Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4258

Appeal PA17-377-3

Ministry of Finance

April 29, 2022

Summary: The Ministry of Finance (the ministry) responded to three related requests for access to records relating to an artificial intelligence project, issuing one decision. The ministry disclosed some information but withheld the remainder under the mandatory exemptions in section 12(1) (cabinet records), 17(1) (third party information), 21(1) (personal privacy) and the discretionary exemptions at section 13(1) (advice or recommendations), 15 (relations with other governments) and 18(1) (economic and other interests of Ontario). In this order, the adjudicator finds that sections 12(1) and 13(1) do not apply to exempt the information claimed but he upholds the other exemptions claimed, in part, and orders the ministry to disclose information withheld under these exemptions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of "personal information"), 12(1), 13(1), 15, 17(1), 18(1) and 21(1).

Orders and Investigation Reports Considered: Orders MO-2363, P-470, PO-2225, PO-2435, PO-2569, PO-2780, PO-3157, PO-4047 and R-980015.

Cases Considered: *Ontario* (*Workers' Compensation Board*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (1998), 41 OR (3d) 464 (ONCA); *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23; *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII).

OVERVIEW:

[1] The Ministry of Finance (the ministry) received three related requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records

relating to an artificial intelligence project. The requests sought all emails, phone records, handwritten notes, documents and memos between seven named individuals, relating to a named organization for various specified time periods.

[2] In the ministry's response, it combined the three access requests and issued one decision granting the appellant partial access to the responsive records. In its decision, the ministry relied on the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), and the discretionary exemptions in sections 13(1) (advice or recommendations), 15 (relations with other governments) and 18(1) (economic and other interests) to withhold access to portions of the records.

[3] The requester, now the appellant, was not satisfied with the ministry's decision and appealed it to the Information and Privacy Commissioner's Office of Ontario (the IPC).

[4] Mediation of the appeal was attempted. During mediation, the appellant confirmed that she did not wish to pursue access to the withheld portions of the records that were identified as not responsive to the request, or to information that related to individuals' vacation schedules, personal email addresses and personal phone numbers withheld under section 21(1) of the *Act.*

[5] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry under the *Act*. The original adjudicator assigned to this appeal sought and received representations from the ministry. Subsequently, this file was assigned to myself and I sought representations from the appellant, affected parties[1] and the named organization. Representations that were received were shared in accordance with the IPC's *Code of Procedure*. The ministry was provided with a complete copy of the appellant's representations and was invited to reply, however, the ministry referred to its initial submission and did not make further representations.

[6] During the inquiry, the ministry indicated that it was also relying on the mandatory exemption at section 12(1) (cabinet records) and as a result, this issue was added to the scope of the appeal. The appellant was invited to provide representations on the application of this exemption.

[7] In this order, I partially uphold the ministry's claim that the exemptions under sections 21(1), 12(1), 13(1), 15, 17(1) and 18(1) apply to the records at issue and, I order the ministry to disclose the information found not to be exempt under these exemptions.

[1] The affected parties include individuals whose names appear where the ministry claimed the personal privacy exemption and other affected parties who appear or are referenced in the withheld information. This includes individuals sending and receiving emails in several email chains.

RECORDS:

[8] The 428 pages of records that remain at issue consist of email correspondence and other documents. As noted, there were three original requests: Request A-17-030, A-17-114 and A-17-129. A description of the specific pages of records that are in dispute is set out in the appendix to this order.

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?

D. Does the mandatory exemption at section 12(1) relating to Cabinet deliberations apply to the record?

E. Does the discretionary exemption at section 13(1) apply to the records?

F. Does the discretionary exemption at section 15 apply to the records?

G. Does the discretionary exemption at section 18(1) apply to the records?

H. Did the institution exercise its discretion under section 13(1), 15 and/or 18(1)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Background

[9] The ministry notes that the appellant filed the following access requests: A-17-030, A-17-114, and A-17-129 requesting records relating to an artificial intelligence project. In particular, the appellant sought information between seven named individuals (some of the affected parties), relating to a named organization for various periods of time.

[10] During the various time periods specified in the requests, the Ontario government was working with partners, including the Federal government and more than 30 private sector companies, to establish the named organization for artificial intelligence. The named organization launched in March 2017. According to the ministry, the Ontario government invested in the organization to: (1) encourage more investment, research and development, and create jobs; (2) retain, train and attract talent; (3) provide businesses with made-in-Ontario artificial intelligence tools, talent

and research; and (4) promote exports of homegrown products and services enabled through artificial intelligence. It submits that the named-individuals in these requests were founders of the organization and/or leading experts in this area.

[11] In her representations, the appellant submits that her access to information requests focus on information, and particularly email communications, in the possession of key Ontario government officials (two of the named individuals) involved in the foundation of a private not-for-profit artificial intelligence research company, the named organization, which received significant government and private funding.

[12] The appellant submits that the named organization holds itself out as: "an independent, not-for-profit focused on research in machine and deep learning, [the named organization] plays a unique role as a neutral third party to bring industry consortia together to cooperate on mutual challenges that affect Canadians."

[13] The appellant submits that public scrutiny and accountability are required into the roles played by the key government officials involved in the foundation of the named organization; into the significant government funding given to it; and, in the subsequent private business opportunities pursued by these same government officials, with supporters and private funders of the named organization.

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

[14] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates.

[15] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

[16] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[2]

[17] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[3] See also sections 2(3) and 2(4), which state:

> (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.

[2] See the definition of "record" in section 2(1).
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

> (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.

[18] 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.[4]

[19] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[5]

[20] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

[21] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[7]

[22] Section 2(1) of the *Act* gives a list of examples of personal information:

> "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,

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[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, cited above.
[7] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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

[23] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[8]

[24] Sections 2(2), (3) and (4) of the *Act* exclude some information from the definition of personal information. Sections 2(3) and (4) are described above.

[25] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.[9] Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[10]

[26] In this appeal, there has been no claim that the records contain the personal information of the appellant and I find that they do not.

Representations

[27] In its representations, the ministry does not specifically address whether the information it withheld under section 21(1) is personal information within the meaning of section 2(1) of the *Act*. However, it describes the information it claims is personal information in various categories as follows:

- Emails or parts of emails discussing personal opinions
- Emails or part of emails regarding qualification of candidates for board and other positions at the named organization
- Emails or parts of emails with individual's employment and educational history

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[8] Order 11.

[9] Under sections 47(1) and 49 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

[10] See sections 21(1) and 49(b).

- Emails or part of emails with personal evaluations for positions at the named organization

- Emails or parts of emails expressing opinion or evaluation.

[28] In her representations, the appellant questions whether all of the information the ministry withheld qualifies as personal information. The appellant refers to the ministry's representations concerning emails discussing personal opinions, noting that the ministry states that this includes strategic positions supplied in confidence. The appellant submits that strategic positions do not qualify as personal information under the *Act*. The appellant also submits that the ministry's redactions are too sweeping. She refers to specific examples where entire pages are redacted including information in the subject and address fields of the emails. The appellant submits that this type of information cannot properly be characterized as personal information and should be disclosed. The appellant also refers to block paragraphs that are redacted and submits that only personal information within the meaning of "recorded information about an identifiable individual" should be redacted, not entire paragraphs which may contain personal information within them.

[29] Affected parties were also invited to provide representations in this appeal. Of the two that responded, neither specifically addressed whether the records contained personal information as defined in section 2(1).

Analysis and findings

[30] After my own review of the information withheld by the ministry, I find that some of it qualifies as personal information because it includes information that fits within paragraphs (d), (e), (f) and (g) of the definition of that term in section 2(1) of the *Act*. However, I do not find that all of the withheld information is personal information as defined under the *Act.* Based on my review, I find that some of the information was given in a business capacity and does not qualify as the personal information of an identifiable individual.

[31] In determining whether information relating to an individual is "personal information," the appropriate approach is to look at the *capacity* in which the individual is acting and the *context* in which their name appears. In Order PO-2225, the adjudicator considered the definition of "personal information" and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. The adjudicator posed two questions that help to illuminate this distinction:

> ... the first question to ask in a case such as this is: *"in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> ....

> The analysis does not end here. I must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[32] I agree with the reasoning in Order PO-2225 and will apply it in the circumstances of this appeal. I find that much of the information that the ministry claims is the personal information of affected parties is not actually personal information. I find that some of the information in the emails withheld by the ministry as personal opinions is actually an opinion given in a business context. In my view, disclosure of this information would not reveal something of a personal nature about the individual or reveal something that is inherently personal in nature.

