

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4381

Appeal PA21-00189

Ministry of Economic Development, Job Creation and Trade

April 26, 2023

**Summary:** The Ministry of Economic Development, Job Creation and Trade (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for communications between the ministry and a named company. The requester appealed the ministry's decision granting partial access pursuant to sections 17(1) and 21(1) of the *Act*. In this order, the adjudicator upholds the ministry's decision in part. She finds that the information withheld under section 21(1) is exempt, and the information withheld under section 17(1) is not exempt, which she orders the ministry to disclose.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56, as amended, section 17(1) and 21(1).

**Orders Considered:** Order PO-3256.

### OVERVIEW:

[1] Seneca College received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information. It forwarded a portion of the request to the Ministry of Economic Development, Job Creation and Trade (the ministry). The ministry subsequently clarified the request with the requester, as

follows:<sup>1</sup>

Records of all communications between the Ministry of Economic Development, Job Creation & Trade and [named third party #1], Seneca College, [named third party #2] and [named third party #3], including those that were not responsive/outside of the scope of [specified FOI request].

Time period January 1, 2016 - February 1, 2020

[2] Following third party notification, the ministry issued an access decision granting partial access to responsive records in relation to named third party #1 (the third party). The ministry relied on the mandatory exemptions in section 17(1) (third party information) and section 21(1) (personal privacy) to deny access to certain records and portions of records.

[3] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner (IPC).

[4] During mediation, the appellant advised that he was pursuing access to the withheld information and to specified attachments to correspondence that were not disclosed. He also requested more information explaining the basis for the exemptions.

[5] The ministry responded that no attachments exist and that it would reconsider its application of section 17(1) of the *Act*.

[6] As a result, the ministry issued a revised decision and index of records to the appellant. The ministry disclosed additional information, and withheld portions of seven records under sections 17(1) and 21(1) of the *Act*.

[7] As mediation did not resolve the appeal, this file was transferred to the adjudication stage. The adjudicator originally assigned to this appeal conducted an inquiry in which she sought and received representations from the ministry and the appellant. The ministry submitted representations, which were shared in accordance with the IPC's *Practice Direction 7*. The appellant then submitted his representations in response.

[8] The file was assigned to me to continue the adjudication of the appeal.

[9] After reviewing the records, and the representations of the ministry and the appellant, I decided to notify the third party as their interests might be affected by disclosure of the information at issue. The third party did not provide a response.

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<sup>1</sup> The ministry also advised the requester that the portion of his request that relates to Seneca College was transferred to the Ministry of Colleges and Universities in accordance with section 25(1) of the *Act*, due to that institution's greater interest in the records he was seeking.

[10] I have reviewed all of the parties' representations and attachments, and below I summarize the portions of their representations that are most relevant to the issues before me.

[11] For the reasons that follow, I uphold the ministry's decision in part. I find that the information withheld under section 21(1) is exempt, and the information withheld under section 17(1) is not exempt. I order the ministry to disclose the latter to the appellant.

## **RECORDS:**

[12] As identified in the ministry's index of records, the seven records at issue consist of the withheld portions of 9 pages in records 2-6, 8 and 11.<sup>2</sup> The records comprise of emails and meeting notes.

Record and description	Page(s) at issue	Exemption at issue
2 - email	105	17(1)
3 - email	106	17(1) and 21(1)
4 - meeting notes	107-108	17(1)
5 - email	109	17(1) and 21(1)
6 - email	110	17(1)
8 - meeting notes	132-133	17(1)
11 - email	138	17(1)

## **ISSUES:**

- A. Do the records 3 and 5 contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?
- C. Does the mandatory exemption at section 17(1) for third party information apply to the information at issue?

## **DISCUSSION:**

### **Preliminary issues**

[13] The appellant notes that there is information missing from records 2, 3, and 11,

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<sup>2</sup> The Mediator's Report indicated that the seven records at issue consist of the withheld portions of 11 pages in records 2-6, 8 and 11, however, there are no redactions on two of the three pages in record 11.

referring to the from, sent, to and cc fields in certain emails. He submits that this information is not exempt under section 17(1) and should be disclosed to him. I appreciate that the appellant would like access to this information, however, the issue of reasonable search is not at issue in this appeal. As confirmed in the Mediator's Report, the only issues for adjudication are the third party information and personal privacy exemptions. These were therefore the only issues canvassed during the inquiry.

