Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4453

Appeal PA21-00592

Ministry of Transportation

October 25, 2023

Summary: A requester sought access to G2 examiner training documents from the Ministry of Transportation (the ministry). A third party appealed, relying on the mandatory third party information exemption at section 17(1) of the *Act* to deny access to the records at issue. In this order, the adjudicator finds that the section 17(1) does not apply, and orders the ministry to disclose the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 17(1).

Orders Considered: Orders PO-3756 and MO- PO-4055.

OVERVIEW:

[1] A request was submitted to the Ministry of Transportation (the ministry), under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information:

> 1) (a) The name of the examiner at [a particular examination center] who conducted [a G road exam on a specified date and time]; (b) the official notes and grading reported by the examiner during [the requester's exam].

> 2) [regarding the examination center and for a specific timeframe]: (a) names of all currently active examiners; (b) active examiners' duration of employment at the … examination center; (c) outcomes of exams for each examiner (i.e., pass/fail outcome) in the last three months; (d) records of any complaints lodged against currently active examiners in the … exam center to the ministry in the last three months; and (e) latest examiners' training manual at the … examination center.

[2] Following third party notification, the ministry issued a decision granting partial access to the requested records with severances made pursuant to section 21(1) (personal privacy) of the *Act*.

[3] A third party, now the appellant, appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the requester confirmed an interest in pursuing additional access to the responsive records.

[5] With the appellant's consent, the ministry shared an index of records with the requester. The ministry subsequently disclosed some additional information to the requester. However, the requester advised that he wishes to continue to pursue access to records 14 to 20.

[6] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeals process, where I decided to conduct an inquiry under the *Act*. I invited and received representations from the appellant and the requester.[1] The ministry declined to submit any representations.

[7] In this decision, I find that the records at issue are not exempt under section 17(1) and order them disclosed. I note the ministry's decision to withhold information under section 21(1) was not appealed by the requester. Accordingly, the information withheld under section 21(1) should not be disclosed to the requester.

RECORDS:

[8] The records at issue are records 14 to 20, which are the G2 examiner training documents.

DISCUSSION:

[9] The sole issue in this appeal is whether the mandatory exemption at sections

[1] The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Practice Direction 7* and section 7.07 of the IPC's *Code of Procedure*.

17(1)(a) of the *Act* applies to the G2 examiner training documents.

[10] The appellant claims that the mandatory exemption at section 17(1)(a) applies to the G2 examiner training documents and that it therefore should not be disclosed.

[11] Sections 17(1)(a) 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;

[12] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[2] where specific harms can reasonably be expected to result from its disclosure.[3]

[13] 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; 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) and/or (c) of section 17(1) will occur.

[14] All three parts of the three-part test must be met to establish the exemption. Because I find below that the appellant has not established part 3 of the three-part test, it is not necessary for me to consider parts 1 and 2 of the test.

[15] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that

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

disclosure will in fact result in such harm.[4]

[16] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[5] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[6]

Representations of the parties

[17] The appellant submits that there is a reasonable expectation of harm to its competitive position if the records are disclosed. It explains that it is a private organization, and the records are not publicly available. The appellant submits that the records are its "informational assets" that, if disclosed, would result in the release of sensitive competitive information that would cause harm to its operations as an organization.

[18] Specifically, the appellant submits that competitors could use the records to compete with it in anticipated procurements to operate the DriveTest program.

[19] In addition, the appellant submits that its competitors would be able to use the records as a "springboard" for developing their own materials and to demonstrate how they would effectively train examiners. It relies on Order PO-4055, where the adjudicator accepted that disclosure of technical and commercial information is valuable to competitors as it allows newcomers to get a "head start" by modelling their operations on details found in the record. The appellant submits that it has spent considerable time and effort (over approximately 20 years) to develop the G2 examiner training documents. As such, it submits that its competitive position would be harmed.

