as well as the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy). The requester did not appeal the ministry's access decision. A third party (now the appellant) appealed the ministry's access decision, claiming that all of the records relating to him are exempt under sections 17 and 21(1). In this order, the adjudicator upholds the ministry's decision, in part. She finds some personal information relating to the appellant is exempt from disclosure under section 21(1) that had not been previously withheld. The ministry's access decision with respect to section 17(1) is upheld. The ministry is ordered to disclose the records at issue to the requester.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 17(1) and 21(1).

### OVERVIEW:

[1] This order disposes of the issues raised in response to an appeal of an access decision made by the Ministry of Natural Resources and Forestry (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for records relating to a named individual and a specified business.

[2] The ministry notified third parties about the request to seek their views on the

disclosure of the records involving the interests of these third parties. One of the third parties responded to the ministry, objecting to the disclosure of the records relating to them. The ministry subsequently issued an access decision to the requester granting access, in part, to the records. The ministry withheld other records either in whole or in part, claiming the application of a number of exemptions including the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemptions in sections 13 (advice or recommendations), 14 (law enforcement), 18 (economic and other interests), 19 (solicitor-client privilege), 20 (threat to safety or health) and 21.1 (species at risk).

[3] The third party who had objected to the disclosure of the records (now the appellant) appealed the ministry's decision to this office. The requester did not appeal the ministry's access decision.

[4] During the mediation of the appeal, the appellant, through his representative, took the position that all of the records relating to them should not be disclosed to the requester, relying on the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*.

[5] The requester advised that they wished to pursue access to the records. As the requester did not appeal the ministry's access decision, the only exemptions remaining at issue in this appeal are sections 17(1) and 21(1) to all of the records relating to the appellant.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator assigned to the appeal sought and received representations from the ministry, which were shared with the appellant. The adjudicator then sought representations from the appellant, who did not provide representations, despite being contacted, through his representative, by staff of this office to inquire if representations would be provided. The file was then transferred to me to continue the inquiry.

[7] For the reasons that follow, I uphold the ministry's access decision, in part. I find that the personal information I found in the records, which had not been withheld, is exempt under section 21(1). I also uphold the ministry's access decision with regard to the application of section 17(1). The ministry is ordered to disclose the records at issue to the requester.

## **RECORDS:**

[8] There are approximately 570 pages of records remaining at issue, consisting of email correspondence, including attachments such as maps, photographs, a receipt and a business proposal.

[9] To be clear, the issues to be determined in this appeal relate to the possible application of the mandatory exemptions in sections 17(1) and 21(1) to the portions of

the records relating to the appellant that the ministry decided to disclose to the requester. The portions of these records that were withheld by the ministry are not at issue.

## **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 17(1) apply to the records?

## **DISCUSSION:**

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

[10] 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;

[11] 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.<sup>1</sup>

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

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(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.

[13] 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.<sup>2</sup> 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.<sup>3</sup> To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

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<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

### ***Representations***

[14] The ministry submits that it undertook a careful record-by-record review of the records at issue, and claimed the application of the personal privacy exemption in section 21(1) to the personal information in them. As previously stated, the appellant did not provide representations in this appeal.

### ***Analysis and findings***

[15] I have reviewed the information at issue for which the appellant has claimed the application of section 21(1), and I find that, with one exception, this information does not qualify as "personal information." The records consist of communications between the appellant, in his professional capacity and ministry staff, in their professional capacity. Further, I find that to the extent the records in their entirety contain the personal information of a number of identifiable individuals, this information, with one exception, has already been withheld by the ministry under section 21(1). The sole exception is the appellant's personal email address, which is located at the bottom of page A0308739\_5- 000518,<sup>5</sup> which is a cover page to a business plan prepared by the appellant. I find that the appellant's personal email address qualifies as his personal information, as it falls within paragraph (d) of the definition of "personal information" in section 2(1) of the *Act*.

[16] I will now consider whether the appellant's personal email address is exempt from disclosure under section 21(1).

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

[17] 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.

[18] 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.

[19] If the information fits within any of paragraphs (a) to (e) of section 21(1), it is not exempt from disclosure under section 21. Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[20] Sections 21(2) and (3) help in determining whether disclosure would or would

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<sup>5</sup> This page is also referred to as page 154 of 570, located on a CD entitled "third party records" that was provided to this office by the ministry.

not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[21] 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. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the “public interest override” at section 23 applies.<sup>6</sup>

### ***Representations***

[22] The ministry submits that it specifically considered the possible application of the mandatory exemption in section 21(1) of the *Act*, and this is reflected in its decision to withhold certain records or portions of records on this basis. The ministry acknowledges that there may be facts or circumstances known only to the appellant that may assist in determining whether further information contained in the records falls within the exemption in section 21(1). The ministry submits that it made best efforts based on the limited information available at the time of its decision and that it is in no better position now than at the time of the access decision, given that the appellant has not submitted information or analysis on the issue, other than making a bare assertion (during mediation) that the exemption in section 21(1) applies to all of the records.

