

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-4539

Appeal PA22-00571

Ministry of the Environment, Conservation and Parks

August 2, 2024

**Summary:** An individual made a request under the *Act* for records provided to the ministry by an autobody shop to demonstrate environmental regulatory compliance. The autobody shop appealed the ministry's decision to grant partial access to the records, asserting that the information that the ministry was prepared to disclose is third party information subject to the mandatory exemption for that type of information in section 17(1)(c) of the *Act*.

In this order, the adjudicator upholds the ministry's decision. She finds that the information remaining at issue is not exempt under section 17(1)(c). She dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 17(1)(c), and 64(1).

**Orders Considered:** Orders MO-1481, PO-2293, and PO-2490.

### OVERVIEW:

[1] This order considers whether records provided to the Ministry of the Environment, Conservation and Parks (the ministry) by an autobody shop to demonstrate environmental regulatory compliance is third party information that should not be disclosed.

[2] The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to the following:

Including, but not limited to all emails, correspondence, forms, consulting firm reports/findings and applications in any relation to the operation of [a specific autobody shop].

ESDM [Emission Summary and Dispersion Modelling] report, Air modeling report & Acoustic monitoring report and all other documents submitted on behalf of [the autobody shop] by third party consultants.

In addition, any inter office communications (emails) and all correspondence from third party consulting firms / planning firms relating to the operation of [the autobody shop]. Officers' notes and all other supporting documents that relate to [the autobody shop].

From May 3, 2022, to August 22, 2022

[3] Prior to issuing its decision, the ministry notified the autobody shop under section 28 of the *Act* and sought its representations regarding disclosure of the responsive records.

[4] The ministry subsequently granted access to the information, in part, denying some of the information pursuant to the mandatory exemptions at section 17(1) (third party information) and 21(1) personal privacy) of the *Act*. The ministry explained that the information that was severed pursuant to section 17(1) belonged to the suppliers of the products that the third party uses, as well as a process flow diagram.

[5] The requester did not appeal the ministry's decision, therefore, the portions of the records that the ministry severed under sections 17(1) and 21(1) are not at issue.

[6] The autobody shop (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[7] As mediation did not resolve the appeal, it moved to adjudication, where an adjudicator may conduct an inquiry. I sought the parties' representations, the non-confidential portions of which were shared between them.

[8] In its representations, the appellant consented to the disclosure of certain portions of the records that the ministry decided to disclose to the requester.<sup>1</sup> Therefore, this information is no longer at issue. Below, I will order the ministry to disclose it. The appellant clarified that it was relying on section 17(1)(c) to exempt the information that remains at issue, which is the information that the ministry decided to disclose.

[9] In this order, I uphold the ministry's decision. I find that the information that it is

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<sup>1</sup> Being portions of pages 64, and 99 to 106, 326 to 333, and 339, and all of pages 127, 141 to 142, 210 to 225, 229 to 233, 334 to 338, and 340. These portions are no longer at issue.

prepared to disclose is not exempt by reason of section 17(1)(c). I order the ministry to disclose it to the requester and dismiss the appeal.

## **RECORDS:**

[10] The information remaining at issue in the records is noted in the following index of records.

Pages at issue	Description of record at issue
1-33	Paint Booth and Exhaust Stack Inspection Report dated June 8/2022
34-63 <sup>2</sup>	Emission Summary and Dispersion Modelling Report (ESDM report) <sup>3</sup>
65-78	ESDM – Source and contaminants identification table, Source summary table, and Emissions table
78-82	ESDM - Site Location Map
84-89	ESDM – Supporting Calculations
90	ESDM - Supplier name withheld by ministry, remainder of page at issue
91-98	ESDM
107-108	ESDM – Site Emissions Summary
109-113	ESDM – Supporting Information for Assessment of Negligibility
114-126	ESDM – Dispersion Modelling Printouts
128-132	ESDM - Filter Specification Sheet
133-140	ESDM – Supplement Report
143-196	Acoustic Assessment Report
143-196	Acoustic Assessment Report
197-204	Sound Measurements and Sound Power Calculations

<sup>2</sup> Pages 65 to 134 are attachments to the EDSM report.

<sup>3</sup> Prepared in accordance with s. 26 of O. Reg. 419/05 under the *EPA* and the ministry's March 2009 documents titled, "Procedure for Preparing an Emission Summary and Dispersion Modelling Report" and "Air Dispersion Modelling Guideline for Ontario."

205-209	Predictor Model Inputs and Outputs
226-228	Environmental Activity and Sector Registry Approval Application, Operating and Maintenance Procedures
234-322	AERMOD [Air Dispersion Modelling]
323-325	Predictor Inputs

## **DISCUSSION:**

[11] The sole issue in this appeal is whether the mandatory exemption at section 17(1)(c) for third party information applies to the information remaining at issue in the records.

[12] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>4</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>5</sup>

[13] The appellant claims that section 17(1)(c) applies to the information that the ministry is prepared to disclose. That section 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,

result in undue loss or gain to any person, group, committee or financial institution or agency.

[14] 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

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<sup>4</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>5</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

## **Representations**

[15] The appellant states that it is an autobody shop and that, since 2022, it has been in litigation with its neighbour, the requester, in relation to a zoning by-law amendment that was approved for the autobody shop. It provided a copy of the Superior Court of Justice Statement of Claim and the Ontario Land Tribunal (OLT) Appeal Form as proof of the proceedings commenced against it (the autobody shop) and its owners personally in relation to this zoning by-law amendment.