[20] Finally, the appellant relies on Order MO-3756,[7] where I found that it was reasonable to expect that the third party appellant to suffer harm from the disclosure of financial statements.

[21] The requester submits that the mere fact that the records are not publicly available and are intended to train certain employees do not, on their own, lead to the conclusion that they have a significant competitive effect. He points out that the *Act* only protects information that would reasonably cause significant prejudice if revealed.

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

[5] *Ontario* (*Community Safety and Correctional Services*) v. *Ontario* (*Information and Privacy Commissioner*), cited above.

[6] Order PO-2435.

[7] The appellant mistakenly cited MO-3765 which does not exist.

The requester submits that the appellant failed to demonstrate the necessary proximate connection between disclosure and (1) the reasonable expectation for, and (2) the significant gravity of competitive harm.

[22] In addition, the requester submits that the appellant has entrenched itself for almost 20 years as the sole operator of Ontario's road-testing organization, DriveTest. He points out that the appellant is not a new player in the industry that is vulnerable to subtle changes in market forces. As such, the requester submits that the appellant has not demonstrated that it would suffer the high statutory standard of "significant prejudice" by revealing its training materials for employees that conduct the G2 driving test.

[23] Finally, the requester submits that the appellant has not identified the extent to which the records at issue consist of publicly available information that would have no bearing on competitiveness. For example, the laws governing the operation of motor vehicles are publicly available in the *Highway Traffic Act*[8] and its associated regulations.

Analysis and findings

[24] To find that the section 17(1)(a) harms could reasonably be expected to result from disclosure, I must be satisfied that there is a reasonable expectation of the specified harm. I can reach this conclusion based on my review of the records at issue, the circumstances of this appeal, and/or the representations made by the appellant.

[25] Based on my review of the records and the representations of the parties, I find that the appellant has not established that disclosure of the G2 examiner training documents could reasonably be expected to result in the harms enumerated in section 17(1)(a) of the *Act*.

[26] The appellant argues that disclosure of the G2 examiner training documents will allow its competitors to have a head start in developing their own training materials and to demonstrate how they would effectively train examiners. It relies on Order PO-4055, where the adjudicator found that a record containing detailed information of the appellant's linen and laundry services to the hospital would allow newcomers to get a "head start" in their efforts, by modelling their operations on details found in this record. I do not find that Order PO-4055 applies in the circumstances because the G2 examiner documents are of a different quality than the record at issue in Order PO-4055. The G2 examiner training documents are generic training materials and do not contain specific and detailed information contained in the record at issue in Order PO-4055. Much of the information in the G2 examiner documents is customer service information.

[27] The appellant also relies on Order MO-3756. However, the records at issue in Order MO-3756 were financial statements while the records at issue here are G2

[8] R.S.O. 1990, c. H.8.

examiner training documents. They are vastly different records and I find that the reasoning in Order MO-3756 is not helpful in the present appeal.

[28] The appellant also argues that its competitors could use the records to compete with it in anticipated procurements to operate the DriveTest program. I note that the appellant has been operating the DriveTest program in Ontario for over the last 20 years. The appellant has not provided sufficient evidence to establish that disclosing the G2 examiner training documents could reasonably be expected to result in the loss of future procurement opportunities given the appellant's long-standing status as the operator of the DriveTest program.

[29] In sum, I am unable to find that the disclosure of the G2 examiner training documents could reasonably be expected to result in the harms set out in sections 17(1)(a) of the *Act*.

[30] All parts of the three-part test must be met for the mandatory exemption at section 17(1) to apply. Since the appellant has not established part 3 of the section 17(1) test, I find that section 17(1) does not apply to the records at issue.

ORDER:

1. I uphold the ministry's access decision and dismiss the appeal.

2. I order the ministry to disclose the records in accordance with its access decision by **November 30, 2023** but not before **November 27, 2023**. To be clear, the information withheld under section 21(1) should not be disclosed to the requester.

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

Original Signed By: October 25, 2023

Lan An
Adjudicator