Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4084

Appeal PA17-550

Ministry of Natural Resources and Forestry

November 10, 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, relying on the mandatory third-party information exemption in section 17(1) of the *Act*. 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) of the *Act*. 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.

Orders Considered: Orders PO-3158, PO-3841, and PO-4075.

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 hydro-electric generating facility (referred to below as the Bala Falls Project, or the project).

[2] The ministry notified a third party of the request, and subsequently issued its decision, granting the requester partial access to the responsive records. The ministry denied access to some of the information, claiming the application of 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 this office.

[4] During the mediation of the appeal, the mediator had discussions with the requester, the appellant and the ministry. The appellant asserted that all of the responsive records should be withheld, claiming the application of the mandatory exemption in section 17(1), as well as the discretionary exemptions in 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) of the *Act*. The requester continued to seek access to the records, as per the ministry's decision.

[5] Further mediation was not possible and the appeal moved to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry pursuant to the *Act*. Representations were sought and received from all of the parties. Some portions of the appellant's representations were withheld from the requester, as they meet this office's confidentiality criteria set out in *Practice Direction Number 7*. In its representations, the appellant advised that it is no longer claiming the exemption in section 14(1). Consequently, section 14(1) is no longer at issue. The appellant also confirmed with this office during the inquiry that it was no longer opposed to the disclosure of records 1 to 9, 11, 12, 14 and 16-20. As a result, those records are no longer at issue.

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

[7] 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:

[8] As I noted above, the appellant confirmed with this office during the inquiry that it was no longer opposed to the disclosure of records 1 to 9, 11, 12, 14 and 16-20. As a result, those records are no longer at issue. There are 67 pages of records remaining at issue. The appellant describes these records in Appendix C of its representations as

follows:

Record Number	Description	Page Numbers	Exemption(s) Claimed
10	Statement of Qualifications	1207-1223; 1229-1235; 1339-1431	Sections 16, 17(1), 18(1), and 20
13	Emails with the ministry attaching insurance information	1782-1785; 1787; 1793	Section 17(1)
15	License of Occupation	1861-1882	Sections 16, 17(1), 18(1), and 20
21	License of Occupation	3184-3196	Sections 16, 17(1), 18(1) 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?

[9] 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.

[10] 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]

[11] 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

[12] 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]
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> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences

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[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.

> 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.[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]

The parties' representations

[13] 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).

[14] The ministry says that some of the records contain information that might meet the first part of the 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.

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

Findings and analysis

[15] 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, commercial or financial information for the purposes of section 17(1) of the *Act*.

[16] Record 10 is a "Statement of Qualifications" related to the development of the Bala Falls Project. It contains corporate and business-related information about the appellant, and other related companies, and was clearly provided to the ministry as part of a proposal to provide a service or product. I am satisfied that this qualifies as commercial information. Record 10 also contains technical information that relates to the construction and/or operation of the Bala Falls Project and includes measurements, specifications, designs and/or plans about the infrastructure, components, and/or mechanics of the project.

[17] Record 13 is comprised of email communications and attached documentation about the appellant's application for a license and its insurance in relation to the project. I am satisfied that Record 2 contains both commercial and financial information about the appellant.

[18] The appellant describes each of records 15 and 21 as a "License of Occupation." The licenses relate to fees paid by the appellant to the ministry for permission to use land in a particular manner. I have reviewed both of these records and am satisfied that they qualify as commercial information for the purposes of part 1 of the three-part test in section 17(1).

Part 2: supplied in confidence

Supplied

[19] 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]

[20] 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

[21] 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

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

provincial government department. Specifically with regard to records 15 and 21, the appellant says that the information at issue was supplied in confidence because disclosure of the information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information it supplied to the ministry. It also made a confidential representation that, in summary, and without revealing the specifics of the confidential representation, revealing information in records 15 and 21 would reveal specifics about the project that it supplied to the ministry.[10]

[22] 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."

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

Findings and analysis

[24] For the reasons that follow, I find that all of the information in Record 10 was supplied to the ministry. I find that some of the information in Record 13 was supplied to the ministry and that none of the information in records 15 or 21 was supplied to the ministry.

[25] As described in the chart above, Record 10 is a Statement of Qualifications. Based on my review of this record, and the introductory letter on page two, it is clear to me that the appellant gave the statement to the ministry in order to be considered for the proposed project. Therefore, I find that Record 10 meets the first part of the two-part test in the second part of the section 17(1) test.