[33] As a result, after my review of the information that the ministry claims is personal information because they are emails containing personal opinions and/or evaluations and also contain the employment history of an affected party, I find that the following pages of records do not contain the personal information of affected parties as claimed by the ministry:

> (Request A-17-030) at pages 53-54, part of pages 69-71[11], page 97, part of page 107, page 112, part of page 128, part of pages 132-133, part of pages 138-140, page 150, page 151, parts of page 157, page 56, page 60, pages 65-66, part of page 69, part of page 70, page 71, part of page 97, page 195-196, page 60, page 67-68, page 73, page 98,[12] page 153
>
> (Request A-17-114) part of the information at page 2, part of page 35, page 39, part of page 189, part of page 190, page 97, part of page 66, part of page 81, page 83, page 123, page 125,[13] page 202, part of page 215

[34] I find that the information in the abovementioned records is information that concerns an affected party (or parties) in a professional capacity and not a personal capacity and is therefore not considered to be "about" the individual. Also, I find that this same information does not reveal something of a personal nature about the individuals. As the identified pages of records do not contain personal information, this information cannot be exempt under the mandatory personal privacy exemption in section 21(1).

[35] I note that some of this information is also claimed to be exempt under sections 15, 17(1) and 18(1) and therefore, I will also consider the same information in the relevant issues below. However, for the information found at pages 56, 69-71, 128,

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[11] For parts of pages that do not contain personal information, they also contain other severances that consist of personal information and will be considered under section 21(1).
[12] Page 98 is a duplicate of page 73.
[13] The email at page 125 is a duplicate of the email at page 123.

151, 60, 65-66, 67-68, 73, 98, 153 and 196 of request A-17-030, and page 66, 81 and 202 of request A-17-114, where the ministry has not claimed that any further exemptions apply, I will order it to disclose this information to the appellant.

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

[36] After my determination above of what constitutes personal information, the remaining personal information in dispute is as follows:

- Emails or parts of emails discussing personal opinions located at page 1, 2, 50, parts of 69-70, part of 82, 85, 107, 121- 122, part of 125- 126, part of 132, part of 133, part of 138-140, part of 145, part of 150, part of 157, withheld under section 21(1)

- Email or part of email regarding qualification of candidates for board and other positions at the named organization at page 146, withheld by the ministry under section 21(1)

- Emails or parts of emails with individuals' employment and educational history at part of page 128 and 147-148, withheld by the ministry under section 21(1)

Relating to request A-17-114

- Emails or parts of emails with personal evaluations for positions at the named organization at part of page 35, 75, 99, parts of 189-190, withheld by the ministry under section 21(1)

- Parts of emails relating to the employment history of an individual at page 44, 48, 69, 186, 210, withheld by the ministry under section 21(1)

- Emails or parts of emails expressing opinion or evaluation at page 48, 68-70, 184, 186, 189- 190, part of 197-198, part of 202, part of 215, withheld by the ministry under section 21(1)

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

[38] 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.

[39] The information in this appeal does not fit within any of paragraphs (a) to (e) of section 21(1) of the *Act*. Affected parties were invited to provide representations and

the few that made submissions did not consent to the disclosure of their personal information. During the inquiry, the ministry provided me with the representations made by affected parties at the request stage. The non-confidential portions of these representations were provided to the appellant in order to respond.

Sections 21(2) and (3)

[40] The factors and presumptions at sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). Additionally, if any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy. None of the section 21(4) paragraphs are relevant in this appeal.

[41] 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.

[42] The ministry submits that the presumptions at section 21(3)(d) (employment or educational history) and section 21(3)(g) (personal recommendations or evaluations) apply to some of the personal information in the records.

[43] Sections 21(3)(d) and 21(3)(g) state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

Section 21(3)(d): employment or educational history

[44] The ministry submits that the information at page 128 and 147-148, pertaining to request A-17-030, and at page 44, 48, 69, 186, 210, pertaining to request A-17-114, relates to the employment and education history of an identifiable individual. It submits that the information in these emails is related to the individual's position, career history, job responsibilities, and other human resource related information which are normally associated with a person's employment history. It also submits that the withheld information is comprised of information that normally meet this presumption such as information contained in resumes, work histories and academic qualifications.

[45] The appellant submits that the description and reason for redaction provided by the ministry for some records include some information that would not be captured by section 21(3)(d), such as,

- Job descriptions

- Information relating to current employment
- Information relating to potential future employment.

[46] The appellant submits that if any of the redacted information contains any information meeting the above criteria the presumption does not apply.

Finding

[47] I have reviewed the various records where the ministry claims the presumption at section 21(3)(d) applies and find that it applies to the remaining information at page 128 from request A-17-030 and to the information at page 69 from request A-17-114 because it is information concerning the employment history of an affected party.

[48] Although the appellant refers to Order P-240 to support her submission that current employment is not captured by section 21(3)(d), in Reconsideration Order R-980015, the adjudicator clarified that:

> The term "employment history" refers only to past employment and not to aspects of current employment such as an employee's current salary or job position (Orders 61 and P-399); it does not include information about an employee's expense claims (Order P-256); it does not include a person's name, without more (Order M-32); and it does not generically refer to all employment-related incidents (Orders P-360 and P-357).

[49] The adjudicator in Reconsideration Order R-980015 also stated that:

> [t]he term employment history does not refer to an individual's particular employment activities at a given point in time. It comprises instead a more comprehensive overview of the job or work activities which an individual has undertaken in the course of his or her professional life. This interpretation is in keeping with the previous orders of this office which address the application of the presumption in section 21(3)(d) [Orders 170, P-235, P-611 and P-1180].

[50] In considering Order R-980015 and reviewing the information at pages 128 from request A-17-030 and at page 69 from request A-17-114, it is my view that the presumption at section 21(3)(d) applies to it.

[51] I find the presumption does not apply to the information at pages 147-148 from request A-17-030, and at page 44, 48, 186, 210, from request A-17-114. After my review of that information, I find that it does not refer to the employment or educational history of an affected party. I will consider if the factors at section 21(2) apply to this information.

[52] Although the ministry did not submit that section 21(3)(d) applies to the personal information at page 75 of request A-17-114, after my review of that information, I find that this presumption applies to the information because it is related to the employment

history of an affected party.

Section 21(3)(g): personal recommendations or evaluations

[53] This presumption covers recommendations, evaluations or references about the identified individual in question rather than those made by that individual.[14]

[54] "Personal evaluations" or "personnel evaluations" refer to assessments made according to measurable (or objective) standards.[15] The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, etc., by that individual.[16]

First group of records

[55] The ministry submits that the personal information at page 1, 2[17], 69-70, 82, 107, 121-122, 125-126, 128, 132, 133, 138-140, 145, 147-148, 150, 157 pertaining to request A-17-030, and information at page 48, 68-70, 184, 186, 189-190, part of pages 197-198, part of page 202, part of page 215, pertaining to request A-17-114 consists of personal opinions or evaluations of another individual under section 21(3)(g).

[56] For these records, the appellant submits that it has been held that section 21(3)(g) applies to "assessments made according to measurable standards." She refers to Order PO-1756 which concerned the opinions on the suitability of the individual as an adoptive parent. She submits that in that order, the adjudicator considered whether this type of opinion of another individual qualified as a personal recommendation pursuant to section 21(3)(g) and determining that it was not, wrote:

> The Ministry submits that Records 1-4, 12-13, 24, 25-26 and 62-65 contain information which may be characterized as personal recommendations, or evaluations as contemplated by section 21(3)(g) because they relate to the views of the affected person about the suitability of the appellant to be an adoptive parent. In Order P-447, Adjudicator Holly Big Canoe made the following comments with respect to the application of the presumption in section 21(3)(g):
>
> > In my opinion, the terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards. The records contain opinions, comments and observations provided by the primary and secondary affected persons during the course of an investigation of an allegation of sexual harassment and, in my view, do not consist of personal or personnel evaluations. Accordingly, I find that the presumption of

[14] Order P-171.
[15] Orders PO-1756 and PO-2176.
[16] Order P-171.
[17] Page 2 contains a duplicate of the information on page 1.

> unjustified invasion of personal privacy contained in section 21(3)(g) does not apply.
>
> I adopt the approach taken by Adjudicator Big Canoe for the purposes of this appeal. In my view, the comments contained in these records cannot reasonably be characterized as "assessments made according to measurable standards". Rather, they represent the opinions of the affected person as to the appellant's suitability to be an adoptive parent. Accordingly, I find that these records do not consist of personal or personnel evaluations made according to measurable standards, within the meaning of the presumption in section 21(3)(g).

[57] The appellant submits that in this appeal, the ministry's description of "personal opinions" contained in the emails are not assessments made to measurable standards and, therefore, section 21(3)(g) does not apply.

Second group of records

[58] The ministry also submits that the personal information at page 146 of request A- 17-030 and page 35, 75, 99, parts of pages 189-190, of request A-17-114 consists of personal recommendations. It submits that the information in these records are similar to a raw score and interview evaluations of identifiable individuals because it addresses the individual's qualifications similar to what is recorded on an interview evaluation.

[59] The appellant submits that this presumption does not apply to general opinions, comments or observations. She submits that interview evaluations like interview scores, test scores, etc. have been held to meet this standard because there is some element of a measurable, quantitative standard. The appellant submits that when reviewing the records, if the information consists of just a list of candidates being considered for the board or comments on their qualifications, the information is not protected under section 21(3)(g).