[14] The appellant makes detailed arguments relating to the ministry's handling of this appeal, and a related appeal. I will not outline or comment on these allegations as they are not relevant to the issues before me in this appeal.

**Issue A. Do records 3 and 5 contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?**

[15] The ministry claimed the application of section 21(1) over information in records 3 and 5. As section 21(1) only applies to records that contain personal information, I must therefore determine whether the information at issue qualifies as personal information under section 2(1), and, if so, to whom it relates.

[16] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, such as paper or electronic records.<sup>3</sup>

[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.<sup>4</sup> 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.

(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] 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.<sup>5</sup>

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<sup>3</sup> See the definition of "record" in section 2(1).

<sup>4</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>5</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

[19] 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.<sup>6</sup>

[20] Section 2(1) of the *Act* gives a non-exhaustive list of examples of personal information, including information relation to race, ethnic origin or religion (paragraph (a)), medical, criminal or employment history (paragraph (b)), or an individual’s identifying number or symbols.

***Representations, finding and analysis:***

[21] The ministry submits that records 3 and 5 contain personal information within the meaning of section 2(1) that does not belong to the appellant. For the reasons that follow, I agree with the ministry.

[22] According to the ministry, these records are emails containing recorded information about an identifiable individual that is implicitly private in nature, and which does not relate to this individual’s activities in a business capacity.<sup>7</sup> The ministry provides further details in its confidential representations, describing the nature of the information it claims is exempt.

[23] The appellant submits that he suspects the information at issue relates to the identifiable individual referred to by the ministry in a business or an official capacity, citing sections 2(3) and 2(4).

[24] The ministry relies on Order PO-3256, which found that details relating to vacations qualify as personal information under section 2(1):

I have reviewed the records and find that information about the individuals’ vacation time is recorded information about them and qualifies as their personal information. I make this finding despite the fact that the named individuals were acting in their professional capacity. I find that information about an individual’s vacation time would reveal something of a personal nature about them.

[25] I agree with and adopt this reasoning. I have reviewed the information at issue in records 3 and 5, and find that it qualifies as personal information within the definition at section 2(1) of the *Act* and to disclose it would reveal details about an individual’s vacations. Though this information may appear in a professional capacity, I find that its disclosure would reveal something of a personal nature about the individual in question.

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<sup>6</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>7</sup> The ministry cites Order PO-3256, para 21.

**Issue B. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?**

[26] One of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions. Section 21(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions.

[27] If any of the five exceptions covered in sections 21(1)(a) to (e) exist, the institution must disclose the information. Based on my review of the records and the parties' representations, I find these exceptions do not apply in the circumstances.

[28] Under the section 21(1)(f) exception, the institution is required to disclose another individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy." Sections 21(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

[29] Sections 21(3)(a) to (h) outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy. I find that none of these situations apply in the circumstances.

[30] As the personal information being requested does not fit within any presumptions under section 21(3), one must next consider the factors set out in section 21(2) to determine whether or not disclosure would be an unjustified invasion of personal privacy. However, if any of the situations in section 21(4) is present, then section 21(2) need not be considered. I also find that none of the situations described in section 21(4) apply in the circumstances. The appellant raises the factors at sections 21(2)(a) and 21(2)(d), which I consider below.

***Representations, finding and analysis***

[31] The ministry submits that disclosure of the information it withheld under section 21(1) would be an unjustified invasion of privacy. It argues that none of the factors listed in section 21(2) favour disclosure or non-disclosure of the information at issue.

[32] As the section 21(1) exemption is mandatory, and as there are no enumerated circumstances favouring disclosure, the ministry submits that the IPC should uphold its decision in this regard. The ministry relies again on Order PO-3256, which states:

I have considered the factors in section 21(2) and find that there are no factors either favouring disclosure or non-disclosure of the individuals' vacation time to the appellant. However, as the section 21(1) exemption is mandatory, and there are no factors favouring disclosure, I uphold the exemption and the ministry's decision with respect to the personal information contained in the records. Consequently, those portions of

records that were withheld under section 21(1) will not be disclosed to the appellant.