[26] The first four pages of Record 13 are comprised of email communications between the ministry and the appellant about the insurance information the appellant submits is attached to those emails. The communications are about information that the ministry is requesting the appellant provide and whether and how it will provide that information. In my view, there is no information supplied in the four pages of email communications and therefore these pages do not meet the first part of the two-part test in section 17(1).

[27] However, I find that the last two pages of Record 13 were supplied. These two pages are comprised of documents that the appellant refers to as "insurance information." It is clear to me from the emails and from reviewing the insurance information that the appellant provided this information to the ministry and therefore I have no trouble finding that it was supplied.

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[10] The appellant's specific representation was not shared with the other parties to the appeal because this office concluded that it met the confidentiality criteria set out in this office's *Practice Direction Number 7*.

[28] As noted above, records 15 and 21 are each described by the appellant as a "License of Occupation." I have reviewed these records and while I cannot reveal the content, each record is signed by both the ministry and the appellant and consists of terms and conditions to which they have both agreed. Based on my review of records 15 and 21, I am satisfied that the terms and conditions in the licenses were negotiated by the parties and that these records are in effect, a type of contract.

[29] As previous orders of this office have stated, 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 a 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.[11]

[30] As noted above, an exception to this general rule is where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by an affected party to an institution. This is called the "inferred disclosure" exception.

[31] The appellant makes a general assertion that the inferred disclosure exception applies, but it does not identify what specific information in the licenses the exception applies to. It specifies in its confidential representation only that revealing the information in records 15 and 21 would reveal information it says it supplied to the ministry about the proposed project.

[32] I have reviewed both of the licenses in detail and I am unable to identify any information that would permit an accurate inference about non-negotiated information to be made. Without further detail from the appellant about what specific information in the licenses it believes would permit accurate inferences to be drawn about information that is supplied, I find that the inferred disclosure exception does not apply and the information in records 15 and 21 was not supplied. To be clear, I am not persuaded by the appellant's confidential representation that revealing the information at issue in records 15 and 21 would reveal information that it supplied to the ministry about the project. As a result, the first part of the two-part test in section 17(1) has not been met for these records.

[33] In summary, I find that Record 10 and the last two pages of Record 13 were supplied. I find that the first four pages of Record 13 and records 15 and 21 were not supplied. As all three parts of the section 17(1) test must be met in order for the

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[11] See: Order PO-3116 and *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing*).

section 17(1) exemption to apply, these records are not exempt under section 17(1) and I will not consider them further at this time. However, the appellant asserts that it should be permitted to raise the discretionary exemptions in sections 16, 18(1) and 20 of the *Act* for all of the records at issue and I will consider those assertions below.

Supplied in confidence

[34] In order to satisfy the "in confidence" component of part two of the three-part test, 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.[12]

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

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

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

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

d. prepared for a purpose that would not entail disclosure.[13]

The parties' representations

[36] 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 [the appellant], [the appellant's contractors], the ministry, and other related departments of government.

[37] The appellant repeats the test set out above in this decision at paragraph 28 for

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

determining whether information was supplied in confidence and says that it meets this criteria because:

a. 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

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

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

[39] 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.

[40] 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 [the Act] 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.

[41] 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.

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

[43] In its reply representations, the appellant submits that it provided detailed record-by-record evidence and argument 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 22 to 24 of its original representations (which I have summarized above at paragraphs 37 and 38 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.

[44] 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.

[45] 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.*"

Findings and analysis

[46] I concluded above that Record 10 and the last two pages of Record 13 were supplied to the ministry. For the reasons that follow, I also find that the information in these records was supplied in confidence.

[47] Without revealing the content of the Record 10, the Statement of Qualifications, I can say that there is a paragraph on page nine that specifically references confidentiality. Based on the wording of this paragraph, I accept that the appellant would have had a reasonably held belief that the information it provided was being given on the understanding that it would be kept confidential. As a result, I find that the second part of the two-part test in section 17(1) has been met for Record 10.