Finding

[60] The ministry submits that because the records contain a personal opinion of an affected party, this presumption applies. In Order P-470 when examining if the presumption at section 21(3)(g) applied, the adjudicator held that the information at issue was "not sufficiently detailed to attract the application of the presumption," because it consists of "very general comments" made by the panelists about the candidates and their performance during a competition. In Order PO-4047 the adjudicator found that information that describes views about an identifiable individual, their performance and their ability to fulfill certain positions within an organization fell within the scope of the section 21(3)(g) presumption and weighed in favour of a finding that disclosure would be an unjustified invasion of an identifiable individual's personal information.

[61] I have reviewed the relevant personal information in each of the groups of records and find that the presumption at section 21(3)(g) does not apply to some of the information. While I find that the information is a personal opinion of an affected party, it is not an assessment made according to measurable standards, implying an evaluation in a more formal way. As a result, I find that the presumption at section 21(3)(g) does not apply. I will consider if the factors at section 21(2) apply to this information.

[62] However, I find that the presumption applies to the personal information at pages 121-122 (being the last email on page 121 that continues on page 122), page 125 of request A-17-030 and 35, 75 and 189-190, of request A-17-114. After reviewing this information, I find that it describes views about an identifiable individual(s), including their ability to fulfill certain positions and it is sufficiently detailed to attract the application of this presumption.

Section 21(2) factors

[63] I will now consider any factors in section 21(2) that may apply for any personal information not covered by the presumptions.

[64] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[18] The factors listed at paragraphs 21(2)(a) through (d), if present, generally weigh in favour of disclosure, while the factors listed at paragraphs 21(2)(e) through (i), if present, generally weigh in favour of non-disclosure.

[65] The ministry submits that the factors at section 21(2)(h) (supplied in confidence) and (i) (unfairly damage the reputation) apply in this appeal, and also refers to an unlisted factor: reasonable expectation of privacy.

[66] The appellant submits that the unlisted factor, "public confidence in the integrity of an institution" applies in this appeal to weigh in favour of disclosing the personal information.

Factors that weigh in favour of disclosure

Unlisted factor: public confidence in the integrity of an institution

[67] In her representations, the appellant references this unlisted factor and submits that it is the overriding factor in this appeal. She submits that this factor has been applied largely with respect to senior-public officials where there is the need for transparency of taxpayer money, as is the case with the named organization.

[68] The appellant refers to Order M-953 which confirmed that previous orders of the IPC have considered if disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution. In that appeal, the

[18] Order P-239.

adjudicator found that severance agreements "involved a large expenditure of public funds on behalf of senior City employees." The adjudicator found that the climate of spending restrains in which the agreements were negotiated, placed an obligation on the city officiants to ensure that tax dollars were spent wisely. It was on this basis that the adjudicator concluded that the public confidence consideration applied in that appeal.

[69] The appellant also references Order PO-2536 where this same unlisted factor was applied. In that order, the adjudicator applied this unlisted factor in favour of disclosure and found:

> The four affected parties are senior executives at the OEB. The disclosure of the expense claims including menu selections is desirable for ensuring public confidence in the integrity of the OEB.

[70] The appellant submits that there was a large expenditure of taxpayer money from the government to the named organization and there are valid issues to address with respect to conflict of interest. The appellant submits that the disclosed information in emails shows that two senior officials of the government were instrumental in developing the named organization and securing government funding. She submits that both individuals were involved in both sides: the granting of funds by their employer, the Ontario government, and receipt of government funding by the named organization. The appellant notes that one of these government officials is now the chair of this organization and the other is the chief operations officer of same.

[71] The appellant refers specifically to an email at page 135 as an example. She submits that this is an email from a named entity summarizing its findings and making preliminary recommendations with respect to the creation of a new artificial intelligence Institute (ultimately the named organization). In this email she refers to the heading "conflict of interest" where the content of the paragraph was completely redacted by the ministry. The appellant also suggests that there appears to be a response from one of the government officials now working for the named organization in his email reply (page 133), which the ministry also redacted. The appellant submits that issues of potential conflict of interest weigh heavily in favour of disclosure to ensure public confidence and transparency in the way the taxpayer money was spent.

[72] As noted, the ministry did not provide reply representations and therefore did not respond to this submission.

Finding

[73] After reviewing the withheld personal information, I find that this factor has no bearing in this appeal because disclosure of the redacted personal information would not address the public confidence in the integrity of an institution. I find that disclosure of the personal information attributed to the two individuals who were government employees at the relevant time will not disclose information that will ensure public confidence in an institution.

[74] The appellant refers to specified records including a conflict of interest statement at page 135 and one government official's response to same in an email at page 133 as examples of information that will increase the public's confidence in the institution. However, in my review of these two records specifically, I do not agree that the conflict of interest statement involves the two specified government employees and the response to the statement at page 133, if disclosed, would also not address this factor because the statement does not involve the two individuals as suggested by the appellant.

Factors that weigh in favour of non-disclosure

[75] The ministry submits that the factors at sections 21(2)(h) and (i) and an unlisted factor apply in favour of non-disclosure of the record. However, as I have found that there are no factors favouring disclosure of the records, I find that the withheld personal information is exempt under section 21(1).

Conclusion

[76] I have found that some of the personal information at issue is subject to the presumptions at sections 21(3)(d) and 21(3)(g); I have also found that there are no factors favouring disclosure of the withheld personal information. As a result, I find that the personal information is exempt under section 21(1) and should be withheld from disclosure.

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

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

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[78] Section 17(1) is designed to protect the confidential "informational assets" of

businesses or other organizations that provide information to government institutions.[19] 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.[20]

[79] 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

[80] In this appeal, the ministry claims that the records contain commercial and financial information.

[81] This type of information listed in section 17(1) has 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.[21] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[22]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[23]

Representations

[82] The ministry divided the records into five separate groups for the purposes of providing its representations on the application of section 17(1).

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[19] *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.*).
[20] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[21] Order PO-2010.
[22] Order P-1621.
[23] Order PO-2010.

First group of records

[83] The ministry describes the first group of records as "emails or parts of emails" discussing a meeting about:

- Funding issues, replies, successes
- Prospective investor(s)
- Tiers of investors
- Breakdown of funding
- Allocation of funding
- Updates on funding meetings/calls
- Budget chart

[84] These records are identified as located at the following pages:

> 1 ,2, 4, 17, 39, 45, 50, 52, Email 2 on 53-54, 65, 66, 69, 77- 80, 92, 97, 101, 106, 108, 111-114, 116, 117, 127, 136, 137, 145-146, 149-150 and 195, relating to request A-17-030.

[85] The ministry submits that the withheld information refers to financial information including various aspects of securing and allocating funding. The appellant also provided representations on this specific group of records, claiming that emails or parts of emails redacted do not satisfy the requirements for an exemption under section 17(1). She submits that many of the redacted records do not appear to meet the criteria for financial information. She submits that the description of the redactions explains that the documents are emails or parts of emails discussing a meeting about financial matters. The appellant submits that "financial information" for the purposes of section 17(1) has been interpreted to largely exclude this type of correspondence, instead requiring "specific data" and "actual dollar amounts."

[86] The appellant refers to Order PO-2010 and submits that this office clearly defines "financial information" as "… information relating to money and its use or distribution and must contain or refer to specific data."

[87] The appellant makes specific representations on the redacted records and submits:

- Pages 1, 2, 4, 17, 92, 9, 106, 111, 112, 113, 116, 149 and 150 are all completely redacted and submits that the address and subject field of these emails, and portions of the email content of these pages, are not specific financial data. She submits that these redactions are too sweeping.

- Page 52 claims to have redacted financial information, but instead improperly redacts the names of the "3 names to approach."

- The same block redaction on pages 53-54 is claimed to be redacted under section 17(1) as financial information, and also under section 21(1) as "personal opinions or evaluations of another individual." The appellant submits that these reasons for redaction are inconsistent with respect to the nature of the information redacted, as information evaluating an individual would not qualify as financial information, and vice versa.

[88] In reviewing the records, I find that all of the records in this group contain financial information because it is information relating to money and its use or distribution. Although not every record contains specific data, I find that they contain or refer to specific data and meet the test of financial information.

[89] With regard to the appellant's representations regarding specific records, I find that the information on page 52 is more than just names and contains financial information relating to money and its use or distribution and referring to specific data. Also, after reviewing the various records where the entire email was redacted, I agree with the ministry that the emails contain financial information.

Supplied in confidence

[90] 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.[24]

[91] 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.[25]

[92] The contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[26]

[93] There are two exceptions to this general rule:

1. the "inferred disclosure" exception. This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences

[24] Order MO-1706.
[25] Orders PO-2020 and PO-2043.
[26] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

about underlying non-negotiated confidential information supplied to the institution by a third party.[27]

2. the "immutability" exception. This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.[28]

In confidence

[94] The party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[29]

Representations

[95] The ministry's representations on this part of the test are similar for each group of records and the appellant did not speak to this test in her representations. As a result, I will deal with the requirement that the records were "supplied in confidence" only once and my finding applies to all of the records withheld under section 17(1).