[33] The appellant submits that section 21(2)(a) and 21(2)(d) are relevant in the circumstances.

***21(2)(a): disclosure is desirable for public scrutiny***

[34] This section supports disclosure when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.<sup>8</sup> It promotes transparency of government actions.

[35] The issues addressed in the information that is being sought do not have to have been the subject of public debate in order for this section to apply, but the existence of public debate on the issues might support disclosure under section 21(2)(a).<sup>9</sup>

[36] The public has a right to expect that spending by employees of government institutions when performing their employment-related responsibilities is in line with established policies and procedures.<sup>10</sup>

[37] The appellant submits detailed representations enumerating his concerns with the ministry's handling of his request, as well as a related request. He argues that the information at issue should be disclosed due to the ministry's lack of transparency. He also invokes the public's right to scrutinize the division responsible for the processing of his requests.

[38] I have reviewed the information at issue in records 3 and 5, and do not find that its disclosure would subject the activities of the government to public scrutiny. The information in question is limited, amounting to two clauses relating to the vacation of an individual who is not a ministry employee. The appellant has not provided sufficient evidence to establish that disclosure of the personal information is desirable for the purpose of subjecting the ministry's activities to public scrutiny.

[39] Accordingly, I find that section 21(2)(a) is not relevant in the circumstances.

***21(2)(d): the personal information is relevant to the fair determination of requester's rights***

[40] This section weighs in favour of allowing requesters to obtain someone else's personal information where the information is needed to allow them to participate in a court or tribunal process. The IPC uses a four-part test to decide whether this factor applies. For the factor to apply, all four parts of the test must be met:

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<sup>8</sup> Order P-1134.

<sup>9</sup> Order PO-2905.

<sup>10</sup> Orders P-256 and PO-2536.

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?
4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?<sup>11</sup>

[41] The appellant submits that disclosure of the information at issue is relevant to the fair determination of his rights. He indicates that he is in the midst of a Human Rights Tribunal of Ontario proceeding with Seneca College (the college), and submits tribunal correspondence in relation to his file as evidence. The appellant submits that he was discriminated against in the context of a contract.<sup>12</sup> Based on my understanding of the appellant's representations, he submits that there is evidence that the ministry provided support to the college in relation to this alleged discrimination, and that he requires the withheld information to determine the infringed right and demonstrate the ministry's involvement with the college.

[42] Based on my review of the information at issue and the appellant's representations, I note that while he has made out the first two parts of the test, the appellant has not satisfied parts 3 and 4. I have not been presented with evidence to persuade me that the information at issue – which relates to details of an individual's vacation – is significant to the determination of the appellant's right or required to prepare for this proceeding or to ensure an impartial hearing.

[43] As a result, I also find that section 21(2)(d) is not relevant in the circumstances.

[44] I found above that none of the exceptions in sections 21(1)(a) to (e) apply in the circumstances, nor do the presumptions in section 21(3) and the situations enumerated in section 21(4). With regards to the factors in section 21(2), I found above that sections 21(2)(a) and 21(2)(d) are not relevant in the present case. Accordingly, I accept the ministry's argument that in light of the mandatory nature of the section 21(1) exemption, and the absence of factors favouring disclosure, the information at issue should not be disclosed. I uphold the ministry's decision in this regard.

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<sup>11</sup> See Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

<sup>12</sup> The appellant cites section 3 of Ontario's *Human Rights Code*, which provides for the "right to contract on equal terms without discrimination."



**Issue C. Does the mandatory exemption at section 17(1) for third party information apply to the records?**

[45] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>13</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>14</sup>

[46] Section 17(1) states:

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

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

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

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

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

[47] For section 17(1) to apply, the party arguing against disclosure 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;
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.