[48] Next, with respect to the insurance information on last two pages of Record 13, I also accept that the appellant would have had a reasonably held belief that it was providing this information to the ministry in confidence. I base this finding on the email communications in the four pages preceding the insurance information that remains at issue. While I cannot reveal the content of the email communications, it is clear that the appellant was concerned about confidentiality and in my view there would have been an implicit understanding between the ministry and the appellant that the information the appellant was providing was being given to the ministry in confidence. Therefore, I find that the second part of the two-part test in section 17(1) has been met for these two pages.

Part 3: harms

[49] 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.[14]

[50] 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.[15] 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.*[16]

The parties' representations

[51] The appellant begins its representations by stating that with regard to the "harms" part of the section 17(1) test, it needs only "to establish that the future risk is somewhere between possible and probable." The appellant refers me to the Supreme Court of Canada's decision in *Merck Frosst Canada Ltd. V. Canada (Health)* and submits that it does not need to prove there is a 50% or more risk of a consequence occurring.[17] It says that there could be less than a 50% risk of a consequence occurring and it would still meet the third part of the section 17(1) harms test.

[52] The appellant says that in general, the disclosure of the information at issue could reasonably be expected to:

- significantly prejudice its competitive position by revealing sensitive and detailed technical and/or scientific drawings and information, or commercial and/or financial information to market competitors;
- jeopardize or delay the building of the Project;
- prevent it from fulfilling many of its contractual obligations;
- result in a waste of resources which have already been used to advance the project to date; and
- expose it to risk of undue financial loss for both a breach of contract and a diminution of profits.

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[14] *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 S.C.R. 23 (*Merck*).
[15] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.
[16] Order PO-2435.
[17] 2012 SCC 3 (*Merck).*

[53] Specifically with regard to Record 10, the appellant says that disclosing the information at issue would provide insight into its competitive position and its marketing and pricing strategies, and thereby would likely result in significant prejudice to its competitive position as well as undue economic losses caused by a loss of future opportunities and future partnerships with other construction and development partners.

[54] With regard to Record 13, the appellant says that the release of the insurance information would be harmful and prejudicial to its economic interests because it would provide details about the operation of its business that would be valuable to competitors. It says that it would also allow a competitor to infer information about the appellant's current business and disadvantage the competitive position of the appellant for prospective customers.

[55] The ministry says that the appellant has not provided any evidence or argument about how the disclosure could reasonably be expected to result in any of the harms enumerated in section 17(1)(a) through (d). The ministry submits that the appellant has not satisfied the third part of the test, showing that the prospect of disclosure will give rise to a reasonable expectation of harm or loss. The ministry says that it is well established that a party resisting disclosure must provide more than mere speculation. It asserts that the appellant has not done so to date.

[56] The requester's representations do not specifically address part three of the section 17(1) test.

[57] In reply, the appellant reiterates its initial representations and provides an affidavit from its Vice-President in support of its submissions regarding the harms it says it would suffer if the information at issue were disclosed.

[58] The Vice-President attests that disclosing the responsive records would cause serious and irreparable harm to the appellant because the renewable energy industry is very competitive, particularly in Ontario. The Vice-President says that there are always potential competitors seeking to replace each other or take market shares.

[59] The Vice-President says that disclosing the information at issue would severely prejudice the appellant's economic interests and competitive position and could result in undue financial loss. In a portion of his affidavit that this office determined should be kept confidential because it met the IPC's confidentiality criteria *in Practice Direction Number 7*, the Vice-President attested, in general, without revealing the specific confidential representation, that some of the information that it says should be withheld was the result of its negotiations with the ministry and could be used by the appellant's competitors to their advantage.

[60] The Vice-President also says that the release of the information at issue would prematurely reveal construction plans, policies, decisions and negotiations that could lead to public confusion and misinformation, thereby further delaying the building of the

proposed project and significantly jeopardizing the appellant's ability to fulfil its existing contractual obligations to it contractors and to adhere to construction timelines.

[61] The Vice-President attests that there has been vocal public resistance to the project and that disclosure of the information at issue would likely be exploited by activists who are closely monitoring the commencement of the project.

[62] Finally, in another confidential portion of the Vice-President's affidavit, and without revealing the specifics of that representation, the Vice-President says that revealing the information would cause the appellant undue losses in a potential future deal that it described confidentially, either by the disclosure of the information itself, or by delays caused to the project due to the disclosure of the information.

Analysis and findings

[63] For the reasons that follow, I find that the appellant has not provided sufficient evidence to establish that the harms contemplated by sections 17(1)(a) or (c) could reasonably be expected to result from the disclosure of Record 10 or the last two pages of Record 13.