[23] As previously stated, the appellant did not provide representations in this appeal.

### ***Analysis and findings***

[24] The information at issue is the appellant’s personal email address. Upon my review of the content of the records at issue, I find that none of the presumptions in section 21(3) apply. I also find that, in the absence of evidence before me, none of the factors in section 21(2), either weighing in favour of disclosure or against disclosure, apply. In addition, I find that none of the exceptions in section 21(1) or 21(4) apply. 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.<sup>7</sup> I therefore conclude that the appellant’s personal email address is exempt from disclosure under the personal privacy exemption in section 21(1).

### **Issue C: Does the mandatory exemption at section 17 apply to the records?**

[25] The appellant took the position that section 17(1) applies to the records at issue, although he did not specify which subsection of section 17(1) applied. Section 17(1)

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<sup>6</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

<sup>7</sup> Orders PO-2267 and PO-2733.

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.

[26] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>8</sup> 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.<sup>9</sup>

[27] 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.

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<sup>8</sup> *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.*).

<sup>9</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

**Part 1: type of information**

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

*Commercial information* is information that relates solely to the buying, selling or exchange 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.<sup>10</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>11</sup>

**Part 2: supplied in confidence**

[29] 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.<sup>12</sup>

[30] 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.<sup>13</sup>

[31] 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.<sup>14</sup>

[32] 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; and
- treated consistently by the third party in a manner that indicates a concern for confidentiality; and
- not otherwise disclosed or available from sources to which the public has access; and

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<sup>10</sup> Order PO-2010.

<sup>11</sup> Order P-1621.

<sup>12</sup> Order MO-1706.

<sup>13</sup> Orders PO-2020 and PO-2043.

<sup>14</sup> Order PO-2020.



- prepared for a purpose that would not entail disclosure.<sup>15</sup>

### ***Part 3: harms***

[33] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.<sup>16</sup>

[34] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>17</sup> 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 records themselves and/or 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*.<sup>18</sup>

### ***Representations***

[35] The ministry submits that it took a careful record-by-record review of the records, specifically taking into consideration the possible application of the mandatory exemption in section 17(1), and that it applied the exemption to some records in whole and others in part. The ministry further submits that it is possible, in the absence of any specific facts or explanations from the appellant, that it failed to appreciate the nature or significance of certain information or the potential harm that could result from disclosure. However, the ministry argues, it is in no better position now than at the time of the access decision, to assess any further information or analysis from the appellant, other than his bare assertion that the records are exempt in their entirety under section 17(1).

[36] As previously stated, the appellant did not provide representations in this appeal.

### ***Analysis and findings***

[37] As previously noted, and to be clear, the ministry withheld a number of records under section 17(1), which are not at issue in this appeal. I have taken the position of the parties into consideration, in addition to my review of the records, and I find that while part one of the three-part test in section 17(1) has been met, the other two

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<sup>15</sup> Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

<sup>16</sup> *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>17</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>18</sup> Order PO-2435.

required parts have not been met. As all three parts of the test must be met in order for the exemption to apply, I find that the remaining information at issue is not exempt under section 17(1).

[38] Concerning the first part of the test, I find that it has been met because the records contain commercial information. In particular, the records relate to the buying and selling of both merchandise and services, between the parties communicating in the records, as part of the appellant's business.

[39] Conversely, I find that neither part two nor part three of the three-part test have been met. I have no evidence before me that the information issue was "supplied in confidence" by the appellant to the ministry, nor is it evident from my review of the records. Similarly, the appellant has not met the burden of proof regarding the harms contemplated in section 17(1), due to the absence of evidence before me. As well, upon my review of the remaining information at issue, it is not evident that the disclosure of this information would result in the harms in section 17(1).

[40] As a result, I uphold the ministry's access decision with respect to the application of section 17(1) and dismiss this portion of the appellant's appeal.

## **ORDER:**

1. I uphold the ministry's decision, in part. I order the ministry to disclose the records to the requester based on its access decision by **December 4, 2020** but not before **November 30, 2020**, with the exception of the appellant's personal email located at the bottom of page A0308739\_5-00518, which is to be withheld.
2. I reserve the right to require the ministry to provide copies of the records it discloses to the requester to this office.
3. The timelines noted in order provisions 1 and 2 may be extended if the ministry is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed by \_\_\_\_\_

Cathy Hamilton  
Adjudicator

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October 29, 2020