[48] The ministry submits that the information at issue is exempt under sections

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<sup>13</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

<sup>14</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

17(1)(a), (b) or (c). Its representations are outlined below. As noted above, the third party did not respond when invited to submit representations. In his representations, the appellant did not address the three-part section 17(1) test.

[49] For the reasons below, I find that the information withheld under section 17(1) meets parts one and two of the test, but not part three. Accordingly, I find that it is not exempt.

***Part 1 of the section 17(1) test: type of information***

[50] The ministry submits that the information it withheld under section 17(1) qualifies as either commercial or financial information, which the IPC has described as follows:

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.<sup>15</sup> The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.<sup>16</sup>

Financial information is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>17</sup>

[51] The withheld information appears in various emails and meeting notes. The ministry submits that it relates to hiring, marketing, business strategies, the third party's product, trade show attendance, operating costs such as marketing outlays, and profit data such as customer value projections. I have reviewed the information at issue and the ministry's representations, and am satisfied that it qualifies as either commercial or financial information.

***Part 2: supplied in confidence***

[52] As explained below, I find that the information at issue was supplied to the ministry in confidence.

[53] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.<sup>18</sup>

[54] Information may qualify as "supplied" if it was directly supplied to an institution

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<sup>15</sup> Order PO-2010.

<sup>16</sup> Order P-1621.

<sup>17</sup> Order PO-2010.

<sup>18</sup> Order MO-1706.

by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>19</sup>

[55] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.<sup>20</sup>

[56] In support of its position that the withheld information was supplied in confidence, the ministry provides context for its relationship with the third party:

- The ministry's Business Advisory Services Branch (BASB) works with business organizations looking to establish themselves in Ontario and engages with them upon request.
- Seniors Business Advisors (SBAs) meet with businesses to discuss their needs and growth strategy. Commercially sensitive information is often discussed with SBAs, including confidential information about businesses' operations (financial, strategies, markets, etc.).
- The more information is shared, the better equipped SBAs are to provide tailored services. Information is supplied in confidence by the business with the expectation that it will be held as such.
- All SBAs sign an oath of confidentiality and discuss this with the client.<sup>21</sup>

[57] According to the ministry, the information at issue in records 2, 3, 5 and 11, which consist of emails, was directly supplied by the third party through correspondence with a ministry employee. With regards to the withheld information in records 4 and 8, which consist of meeting notes, the ministry submits that it was gathered at meetings with the third party and other parties. The ministry submits that the withheld information in record 6 appears in an email exchange between a ministry employee and another party.

### *Supplied*

[58] I find that most of the information at issue was supplied to the ministry by the third party. Records 3, 5, and 11 consist of emails sent by an officer of the third party to a SBA.<sup>22</sup> While records 4 and 8 document meetings attended by the third party, the ministry in addition to other parties, based on my review of these meeting notes, the

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<sup>19</sup> Orders PO-2020 and PO-2043.

<sup>20</sup> Order PO-2020.

<sup>21</sup> This information was provided in the ministry's representations and an email from the Director of the Ministry's Business Advisory Services Branch at Tab 2 of the ministry's representations.

<sup>22</sup> Though the email at record 3 was sent by an officer of the third party to another party, it appears that the SBA was copied on the thread.

withheld information originated with the third party.

[59] With regards to record 6, an email sent by a ministry employee to another party, the ministry explains that according to the employee in question, an officer of the third party endorsed the information at issue. It submits that disclosure of this information would therefore reveal information supplied to the ministry by the third party. Based on my review of the record, though the third party is not included in this exchange, it appears that it previously communicated the information contained in this email to the ministry. As noted above, information may qualify as supplied in one of two ways. In this case, the information was not directly supplied to the institution by the third party. However, I find that its disclosure would reveal, or permit the drawing of accurate inferences, with respect to information supplied by the third party to the ministry.

[60] Record 2 similarly consists of an email from the third party's SBA to another party, copying an officer of the third party. Based on my review of this records, it is reasonable to conclude that the withheld information was provided to the ministry by the third party. Accordingly, I find that the "supplied" part of the test has been satisfied for records 2 and 6 as well.