[64] First, I do not accept the appellant's general assertion that the disclosure of the information at issue could jeopardize or delay the building of the project, or that it might prevent the appellant from fulfilling its contractual obligations, or result in a waste of resources. According to the Bala Falls Project website, the hydro-electric generating facility has been completed and is now operational.

[65] During the course of this appeal, I wrote to the appellant, noting that the project appeared to be completed and operational. I pointed out that there was a substantial amount of information about the project online on the website and I invited the appellant to make additional representations in response. The appellant provided no additional representations. Given that the Bala Falls Project is now operational, I reject the appellant's representations that revealing the information at issue could jeopardize or delay the building of the project or cause it financial loss due to breach of contract or diminution of profits.

[66] I also do not accept the appellant's assertion that disclosing Record 10 would provide insight into its competitive position or marketing and pricing strategies. I have reviewed Record 10 in detail and without revealing the contents, it is generally comprised of the following items:

- cover pages;
- a letter;
- a table of contents;
- various administrative forms;

- general information about the appellant and other related companies;
- high-level descriptions of proposed projects; and
- tables, maps and/or diagrams.

[67] The appellant has not specified what specific information in Record 10 would provide insight into its competitive position or marketing and pricing strategies. Without further explanation from the appellant, I am unable to connect any of the information in the Statement of Qualifications to marketing or pricing. Furthermore, I do not see how the disclosure of any of the information in the Statement of Qualifications could harm the appellant's competitive position or cause undue losses or a loss of future opportunities.

[68] With regard to Record 13, I also fail to see how its release could be harmful and/or prejudicial to the appellant's economic interests. The appellant said that releasing the information would provide details about the operation of its business that would be valuable to competitors and that competitors could infer information about the appellant's current business and disadvantage the competitive position of the appellant for prospective customers. I disagree. The remaining information in Record 13 is comprised of a cheque and an outdated Certificate of Insurance. The certificate expired in 2017 and the appellant has not explained how any of this information could be harmful or prejudicial to its economic interests.

[69] I note that in Orders PO-3158 and PO-3841, adjudicators concluded that affected parties' Certificates of Insurance did not provide the kind of insight into their current and proposed business strategies that could reasonably be expected to lead to the harms contemplated by section 17(1). Similar to these findings, I cannot identify any information in the last two pages of Record 13 that would be valuable to a competitor or allow it to infer information about the appellant's current business.

[70] I am also not persuaded by the evidence in the Vice-President's affidavit that the types of harms contemplated by section 17(1)(a) or (c) would reasonably be expected to occur if the information in records 10 or 13 was disclosed. While I accept that the renewable energy industry may be competitive, the Vice-President has not explained how or why any of the information in the records at issue would be useful to a competitor.

[71] With regard to the portion of his affidavit that this office determined should be kept confidential, that some of the information was the result of its negotiations with the ministry and could be used by the appellant's competitors to their advantage, I have been unable to identify what specific information in records 10 or 13 the Vice-President is referring to.

[72] In response to the Vice-President's assertion that the release of the information at issue would prematurely reveal construction plans and premature policies, decisions

and negotiations that could lead to public confusion and misinformation, thereby further delay the building of the Bala Falls Project, I refer to my reasons above at paragraph 65.

[73] I have considered the Vice-President's assertion that there has been vocal public resistance to the Bala Falls Project and that disclosure of the information at issue would likely be exploited by activists who are closely monitoring the commencement of the Bala Falls Project. In my view, there is much more detailed information available online on the project's website and I am therefore not persuaded by this assertion.

[74] Finally, with regard to the remaining confidential portion of the Vice-President's affidavit, that revealing the information would cause the appellant undue losses in a potential future deal that it described confidentially, I note that neither the Vice-President, nor the appellant, have provided sufficient evidence about this potential deal that could permit me to make a finding on that basis. Furthermore, neither the Vice-President, nor the appellant, identified what specific information in the records could cause the type of losses it refers to in its confidential representations. As a result, I do not find these representations to be of any assistance to the appellant.