[96] The ministry submits that the information at issue was supplied to it and it did not produce it nor was it a party to the negotiation which resulted in the draft agreement.[30] It submits that in instances where the government of Ontario was a party to negotiation, the relevant information is "immutable" and therefore, still satisfies the "supplied" requirement. The ministry submits that there exists a reasonable expectation of confidentiality between the parties as the information has been supplied in relation to a joint-venture. The ministry also submits that the information has been treated by all parties as confidential, delivered by email to an identifiable group of people and cannot be accessed through another source.

[97] As noted, the appellant does not address this requirement in her representations.

Finding

[98] After reviewing the various emails containing the severed information, I agree that any commercial or financial information contained within would have been supplied to the ministry by the named organization with an expectation of confidentiality. Considering the subject matter and some of the information contained in the records, it is clear that these communications were intended to be and remain confidential and I find that this part of the test has been met for all the records in dispute. For emails that originate from the ministry itself, I find that they are emails in a chain of other emails

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[27] Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.
[28] *Miller Transit*, cited above at para. 34.
[29] Order PO-2020.
[30] Although the ministry does not specifically state who supplied this draft agreement, from my review of the email, it was provided by another government employee from a different ministry.

that contain commercial and financial information that was supplied to the ministry with an expectation of confidentiality.

[99] Regarding the draft agreement, I find that as it is a draft agreement between another ministry and the University of Toronto and was supplied to the ministry for its review. I find the ministry was not a party to the agreement and thus this draft agreement is not subject to the rule that a contract can not qualify as being supplied for the purposes of section 17(1). In this case, I find that the draft agreement was supplied by a government employee in a different ministry to the ministry and other affected parties. Further, I find that the draft agreement would have been supplied in confidence because it is an email that contains commercial and financial information that was supplied to the ministry with an expectation of confidentiality.

Harms

[100] Parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act.*[31]

[101] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[32] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[33]

[102] In applying section 17(1) to government contracts, the need for accountability in how public funds are spent is an important reason behind the need for detailed evidence to support the harms outlined in section 17(1).[34]

Representations

[103] The ministry submits that the disclosure of this information would have reasonably prejudiced on-going funding negotiations and would give competitors knowledge of the expenses, total cost, who to approach for investment, and how much investment can be expected on similar projects. The ministry submits that artificial intelligence is a highly competitive space and disclosure of the aggregate information about funding would unduly benefit competitors.

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[31] Orders MO-2363 and PO-2435.
[32] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[33] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.
[34] Order PO-2435.

[104] The appellant submits that the ministry has not discharged the burden of proof of a reasonable expectation of harm. The appellant refers to *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*[35] and submits that to discharge the burden of proof of a reasonable expectation of harm, the party resisting disclosure must present evidence that is "detailed and convincing," and evidence amounting to speculation of possible harm is not sufficient. She submits that bald statements of possible harm amount to speculation.

[105] The appellant submits that the ministry has not met its burden as it has:

- Provided only two sentences to substantiate harm arising from disclosure of 39 unique pages with redactions
- Provided vague and speculative explanations of expectation of harm without connecting any risk of harm to the disclosure of any specific records
- Failed to even identity the third party, or parties, that would allegedly be harmed by disclosure of the redacted information.

[106] The appellant submits that the impact of any alleged risk of harm on the named organization caused by the disclosure of financial information has not been established. She submits that the named organization's industry partners are identified publicly on their website, and the financial statements are published publicly in the annual reports.

[107] The appellant refers to Order PO-2435 where the adjudicator found that the ministry and third party made very general submissions about the section 17(1) harms, providing no explanation, let alone one that was "detailed and convincing," of how disclosure could reasonably be expected to lead to these harms. The appellant submits that the ministry in this appeal provided representations similar to the level provided in Order PO-2435, however, in this appeal, there are more redactions (39 compared to 3) within 25 unique documents.

[108] The appellant also submits that the named organization holds itself out to the industry as fulfilling a "unique role" on the very basis that they are not competing in the industry. She submits that it describes itself as a neutral third party focused on research, giving it the ability to bring competitors in the industry together. She submits that on its website, the named organization's "Industry Sponsorship" webpage reads:

> As an independent, not-for-profit focused on research in machine and deep learning, [the named organization] plays a unique role as a neutral third party to bring industry consortia together to cooperate on mutual challenges that affect Canadians

[109] The appellant submits that the ministry has not established that the named organization has competitors for funding, or in the marketplace, or that disclosure of

[35] (1998), 41 OR (3d) 464 (ONCA).

the redacted information to purported competitors could be reasonably expected to cause harm to it.

Analysis and finding

[110] The appellant submits that the ministry must provide detailed evidence to support its section 17(1) claim. As I stated above, the law on the standard of proof is clear. In *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two exemptions under the *Act*, and found that it requires a reasonable expectation of probable harm. In addition, the Court observed that "the reasonable expectation of probable harm formulation… should be used whenever the 'could reasonably be expected to' language is used in access to information statutes."

[111] In order to meet that standard, the Court explained that:

> As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground; paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and inherent probabilities or improbabilities or the seriousness of the allegations or consequences…

[112] I agree with and adopt this principle for the purposes of this appeal.

[113] The ministry submits that the disclosure of the information in the first group of records would reasonably prejudice on-going funding negotiations and give competitors knowledge of the expenses, total cost, who to approach for investment, and how much investment can be expected on similar projects. The ministry submits that artificial intelligence is a highly competitive space and disclosure of the aggregate information about funding would unduly benefit competitors.

[114] The appellant refers to Order PO-2435 for each group of records but I will address that order here. I note that in Order PO-2435, when the adjudicator found that the parties had not provided an explanation about the harms let alone one that was detailed, the adjudicator found that there was "nothing in the records or the representations" to indicate how disclosure would provide a competitor with the means to determine the third party's profit margins and mark-ups. In my view, even if the institution or third party has not provided detailed evidence of harms, if the harm of disclosure is apparent on the face of the record, that is sufficient to find the exemption applies.

[115] The appellant also submits that the named organization holds itself out as fulfilling a unique role and that it is not competing in the industry and as a result, it has

not established that the named organization has competitors for funding, or in the marketplace, or that disclosure of the redacted information to purported competitors could be reasonably expected to cause harm to it. I do not agree. In my view, even if the named organization is fulfilling a "unique role" and is not in competition within the industry, its commercial and financial information if disclosed can still cause harm and will be of interest to other organizations in this field.

[116] In my view, section 17(1) applies to information relating to the named organization who is engaged in a not-for-profit enterprise, by taking into consideration the same factors that might apply to a third party engaged in an industry for profit. In order P-493, the adjudicator held that "[t]he term 'commercial' information can apply to both profit- making enterprises and non-profit organizations, and has equal application to both large and small enterprises." Also, in my reading of the definition of "financial information" arising from a previous order of the IPC[36], I find that it can also apply to non-profit enterprises. The appellant asserts that the ministry has not established that the named organization has competitors for funding, or in the marketplace. However, in my view, while that factor may be relevant to some commercial or financial information, section 17(1) may still apply to the information even if an organization is not in competition for funding in the marketplace because there will still be sensitive commercial and financial information that if publicly released, could harm it.

[117] After my review of the severed information in this group of records, I am satisfied that if the information is disclosed it could harm the named organization because it contains information concerning funding commitment details and disclosure would prejudice ongoing funding negotiations and/or arrangements.

[118] Despite the appellant's focus on the statements that the named organization is not competing with others in the industry, it is clear from reviewing the records that an organization is being established which requires ongoing funding. In my view, whether the organization is for, or not-for profit, in a highly competitive industry, I find that releasing the information could cause harm to the named organization. If this information is disclosed, it could clearly give others operating in this industry knowledge of which they would otherwise not have access to.

[119] However, I do not agree that these emails could be further severed as suggested by the appellant. After reviewing this information, I find that releasing the address and subject field of these emails, and portions of the email content of these pages, that are not specifically financial data, would result in disclosure of worthless snippets without context and this also applies to the remainder of the information if determined to be exempt under section 17(1) below.

Second group of records

[120] The second group of records where the ministry claimed information was exempt under section 17(1) are records described as "emails discussing potential candidates for

[36] Orders P-47, P-87, P-113, P-228, P-295, P-394 and PO-2010.

positions in the project." The ministry claims that the severed information at pages 40, 152 and 198 (from request A-17-030) contain commercial information. It submits that the emails or portions of emails reference individuals being considered to sit on the board of the named organization and directly relates to proposed hiring practices. The ministry references Order PO-3157 for its assertion that information that refers to hiring practices is commercial information.