*In confidence*

[61] The ministry submits that it collected sensitive business information from the third party in order to direct it to relevant government programs and services and other types of opportunities, within the Ontario government and within other levels of government. It explains that this information was supplied in confidence, in the context of the business development services it offers. According to the ministry, the information was understood to be supplied in confidence because it contains details of the third party's competitive position and resource needs. It submits that the third party had a reasonably held expectation that the information it provided would remain confidential, and would not be disclosed to competitors.

[62] I have reviewed the records and the ministry's representations and supporting documents, and accept that the third party shared the information at issue with the ministry on the basis that it was confidential and was to remain confidential. I also accept that this was implied based on the circumstances – in this case, the third party was consulting the ministry to access its business development services and be directed to programs, services and funding opportunities.

[63] In making this finding, I have considered the ministry employees' oath of confidentiality. Based on my review of the records, the third party was emailing with and attending meetings with a SBA. According to the Director of the Ministry's Business Advisory Services Branch, SBAs sign an oath of confidentiality, which they discuss with their clients, as noted above.<sup>23</sup> I also considered the factsheet submitted by the ministry

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<sup>23</sup> Email from the Director of the Ministry's Business Advisory Services Branch, Tab 2 of the ministry's representations.

about its Business Partnerships and Programs Division, addressing the use of business information. This factsheet notes that, in accordance with their oath of office, ministry employees are not to disclose any information or document that comes into their knowledge or possession by reason of being a public servant, except as legally authorized or required.<sup>24</sup>

[64] I note that certain records include parties that are not part of the ministry or third party – for example, where other parties are included on an email or present at a meeting. Given my finding under part 3 below, I make no finding on whether such records contain information supplied in confidence.

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

[65] 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*.<sup>25</sup>

[66] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>26</sup> 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.<sup>27</sup>

[67] The ministry claims that disclosure of the information withheld under section 17(1) could reasonably be expected to lead to the harms outlined in sections 17(1)(a), (b) or (c), which are set out above.

[68] For the reasons that follow, I find that the ministry has not established that part three of the test has been met.

*Sections 17(1)(a) & 17(1)(c): prejudice to competitive position & undue loss or gain*

#### Ministry's representations

[69] The ministry submits that disclosure of the withheld information could reasonably be expected to lead to a risk of harm to the third party's competitive position.

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<sup>24</sup> Tab 3 of the ministry's representations.

<sup>25</sup> Orders MO-2363 and PO-2435.

<sup>26</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>27</sup> *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.

[70] The ministry states that the information in the emails at records 2, 3, and 11 relates to proposed hiring and training practices and plans. It submits that the third party's hiring needs, resources and proposed hiring practices are not public knowledge, and that competitors could use this information for its own purposes, for instance to target the third party's access to reasonably priced labour. According to the ministry, disclosure may jeopardize the third party's ability to attract new customers or interfere significantly with its negotiations with its employees. In addition, the ministry submits that disclosure of the information at issue could reasonably be expected to result in undue loss to the Crown – as the Crown has legal personhood – in that it may compromise the provincial government's intergovernmental relations with other levels of government, for example, the municipal and federal governments.<sup>28</sup>

[71] Records 4 and 8 are meeting notes that the ministry states contain detailed descriptions of the third party's business plans, product information, marketing strategies, and specific financial resources and projections, which together provide a snapshot of its business position at the time the records were created. Records 5 and 6 are emails which the ministry describes as relating to a marketing opportunity, related strategy and specific sales goals. According to the ministry, disclosure of the information withheld in these records could reasonably result in competitors gaining an unfair understanding of the third party's financial position and marketing strategies, including in relation to a major trade show, and enable them to target their own marketing efforts against the third party's.

### Analysis and findings

[72] As the party resisting disclosure, the onus is on the ministry to provide detailed evidence of the risk of harm in the event of disclosure. Based on my review of its representations and documentation in support of its position, I am not satisfied that it has presented the level of detail required to fulfill the third part of the test. The ministry describes the information at issue and asserts that certain harms could result from its disclosure, however, it does not explain *how* disclosure could reasonably be expected to result in these harms.