[75] I also note the appellant's reference to the *Merck* case. In that case, the Supreme Court of Canada concluded that the harm must be well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure would, in fact, result in such harm. In my view, there is nothing in that decision which would necessitate a departure from the requirement that a party provide sufficient evidence to support its claim that section 17(1) applies.[18] In this case, I find that the appellant has provided insufficient evidence in support of its claim that section 17(1) applies, and I therefore find that the exemption does not apply to Record 10, nor does it apply to the last two pages of Record 13. As such, I will dismiss the appellant's section 17(1) claim.

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

[76] 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.

[77] 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,

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[18] See also, Order PO-3986.

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.

[78] A number of past orders have considered the issue of whether a party other than the institution can claim a discretionary exemption.[19] 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 parties' representations

[79] I begin by noting that the parties to this inquiry have made nearly identical representations to those that the parties made for appeal PA17-551, which I dismissed in Order PO-4075. Below, I have reproduced my summary of the parties' representations. I have, however, considered the application of these representations specifically to the information at issue in this appeal, which is records 10, 13, 15 and 21.

The appellant's representations

[80] 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."

[81] 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.

[82] 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 Canada and other countries.

[83] The appellant then proceeds by offering arguments in support of its submission

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[19] See Orders P-1137, PO-3601 and PO-3841.

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.

[84] 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.

[85] 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 in appeal PA17-36.

[86] 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.

[87] 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.

[88] 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:

a. 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;

b. 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;

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

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

[89] 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

[90] 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.

[91] 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

[92] 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 provided reasons for her decision that the third-party appellant in that appeal did not establish that it was a rare exception to the general presumption that affected parties are not entitled to raise the possible application or discretionary exemptions.

The appellant's reply

[93] 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.

[94] 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.

[95] 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.*

[96] 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

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

[98] First, as I noted in Order PO-4075, despite 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. As I said in Order PO-4075, instead of explaining what specifically makes the Bala Falls Project unique, such that the criteria for unusual circumstances would be met, the appellant has focused on why it believes the discretionary exemptions apply.

[99] As previous orders of this office have stated, the general rule is that the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record.[20] In Order P-1137, Adjudicator Fineberg made the following comments about whether an affected party

[20] Orders PO-3601 and PO-4075.

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.
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> 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*.

[100] The ministry says that it reviewed all of the records at issue in this appeal and considered all of the discretionary exemptions the appellant asserts it should be permitted to raise and found no basis to conclude that there is potential for the specific types of harm which the respective exemptions are intended to prevent. The ministry submits that the circumstances are not such that they warrant a third party claim for these discretionary exemptions.

[101] I have considered the appellant's representations in conjunction with the records at issue in this appeal and I find that it has not established that there are unique circumstances that provide a basis for a finding that the appellant should be permitted to raise the discretionary exemptions. As I said in Order PO-4075, it is my view that 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.

[102] As I noted in Order PO-4075, 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.

[103] Following Order PO-3841, two further orders, Order PO-3986 and PO-4023 were released, as well as my Order PO-4075. These orders dealt with six other 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 each of these orders, the adjudicators concluded that the third-party appellants had not established that they should be permitted to raise any of the discretionary exemptions.

[104] 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.

[105] I also note that in its representations, the appellant referred me to a third-party appellant's evidence in appeal PA17-36. Appeal PA17-36 was another appeal from a third party relating to the same project, with similar records. 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 appeal 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.[21] The appellant advised this office that it continued to object to the disclosure of records 10, 13, 15 and 21. 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.

[106] 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.[22] 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 exemptions in the *Act.*

[107] 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.

[108] Finally, as I noted in PO-4075, I 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.

[109] I have considered all of the appellant's representations regarding its assertion that it should be permitted to raise the discretionary exemptions and I have specifically reviewed records 10, 13, 15 and 21 with a view to identifying any information in those records that would suggest there is something unique, unusual or rare about the circumstances of this appeal. I find that there is not. The appellant has not offered sufficient evidence to demonstrate that there is something extraordinary about the circumstances of this appeal, and I therefore find that it is not permitted to raise the discretionary exemptions in sections 16, 18(1) or 20 of the *Act.*

[110] 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

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

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 all of the severed records to the requester by **December 16, 2020** but not before **December 11, 2020**. For clarity, this includes the records that the appellant confirmed it no longer opposes disclosure of, records 1 to 9, 11, 12, 14 and 16-20, as well as records 10, 13, 15 and 21.

3. In order to verify compliance with order provision 2, 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: November 10, 2020

Meganne Cameron
Adjudicator