[121] The appellant submits that the ministry's description of the information emails discussing potential candidates for positions, does not qualify as commercial information. She submits that Order PO-3157 is distinguishable because in that order the adjudicator found that there was a financial nature to "a business plan proposal, in which information relating to hiring practices and financial information were inextricably linked."

Finding

[122] I do not find that the remaining severed information in these three records qualifies as commercial or financial information for the purposes of section 17(1). Regarding the email at page 40, I have found that significant portions of this email qualify as the personal information of an affected party and that the information should not be disclosed. However, with regard to the remaining information in this group of records, I do not find that it contains commercial or financial information. In my view, the names of individuals being considered to sit on a board do not constitute financial or commercial information and the information does not directly relate to proposed hiring practices.

[123] The ministry references Order PO-3157 for its position, however, the record at issue in that appeal was a copy of a funding agreement with severed portions that included: cumulative job target; project related jobs and project costs; project investment commitment and project financing; employees; default and enforcement; training. The ministry[37] in that appeal stated in its representations that the record contained details of the affected party's "current and proposed hiring practices, project costs and investments, project timelines and training practices and costs."

[124] I do not agree that Order PO-3157 supports the finding that individuals being considered for board positions relates to proposed hiring practices that would be considered commercial or financial information under the *Act*. In finding that the information was commercial or financial information, the adjudicator in Order PO-3157 noted that the information related "to the affected party's sale of its financial services, including its current and proposed hiring practices, project costs and investments, project timelines and training practices and costs." In finding that the information was commercial or financial information, the adjudicator found that it related to an "affected party's sale of its financial services, including its current and proposed hiring practices, project costs and investments, project timeless and training practices and costs."

[37] Ministry of Economic Development and Innovation.

[125] As a result of my finding that the information in this group of records is not commercial information under the *Act*, I find that this information is not exempt under section 17(1). I will order the ministry to disclose this information to the appellant.

Third group of records

[126] The third group of records where the ministry claimed information was exempt under section 17(1) are records described as emails or part of emails referring to a business strategy and incentive program and a document summarizing the corporate pitch of the project including the incentive program. The ministry claims this exemption for the information severed at pages:

> 48, 51, 69, 70, 85, 103-104, 109, 109, 112, 121-122, 125-126, 133, 135, 138-140, 145, 154-156 relating to request A-17-030.

[127] The ministry claims that the severed information in these records is commercial information. It submits that the emails refer to marketing strategies like the incentive of investing and information relating to business plans.

[128] In her representations, the appellant does not seem to challenge that the withheld information is commercial information and focuses her representations mainly on the third part of the test, harms. However, she submits that pages 104, 112, 138, 139, and 140 are all entirely redacted and even if the reasonable expectation of harm is established and the content of the emails were properly redacted, the subject line and address fields should be disclosed as these do not contain information relating to the corporate pitch or incentive program.

[129] After reviewing the withheld information in the abovementioned pages, I agree that it qualifies as commercial information. The withheld information relates to potential investors and the named organization's strategies concerning the buying, selling or exchange of merchandise or services.

Harms

[130] The ministry submits that disclosure of incentive strategies and business plans can assist others to poach investors, increase benefits of investing and implement strategies already in place.

[131] The appellant submits that the ministry has not established that the named organization has competitors in the marketplace, or that disclosure of the redacted information to purported competitors could be reasonably expected to cause it harm.

Finding

[132] After my review of the severed information, I am satisfied that if most of the information is disclosed it would harm the named organization. Although, some of the information has been publicly disclosed as illustrated by the appellant, I find that this publicly disclosed information, in these instances, is intertwined with information that

would reveal the organization's business plans and disclosure would therefore harm the named organization.[38] For the remaining information, I find that disclosure could reasonably harm the named organization because it would reveal details about future incentive strategies as well as sensitive information from its business plan.

[133] However, I find that for some of the information on page 155, there is no risk of harm if this information is disclosed. In addition, neither the ministry or the named organization has provided detailed evidence about the risk of harm if this information is disclosed.

Fourth group of records

[134] The fourth group of records where the ministry claimed information was exempt under section 17(1) is in relation to request A-17-114 and are records described as emails or parts of emails discussing meetings about financial and commercial information including but not limited to:

- Funding/funding issues
- Prospective investors/tiers of investors
- Incentives
- Hiring practices
- Strategies and plans
- Who to approach for investments
- How to deal with situations.

[135] The ministry claims this exemption for information severed at pages:

> 1-2, 4-28, 35, 39-42, 48- 50, 71-72, 74, 77-80, 82-83, 87-89, 92-94, 97, 100-104, 123, 125[39], 130, 189-190, 192-193, 202, 205-209, 211, 215-216, relating to request A-17-114.

[136] The ministry submits that the withheld information on these pages refers to commercial and financial information. It submits that the emails refer to marketing strategies (the incentive of investing) and information relating to business plans.

[137] In her representations, the appellant submits that the ministry did not distinguish which redactions are claimed as financial and commercial information and that both

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[38] After review of the disclosed information, I note that the ministry has disclosed at least some of the publicly disclosed information to the appellant.

[39] Although the ministry did not specifically address page 125 of request A-17-114 in its representations, the information is a duplicate of the information at page 123 and the record at page 125 was also severed indicating the exemption at section 17(1).

categories have been limited to specific interpretation. She submits that many of the redacted records do not appear to meet the criteria for financial information. She refers to Order P-400 and submits that financial information has been interpreted to largely exclude information discussing financial matters and requires "specific data" and "actual dollar amounts" to qualify as financial information.

[138] After reviewing the severances in the abovementioned pages, I find that some consist of financial and commercial information. However, I do not agree that all of the severed information contains either commercial or financial information. I do not find the severed information at page 77, page 94 and part of the information on page 123 is commercial or financial information because it is neither information relating solely to the buying, selling or exchange of merchandise or services and it also does not relate to money and its use or distribution, nor does it contain or refer to specific data. Since the ministry did not claim any other exemptions for this information, I will order that it be disclosed to the appellant.

Harms

[139] The ministry submits that the disclosure of this information would reasonably prejudice the competitive position of the named organization. It submits that the disclosure of total funding, investors, costs of building new facilities, further breakdown of costs, partnering universities, business plans, success measuring parameters, hiring practices and incentive programs can assist others to poach investors, copy strategies, and attempt to replicate the named organization's business model.

[140] The ministry also submits that this information has been collected by the named organization by investing a lot of time and money in research, building relationships, and creating a strategy. It again refers to the a highly competitive marketplace for artificial intelligence and submits that this information would unduly benefit competitors.

[141] The appellant repeats many of her earlier submission regarding the insufficiency of the ministry's representations and also submits that the ministry has not met its burden because it:

- Provided only a few general sentences with respect to harm of disclosure to substantiate harm arising from disclosure of 72 unique pages with redactions, including 40 pages which are redacted in their entirety

- Described the redactions as "emails or parts of emails", without providing a description of the contents of the 25-page document included in the record set that has been fully redacted, or any specific justification of its redaction

- Provided vague and speculative explanations of expectation of harm without connecting the asserted harm to the disclosure of any specific records.

Finding

[142] After reviewing the severed information in this group of records, I agree that disclosure of much of the information could harm the named organization. The information sets out details concerning funding, potential investors, business plans and success measuring parameters as well as hiring practices and incentive programs. I find that disclosure of this information could unfairly harm the organization because it would allow competitors and/or other similar businesses, in a highly competitive field, to benefit by copying strategies, replicating the business model and potentially attracting the confirmed and proposed investors.

[143] A draft presentation at pages 4 to 28, which was fully withheld, in my view, contains the business plans of the named organization that if disclosed, could harm it because it would enable its competitors, or other companies working in artificial intelligence to benefit from the information. However, much of the presentation contains information that would be considered general commercial information, or, as submitted by the appellant, information that is publicly available and I do not accept that the named organization could reasonably be expected to be harmed if this information is released.

[144] Also, with regard to the information severed and claimed exempt under section 17(1) on page 202, I do not find that disclosure of this information could reasonably be expected to harm the named organization. It is not evident on the face of the record how any third party would be harmed. Also, neither the ministry nor the named organization provided detailed representations explaining the potential harm if this information is disclosed.

Fifth group of records

[145] The fifth group of records where the ministry claimed information was exempt under section 17(1) is also in relation to request A-17-114 and is a record described as a draft agreement between the government of Ontario and the University of Toronto for contributing to the named organization. This draft agreement was attached to an email.[40] The ministry also claims the exemption at section 18(1) (economic or other interests) for this same information.

[146] The information for this group is located at pages 133-183 in the records pertaining to request A-17-114.

[147] The ministry submits that the information consists of commercial and financial information. It submits that the emails (the agreement was attached to an email) refer to marketing strategies (the incentive of investing) and information relating to business plans.

[40] As I note above, I found this draft agreement was supplied in confidence for the purposes of section 17(1).