[73] I have also reviewed the records and find that on their face, they do not meet part three of the test. The information at issue in records 2, 3, 5, and 11 is high level or vague in nature. It is unclear how its disclosure could reasonably result in the harms cited by the ministry, such as significant interference with the third party's negotiations with its employees, or undue loss to the Crown. While the information in records 4, 6, and 8 is somewhat more detailed, as the ministry says, they "provide a snapshot of [the third party's] business position at the time the records were created." Having closely reviewed the records, it is difficult to see how the withheld information might now be used by competitors to prejudice the third party's competitive position, or to cause undue loss or gain.

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<sup>28</sup> The ministry cites the email from the director of the BASB that it submitted.

[74] The disclosure of information relating to hiring, marketing and business strategy may reasonably lead to the types of harms envisioned in sections 17(1)(a) and (c). However, I have not been provided with sufficient evidence to support such a finding in this case, nor are the harms evident from the records themselves.

*Sections 17(1)(b): similar information no longer supplied*

#### Ministry's representations

[75] The ministry submits that disclosure of the withheld information could reasonably be expected to result in similar information no longer being supplied to the ministry, where it is in the public interest that it continues to be supplied.

[76] The ministry argues that the information it receives is necessary for the development of on-going support and programs to support the growth of industry in Ontario.<sup>29</sup> It submits that in order to competently provide its services to businesses, it must be able to protect the commercial information supplied to it in confidence from disclosure to competitors.

[77] In the ministry's view, to do otherwise can reasonably be expected to result in less business organizations deciding to invest in Ontario, which may compromise the province's competitive position vis-à-vis other jurisdictions, who are likewise vying to attract the same or similar investors. This ministry submits that it is reasonably expected that parties would be unwilling to provide information about their plans, strategies, and positions if that information were subject to disclosure. The ministry submits that this would severely impede its ability to provide business development and advisory services to its clients. The ministry claims that it is therefore in the public interest that the information at issue not be disclosed so that it may continue to provide services to attract and retain business and economic development in Ontario.<sup>30</sup>

#### Analysis and findings

[78] Based on my review of the records and the ministry's representations and supporting documentation, I am not convinced that disclosure could reasonably lead to similar information no longer being supplied, less businesses investing in Ontario, and compromising the province's competitive position.

[79] As explained above, businesses like the third party consult with the ministry to access business development services, and be directed to programs, services and funding opportunities. Considering the incentive to access these services, I am not persuaded that disclosure of the information at issue in this case presents a real risk of

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<sup>29</sup> Email from the Director of the Ministry's Business Advisory Services Branch, Tab 2 of the ministry's representations.

<sup>30</sup> The ministry cites the email from the Director of the Ministry's Business Advisory Services Branch, Tab 2 of its representations.

the harms described in section 17(1)(b) and those detailed by the ministry.

[80] As noted above, the ministry submitted a factsheet about its Business Partnerships and Programs Division, addressing the use of business information, which appears to be geared at businesses interested in accessing the ministry's services. I note that the factsheet warns of the possibility of access to information requests under the *Act* for records under the government's custody and control, and lays out the three-part test along with some procedural information.

[81] The ministry submits that it is reasonably expected businesses will be unwilling to provide their information if it were subject to disclosure. However, the ministry's factsheet suggests that those interested in pursuing the ministry's services are informed of the possibility of disclosure through an access request.

[82] In my view, the disclosure of the information in the context of this appeal, is unlikely to lead to the harms described by the ministry.

[83] In order to qualify for exemption under section 17(1), all three parts of the test must be met. As I have found that the third part of the test has not been established, I order the ministry to disclose the information that it withheld under section 17(1).

**ORDER:**

1. I uphold the ministry's decision to withhold information under section 21(1).
2. I order the ministry to disclose the information that it withheld under section 17(1) to the appellant by **June 1, 2023** but not before **May 26, 2023**.
3. In order to verify compliance with order provision 2, I reserve the right to require the ministry to provide me with a copy of its access decision as well as any records disclosed with it.

Original Signed by: \_\_\_\_\_  
Hannah Wizman-Cartier  
Adjudicator

\_\_\_\_\_ April 26, 2023