[148] The appellant submits that the ministry's redaction of the entire 51-page draft document is not legitimate under section 17(1). She also notes that the ministry claimed that the information was both commercial and financial information and submits that both types have limited interpretations under the *Act*. She submits that financial information "does not simply refer to any record tangentially relating to finances or referring to funding sources."

[149] After reviewing the draft agreement, it is clear that it consists of commercial and financial information. While the appellant questions whether a 51-page draft agreement can be totally severed under section 17(1), it is clear that severing sections that may not include financial or commercial information would result in disclosing unconnected snippets. However, I will examine the harms in releasing this information below.

Harms

[150] The ministry submits that the disclosure of this information would reasonably prejudice the competitive position of the named organization because it would reveal the amount of funding it has been able to secure for an artificial intelligence project and the steps towards achieving the goal of making Toronto a hub for artificial intelligence. It submits that the disclosure of the draft agreement will unduly benefit the competitors as they will know how much resources are being put towards this project and the reality of the marketplace is that competitors are usually never aware of the amount of funding available to other competitors.

[151] The affected party who sent the email which attached the draft agreement was invited to provide representations but declined to do so.

[152] The appellant submits that, regardless of whether the information in the draft agreement qualifies as either financial or commercial information, the ministry has not met the burden of establishing that the competitive position of the named organization would be significantly prejudiced by disclosure of this information.

[153] She submits that the ministry's claim that disclosure of the amount of funding available to the organization will harm it because "competitors are usually never aware of the amount of funding available to other competitors" is speculative, particularly given:

- the historical nature of the information
- publicly available financial information on funding in the named organization's annual reports

- the abundance of press releases and articles detailing funding awarded to the named organization in 2017, many with comments from the organization's representatives.[41]

Finding

[154] After my review of the information that was withheld in full at pages 133-183, including the draft agreement, I find that disclosure of only some of this information could reasonably be expected to cause harm to the named organization.

[155] Although the ministry's representations focused mainly on funding that may be apparent from the agreement, after my review, I find that the agreement also contains information concerning the ongoing relationship between the parties that is not reflected in the news releases mentioned by the appellant. I find that some of the information in schedules attached to the agreement as well as some comments made on the draft if disclosed, could harm the named organization. I find that it could reveal commercial information, and in some cases financial information, concerning an ongoing relationship as well as reveal details concerning plans for ongoing development that could reasonably harm the named organization if revealed to its competitors or other businesses working in the area of artificial intelligence, a highly competitive field.

[156] However, with regard to the funding mentioned in the agreement, I agree with the appellant that disclosure of this information will likely not cause harm to the named organization given that it was publicly disclosed. The ministry was provided with an opportunity to reply to the appellant's representations but chose not to and therefore, I have no explanation of why this financial information should not be disclosed. As a result, I will order the ministry to disclose the relevant financial information that is set out in the agreement.

Issue D: Does the mandatory exemption at section 12(1) relating to Cabinet deliberations apply to the record?

[157] Section 12(1) protects certain records relating to meetings of Cabinet or its committees. It reads, in part:

[41] The appellant includes two different press releases, one of which reads: New institute aims to make Toronto an 'intellectual centre' of [artificial intelligence] capability, dated March 28, 2017 "The [named organization], an independent non-profit affiliated with the University of Toronto, will hire about 25 new faculty and research scientists. It will be backed by more than $150 million in public and corporate funding in an unusual hybridization of pure research and business-minded commercial goals. The province will spend $50 million over five years, while the federal government, which announced a $125-million Pan- Canadian Artificial Intelligence Strategy in last week's budget, is providing at least $40 million, backers say. More than thirty companies have committed upwards of $80 million over 10 years, including $5 million each from sponsors including Google, Shopify, Loblaws, and several big banks, $2.5 million from a tier that includes Air Canada and Telus, and smaller commitments from a range of homegrown startups like FreshBooks and Deep Genomics." The Toronto Star online, March 28, 2017.

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> > (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;

[158] The Executive Council, which is more commonly known as Cabinet, is a council of ministers of the Crown and is chaired by the Premier of Ontario.

[159] Any record that would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees qualifies for exemption under section 12(1), not just the types of records listed in paragraphs (a) to (f).[42]

[160] A record never placed before Cabinet or its committees may also qualify for exemption, if its disclosure would reveal the substance of deliberations of Cabinet or its committees, or would permit the drawing of accurate inferences about the deliberations.[43]

[161] The institution must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.[44]

Representations

[162] The ministry claims that emails or part of emails subject to section 12(1) are at pages 6, 63, 85, 126 and 135[45] of the records pertaining to request A-17-030. It submits that it must refuse disclosure of the information in the records where it would reveal the substance of deliberations of Cabinet or its committees. It submits that the language of the section is broad to allow for "other record of deliberations" to include an email.

[163] The appellant does not provide representations on the information claimed exempt under this section.

Analysis and finding

[164] The ministry has withheld brief references in the emails under section 12(1) as it claims that disclosure of this information would reveal the substance of deliberations of Cabinet or one of its committees. The withheld information is a sentence at most in the emails while the rest of the content of the emails has already been disclosed. I note that the same duplicate information has been withheld in the records. Based on my review, I find this information is not exempt under section 12(1). The withheld references provide only the briefest mention of Cabinet and at most only refer to the

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[42] Orders P-22, P-1570 and PO-2320.
[43] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[44] Order PO-2320.
[45] The information on page 85 is duplicated on pages 126 and 135.

subject of a Cabinet meeting. The ministry has not established that disclosure of any of this withheld information would reveal the substance of deliberations of Cabinet or permit the accurate inference with respect to the deliberations. Moreover, the ministry has not established a link between the withheld information and the actual substance of Cabinet deliberations.

[165] Accordingly, as this information is not exempt under section 12(1) and the ministry did not claim any other exemptions for it, I will order its disclosure to the appellant.

Issue E: Does the discretionary exemption at section 13(1) apply to the records?

[166] The ministry claims that part of an email on page 53 and part of an email on page 91 pertaining to request A-17-030 are exempt under section 13(1). It describes this information as part of an email referring to advice to the government of Ontario as to "who to partner with".

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[167] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[46]

[168] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[169] "Advice" has a broader meaning than "recommendations." It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [47]

[170] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

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[46] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43.
[47] See above at paras. 26 and 47.

[171] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[48]

[172] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[49]

[173] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 13(1).[50]

[174] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information[51]
- a supervisor's direction to staff on how to conduct an investigation[52]
- information prepared for public dissemination.[53]

Representations

[175] The ministry submits that the information at issue was provided by a member of the Cabinet, a public servant, and therefore protected by section 13(1). The ministry submits that the information in the emails meets the broad definition of advice and there is no exception listed under section 13(2) that applies to the information. The emails speak to a suggested course of action that is not removed from the deliberative process of governmental decisions and policy making and it relates to the actual business of the ministry. The ministry submits that disclosing this information would go

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[48] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario* (*Ministry of Northern Development and Mines*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario* (*Ministry of Transportation*) *v. Ontario* (*Information and Privacy Commissioner*), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[49] *John Doe v. Ontario* (*Finance*), cited above, at para. 51.
[50] *John Doe v. Ontario* (*Finance*), cited above, at paras. 50-51.
[51] Order PO-3315.
[52] Order P-363, upheld on judicial review in *Ontario* (*Human Rights Commission*) *v. Ontario* (*Information and Privacy Commissioner*) (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[53] Order PO-2677.

against the purpose of preserving an effective and neutral public service by disclosing confidential deliberations given by public servants and precluding them from giving full, free and frank advice.

[176] The appellant did not address this exemption in her representations.

Analysis and finding

[177] After reviewing the withheld information in the two emails, I do not find that they contain advice or recommendations for the purposes of section 13(1). The information in the email at page 53 that the ministry claims is exempt under section 13(1) is more informational and, in my reading of the excerpt, contains no advice as suggested by the ministry. In the information in the email at page 91, an opinion is expressed but, in my reading, does not contain advice or recommendations. In both of these excerpts, I find that there is no evaluative analysis to the information, nor is there a suggested course of action that will ultimately be accepted or rejected.

[178] The ministry has also claimed the exemption at section 18(1) for the information at page 53, and this is discussed below. Since the ministry did not claim any other exemption for the information at page 91, I will order it to disclose the portion of that email to the appellant.

Issue F: Does the discretionary exemption at section 15 for information received from other governments apply to the record?

[179] Section 15 acknowledges that the Ontario government creates and receives records in the course of its relations with other governments. Its purpose is to protect these working relationships between governments,[54] and to allow the Ontario government to receive information in confidence, building the trust required to conduct affairs of mutual concern between governments.[55]

[180] Section 15 states, in part:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;

[54] Orders PO-2247, PO-2369-F, PO-2715 and PO-2734.
[55] Order P-1398, upheld on judicial review in *Ontario* (*Minister of Finance*) *v. Ontario* (*Information and Privacy Commissioner*) (1999), 118 O.A.C. 108 (C.A.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.

> and shall not disclose any such record without the prior approval of the Executive Council.

[181] The exemptions found in section 15 apply where disclosure of the record "could reasonably be expected to" lead to one of the harms specified in paragraphs (a) to (c).

[182] Parties resisting disclosure of a record cannot simply assert that the harms under section 15 are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 15 are self-evident and can be proven simply by repeating the description of harms in the *Act.*[56]

[183] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[57] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[58]

[184] The ministry claims that the information at the following pages contains information that is exempt under section 15(a):

> Request A-17-030: pages 3, 5, 6, 8, 9, 37, 38, 97, 106, 110, 113, 116, 142, 150, 195
>
> Request A-17-114: pages 36-37, 74 and 120
>
> Request A-17-129: pages 1-5 and 12

[185] The ministry also claimed that the same information at request A-17-030 at pages 6, 97, 106, 113, 116, and 150 and at request A-17-114 at pages 74 and 120 to be exempt under section 17(1) and since I have found that the information on these pages is exempt under section 17(1), I will not also discuss this same information here.

Representations

[186] The ministry describes the information it severed under section 15(a) relating to all three requests as emails or parts of emails discussing the following information with or received from the federal government:

- meetings
- funding (potential)

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[56] Orders MO-2363 and PO-2435.
[57] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[58] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.

- allocation of funding
- position on when to announce
- updates

[187] The ministry submits that the burden to qualify for this exemption has been clearly met as information being exchanged in these emails is a direct consequence of the planning and negotiation on a joint project and other similar projects. Furthermore, it submits that disclosure of this information could prejudice ongoing work on this joint project.

[188] The ministry submits that it is evident from the nature of the information being exchanged that confidentiality plays a fundamental role in the functioning of this relationship.

[189] Alternatively, the ministry submits the information has not been disclosed under section 15(b) of the *Act* because it would reveal information received in confidence from another government. It submits that the email is a result of intergovernmental communications or negotiations and therefore, is a "record received." It references Order PO-2569 and submits that the nature of the joint-funding of the artificial intelligence project is very similar to the Bombardier financing scheme, where the nature of information was sufficient to establish a reasonable expectation of confidentiality.

[190] The appellant submits that the ministry has provided very little detail to connect disclosure of the record with a reasonable expectation of harm, aside from making bald assertions repeating the words of the *Act*, and that disclosure would prejudice ongoing work on the joint project. She submits that the ministry has not provided detailed evidence to establish how information, for example, disclosing historical discussion on when to announce funding for a project that has been operational for years, could establish a reasonable expectation of harm. The appellant submits that to the extent that the ministry has not established this harm, the records should be disclosed.

[191] The appellant submits that based on the ministry's description of the redactions, it appears that certain redactions are beyond the scope of the section 15 protection. She points to the ministry's descriptions of emails discussing "meetings" or "any updates" indicate certain information is not exempt under section 15. The appellant refers to Order PO-2666 and submits that information that simply reflects issues and decisions facing Ontario, or records of meetings that do not reveal specific positions by identifiable parties are not exempt under section 15(a) and intergovernmental meetings that identify decisions and approaches jointly decided, and that do not reveal specific positions taken by identifiable affected parties, are not exempt under section 15(b).

Analysis and finding

[192] I reviewed the information that remains at issue and the ministry's

representations on the harm contemplated by section 15(a). Upon review of this information, I find that the severed information is exempt under section 15(a) for the following reasons.

[193] I accept that the disclosure of the remaining portions at issue could reasonably be expected to result in prejudice to the conduct of relations between the ministry and the federal government. I note that in Order PO-2569, referenced by the ministry, the adjudicator when addressing the actual records in dispute found that they "clearly relate to intergovernmental relations, as they describe the way in which Industry Canada (representing the federal government) proposes to collaborate with the Ontario government with the intention of providing joint financial assistance to Bombardier in relation to the … project." Similarly, in this appeal, the withheld information relates to intergovernmental relations. Although the appellant submits that some information in these records may be publicly available, in my view, the way the information is presented discloses more than the actual amounts of funding and disclosure could reasonably be expected to prejudiced the conduct of intergovernmental relations.

[194] Accordingly, I find that section 15(a) applies and subject to my finding on the ministry's exercise of discretion, the above-mentioned records are exempt from disclosure.

Issue G: Does the discretionary exemption at section 18(1) apply to the records?

[195] The ministry submits that certain withheld information is exempt from disclosure under section 18(1)(d).

[196] The purpose of section 18(1) is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.[59]

[197] Section 18(1) states, in part:

> A head may refuse to disclose a record that contains,
>
> > (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[198] An institution resisting disclosure of a record on the basis of sections 18(1)(d) cannot simply assert that the harms mentioned in that section is obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or

[59] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

the surrounding circumstances, the institution should not assume that the harms are self- evident and can be proven simply by repeating the description of harms in the *Act.*[60]

[199] The institution must show that the risk of harm is real and not just a possibility.[61] However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[62]

Representations

[200] The parties address the various section 18(1) claims separately in their representations.

Records at part of page 46 and part of page 107 as part of request A-017-030

[201] The ministry claims that information at pages 46 and 107, which it describes as emails or parts of emails with discussion about Ontario's economic interest, is exempt under section 18(1)(d). The ministry submits that disclosure of this information would injure Ontario's financial interest and affect the government's ability to manage the economy. It submits that the incentive discussed in the emails directly affects qualification of Ontarians and eventually, the type of job available for them in the labour market. The ministry submits that the government of Ontario has entered into a joint-venture and is negotiating for positions for second-tier investors in the named organization's flagship program. The ministry submits that the success of these negotiations will give Ontario a competitive advantage and disclosing this information will reasonably injure the financial interests of Ontario. It further submits that with the pan-Canada strategy, other provinces could demand similar incentives for their investors. It submits that Ontario's heavy investment in the program makes it vulnerable if the information is disclosed.

[202] The appellant submits that for the section 18(d) exemption to apply, the ministry must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. She submits that in order to meet this test, the institution must provide detailed evidence to establish a "reasonable expectation of harm," and evidence amounting to speculation of possible harm is not sufficient.

[203] The appellant submits that the ministry has not provide adequate detail to connect disclosure of the two redacted portions of the records in question with a reasonable expectation of harm, aside from stating that disclosure would injure Ontario's financial interests and affect the government's ability to manage the economy. She submits that the two emails which relate to historical incentive do not support the

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[60] Orders MO-2363 and PO-2435.
[61] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[62] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.

ministry's claim that disclosure could reasonably be expected to injure the government's ability to manage the economy.

[204] The appellant submits that the historical nature of the information requested was one factor considered in Order PO-2780, which ordered the disclosure of amounts paid to laboratories in part because the historical nature of the information reduced the impact.

[205] The appellant submits that the ministry has failed to establish a reasonable expectation of harm from other provinces if the information is disclosed. She submits that the named organization receives federal funding, and its reach has not been limited to Ontario. The appellant refers to the named organization's stated vision to "drive excellence and leadership in Canada's knowledge, creation, and use of artificial intelligence to foster economic growth and improve the lives of Canadians."

[206] The appellant submits that the ministry has failed to meet the burden of proof to establish the reasonable expectation of harm required for the protection of section 18 to apply, and therefore, the portions of page 46 and 107 that had been redacted should be disclosed.

Records at part of page 53 and part of page 157

[207] The ministry describes this information as part of emails relating to economic interests of Ontario. It submits that the information in these emails has not been disclosed under the section 18(1)(d) exemption because disclosure of this information would prejudice the government of Ontario's financial interests and affect its ability to manage the economy.

[208] The ministry submits that the goal of this joint project is to create a hub of artificial intelligence expertise in Ontario, and to achieve that goal, it is important to have the right partnerships at the federal level. It submits that the email on page 157 reveals what steps need to be taken to achieve federal support. The ministry submits that disclosure of this information would reveal Ontario's close allies in this industry. The ministry submits that Ontario has a vested financial interest in the outcome of this project and its interest will prejudiced if this information is revealed.

[209] The appellant submits that the ministry has provided no evidence of harm specific to the redaction on page 53, let alone detailed evidence. She also submits that the explanation for redacting page 157 is speculative and does not explain how revealing Ontario's allies in the industry would practically lead to a reasonable expectation of harm to the government of Ontario's financial interests. The appellant also notes that the ministry has described the same information redacted on page 157 as the personal information of an individual that should be withheld under section 21(1). It is disputed that this paragraph can be both personal information and information that could reveal what steps need to be taken to achieve federal support and reasonably compromise the government of Ontario's financial interests if disclosed.

[210] The appellant also submits that the redacted information is historical, point-in-time, economic information. She disputes that disclosure will cause any potential harm. She submits that the named organization is now well-established with the support of federal funding. She submits that the purpose of section 18 is to protect certain economic interests and avoid creating an unfair advantage for those with whom the institution may do business with by the premature disclosure of plans to change policy or commence projects. The appellant submits that there is no premature disclosure, as the named organization and funding arrangements have now been operational for years.

Analysis and findings

Records at part of page 46 and part of page 107

[211] After my review of the severances on these pages, I agree with the ministry that section 18(1)(d) applies to exempt the information from disclosure. As noted by the ministry, in investing in this venture, Ontario's negotiations will give it a competitive advantage and I find that disclosing this information will reasonably injure the financial interests of Ontario. A pan-Canadian strategy referenced by the ministry and the appellant, means that other provinces could demand similar incentives for their investors if the information was disclosed.

[212] In Order PO-2780, referenced by the appellant, the request was for payments made by the Ministry of Health to community laboratories for services insured under OHIP. The assistant commissioner found that the information in the record was now historical information which reduced the impact that the release of the record would have. However, in this appeal, although the negotiating of incentives is historical, information concerning incentives continues to be relevant because these incentives are ongoing. As noted by the ministry, the incentives discussed directly affect qualification of Ontarians, and eventually, the type of job available for them in the labour market. As a result, I find that this information is exempt from disclosure under section 18(1)(d)

Records at part of page 53 and part of page 157

[213] After reviewing the information at page 53, I find that it is not exempt from disclosure under section 18(1)(d). The ministry describes this information as relating to Ontario's economic interests and disclosure would prejudice its financial interests and affect its ability to manage the economy. However, it did not directly address the information at page 53 and in my review of the information, it is not clear on its face how disclosure would prejudice Ontario's financial interests. I have also found that this same information is not exempt under section 13(1) and I will order the ministry to disclose this information.

[214] However, I find that the severed information at page 157 is exempt under section 18(1)(d). As set out by the ministry, this information concerns steps that need to be taken to achieve ongoing federal support and I find that disclosure of this information would reveal strategies that could harm Ontario's financial interest in the

outcome of the project. After reviewing the information, I do not agree that it contains historical information that could no longer cause harm to Ontario and I find that the exemption applies to this information.

Records at pages 133-183 as part of request A-17-114

[215] I have already found that the information in this draft agreement that is published information is not exempt under section 17(1), but the remainder of the agreement is exempt under that section. Although the ministry has also claimed section 18(1) with regard to this published information, for similar reasons as set out in section 17(1), I find that the ministry has not established that disclosure of this information will result in the harm set out in section 18(1)(d) and I will order the ministry to disclose it.

Issue H: Did the institution exercise its discretion under section 15(a) and/or section 18(1)? If so, should the IPC uphold the exercise of discretion?

[216] The section 15(a) and 18(1) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[217] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[218] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[63] The IPC may not, however, substitute its own discretion for that of the institution.[64]

[219] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[65]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific

[63] Order MO-1573.
[64] section 54(2).
[65] Orders P-344 and MO-1573.

    - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[220] Although the parties were invited to address the ministry's exercise of discretion, neither party directly addresses this issue.

[221] Since I did not uphold the ministry's decision in full, I will only consider the ministry's exercise of discretion in relation to the information that I found exempt under sections 15(a) and 18(1)(d).

[222] Based on my review of the withheld information, the parties' representations and the circumstances of this appeal, I find that the ministry did not err in exercising its discretion to withhold information under section 15(a) and section 18(1)(d) of the *Act*.

[223] I am satisfied that the ministry did not exercise its discretion in bad faith or for an improper purpose. I am also satisfied that it considered relevant factors and did not consider irrelevant factors in the exercise of its discretion. The ministry considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal. Accordingly, I find that the ministry took relevant factors into account and I uphold its exercise of discretion in this appeal.

ORDER:

1. I uphold the ministry's decision regarding section 21(1) of the *Act*, in part, and order it to disclose to the appellant the information that is highlighted at pages 56, 60, 65-71, 73, 98, 128, 151, 153, 195-196 relating to request A-17-030 and

pages 66, 81 and 202 relating to request A-17-114, by **June 3, 2022** but not before **May 30, 2022**.

2. I uphold the ministry's decision regarding section 17(1) of the *Act*, in part, and order it to disclose to the appellant the information that is highlighted at pages 40, 152, 155 and 198 relating to request A-17-030 and pages 4 to 28, 77, 94, 123, 125, 202 and 133-183 relating to request A-17-114 by **June 3, 2022** but not before **May 30, 2022**.

3. I do not uphold the ministry's decision regarding section 12(1) of the *Act* to the withheld information at pages 6, 63, 85, 126 and 135 relating to request A-17-030 and order it to disclose this information to the appellant by **June 3, 2022** but not before **May 30, 2022**.

4. I do not uphold the ministry's decision regarding section 13(1) of the *Act* to the withheld information at pages 53 and 91 relating to request A-17-030 and order it to disclose this information to the appellant by **June 3, 2022** but not before **May 30, 2022**.

5. I uphold the ministry's decision regarding section 15 of the *Act*.

6. I uphold the ministry's decision regarding section 18(1) of the *Act*, in part, and order it to disclose to the appellant the information that is highlighted at page 53 relating to request A-17-030 and pages 133-183 relating to request A-17-114 by **June 3, 2022** but not before **May 30, 2022**.

7. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of its correspondence to the appellant, disclosing the records in accordance with order provisions 1, 2, 3, 4 and 6.

Original Signed by: April 29, 2022

Alec Fadel
Adjudicator

APPENDIX

Emails or part of emails located at page # 1, 2, 4, 17, 39, 45, 50, 52, Email 2 on 53-54, 65, 66, 69, 77- 80, 92, 97, 101,106-108, 111-114, 116-117, 127, 136-137,145-146, 149-150, 195 the ministry claims the section 17(1) exemption

Emails or parts of emails discussing personal opinions located at page # 1, 2, 50, 53-54, 65-66, 69-71, 82, 85, 97, 107, 112, 121- 122, 125- 127[66], 132, 133, 135, 138-140, 145, 149- 150[67], 157, 195-196 withheld under section 21(1)

Emails or parts of emails at page # 3, 5, 6, 8, 9, 37, 38, 97, 106, 110, 113, 116, 142, 150, 195 where the ministry claimed the exemption at section 15(a) and 15(b)

Emails or part of emails mentioning cabinet discussions at page # 6, 63, 85, 126 and 135 where the ministry claimed the exemption at section 12(1)(a)

Email discussing potential candidate for position at page # 40, 152 and 198 claimed exempt under section 17(1)

Emails or parts of emails with discussion about Ontario's economic interest at page 46 and 107 withheld under section 18(d)

Documents summarizing the corporate pitch of the project and emails or part of emails referring to business strategy and incentive program at page # 48, 51, 69, 70, 85, 103-104,108, 109,112, 121-122, 125-126, 133,135, 138-140, 145, 154-156 withheld by the ministry under section 17(1)

Part of an email relating to economic interests of Ontario at page # 53, 157 withheld by the ministry under section 18(d)

Email or part of emails regarding qualification of candidates for board and other positions at the named organization at pages # 56, 60, 67-68, 73, 98, 146 withheld by the ministry under section 21(1)

Part of the email referring to advice to the government of Ontario as to who to partner with at Email 1: page 53 and 91 withheld by the ministry under section 13

Emails or parts of emails with individual's employment and educational history at page # 128-129, 147-148, 151 and 153 withheld by the ministry under section 21(1)

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[66] In my review of page 127, I did not identify any personal information severed by the ministry. The only severance on this page is claimed under section 17(1) and section 15.

[67] All of the information on page 149 is claimed exempt under section 17(1), page 150 is totally severed and the ministry claimed both section 21(1) and section 15 to withhold this information.

Confidential presentation with respect to the strategy of making Canada a hub for artificial intelligence and Ontario a center at page # 158-194 withheld by the ministry under section 18(c) and (d)

A-17-114

Email or parts of emails discussing meetings about financial and commercial information at page # 1-2, 4-28, 35, 39-42, 48- 50, 71-72, 74, 77-80, 82-83, 87-89, 92-94, 97, 100-104, 123, 130, 189-190, 192-193, 202, 205-209, 211, 215-216 withheld by the ministry under section 17(1)

Email or part of emails with personal evaluations for positions at the named organization at page # 2, 35, 39, 75, 99, 189-190 withheld by the ministry under section 21(1)

Part of emails relating to the employment history of an individual at page # 44, 48, 69, 97, 186, 210 withheld by the ministry under section 21(1)

Emails or parts of Emails expressing opinion or evaluation at page # 48, 66, 68-70, 81, 83, 123, 125, 184, 186, 189- 190, 197-198, 202, 215 withheld by the ministry under section 21(1)

Emails or parts of emails discussing information with or received from the federal government at page # 36-37, 74, 120 withheld by the ministry under section 15(a) and (b)

Draft agreement between the government of Ontario and University of Toronto for contributing to a named company at page # 133-183 withheld by the ministry under section 18(c) and (d)

A-17-129

Emails or parts of emails discussing the following information with or received from the federal government at page # 1-5 and 12 withheld by the ministry under section 15(a) and (b)