[16] The appellant provided a chart itemizing the records at issue, its position on release in relation to each record, as well as going through the relevant test for each record in relation to section 17(1)(c).<sup>6</sup> Its position is that many of the records at issue:

- contain information that is a result of a technical and/or scientific study conducted by a professional using particular calculations or processes to observe and record the results;
- were supplied to the ministry with a reasonable expectation that the information would be kept confidential. While the documents were supplied to the ministry to satisfy compliance requirements, the records at issue included information which would not have been submitted to the ministry without an expectation of confidentiality and privacy to ensure that they would not be released or disclosed to third parties – especially to third parties with whom they are engaged in litigation;
- were prepared for a purpose that would not entail disclosure; and,
- if disclosed, could reasonably be expected to result in undue loss to the appellant, given its ongoing litigation with the requester, which would be contrary to the purpose of subsection 17(1)(c) of *FIPPA* which seeks to protect information that could be exploited in the marketplace.

[17] The requester submits that the ongoing litigation matters have nothing to do with the request. The requester provided representations on each record, which I will refer to in more detail below. They submit that many of the records were statutorily required to be submitted to the ministry under the provisions of the *Environmental Protection Act (EPA)*, a public protection statute as enforced by the ministry.<sup>7</sup>

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<sup>6</sup> The appellant argued for each record that due to the litigation, disclosure of each record could result in an undue loss to it.

<sup>7</sup> *Environmental Protection Act*, R.S.O. 1990, C.E.19.

[18] The requester states that the ministry works to protect and sustain the quality of Ontario's air, land, and water and works to protect, restore, and enhance the environment to ensure public health and environmental quality.

[19] In addition, the requester states that the submission of documents to the ministry does not on its face meet the test of being supplied in confidence as the information can either be ordered to be submitted to the ministry, such as the ESDM Reports, or required to be submitted by the *EPA*, such as through the ministry's Environmental Activity and Sector Registry. As a result, they submit that such information is known to be publicly accessible and not provided in confidence or with the expectation of it being confidential to the ministry.

[20] The requester states that all of the appellant's representations on section 17(1)(c) attempt to claim undue loss simply because there is litigation occurring before the Superior Court of Justice and Ontario Land Tribunal. They state that the appellant has failed to explain how the alleged undue loss or gain could be expected to occur should the records be disclosed.

[21] In reply, the appellant states that records were provided to the ministry to ensure legal and regulatory compliance and were provided in confidence. It also states that there are several inaccuracies in the records and that if the records were misinterpreted as a result of an inaccuracy or because of their level of sophistication, it may result in unnecessary reputational harm to it, including being misconstrued or manipulated in a way that leads to an unjust outcome for it.

[22] Further, the appellant submits that the disclosure would conflict with the discovery rules in the ongoing litigation, as it would provide the requester with an inappropriate opportunity to obtain information outside of Rule 30 of the *Rules of Civil Procedure*. It states that if the requester believes the records to be relevant to the litigation proceedings, they are obtainable through the discovery process pursuant to Rule 30

[23] In sur-reply, the requester states that any ongoing litigation proceedings are unrelated to the statutorily required release of the records and information under the provisions of the *Act*.

[24] The requester points out that the relationship between *FIPPA* and civil litigation proceedings is dealt with in section 64(1) of the *Act* stating:

This Act does not impose any limitation on the information otherwise available by law to a part to litigation.

[25] The requester makes the following submissions:

- the *Rules of Civil Procedure*<sup>8</sup> and the Ontario Land Tribunals' Rules of Practice and Procedure do not govern proceedings before the IPC;
- the commencement of litigation by the requester against the appellant is not relevant to whether the responsive records are appropriately released on the basis that they do not fall within one of the exemptions under *FIPPA*;
- the usefulness of the information in a court case in and of itself does not result in a finding that the records are exempt from disclosure under the provisions of the *Act*; and
- there does not exist a conflict between the release of records under the discovery rules in ongoing litigation and the release of records under *FIPPA*, as the discovery rights in litigation are entirely separate from access rights under *FIPPA*.<sup>9</sup>

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

[26] The appellant submits that the records reveal scientific or technical information. The IPC has described these types of information, which is protected under section 17(1), as follows:

*Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as "scientific," it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.<sup>10</sup>

*Technical information* is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.<sup>11</sup>

[27] The requester agrees that the records at issue reveal scientific or technical information.

[28] I agree with the parties. From my review of the records, I find that they reveal scientific or technical information. The records are reports and studies prepared by an engineer (technical information) to test and analyze the emissions from the autobody shop (scientific information).

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<sup>8</sup> R.R.O. 1990, Reg. 194: Rules of Civil Procedure under *Courts of Justice Act*, R.S.O. 1990, c. C.43.

<sup>9</sup> The requester relies on Orders PO-1688, PO-2420, PO-2899-R, and PO-4187.

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

<sup>11</sup> Order PO-2010.

[29] Therefore, part 1 of the test under section 17(1) has been met.

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

### ***Supplied***

[30] The requirement that the information has been “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.<sup>12</sup>

[31] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>13</sup>

### ***In confidence***

[32] The party arguing against disclosure must show that the party 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>14</sup>

[33] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.<sup>15</sup>

[34] The appellant’s position is that it provided the records to the ministry to show compliance, with an expectation that they would not be publicly disclosed.

[35] The requester’s position is that the information was provided by the appellant with the expectation that it would be used by the ministry. They submit that the issue of compliance of a facility with the *EPA*, being a public protection statute, is reasonably

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

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

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

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



expected to be subject to public disclosure.

[36] Based on my review of the records and the parties' representations, I find that the information at issue in the records was not supplied to the ministry in confidence. Although the appellant argues that they had an expectation that the information supplied to the ministry was supplied in confidence,

[37] The records themselves are not marked confidential and do not indicate otherwise that they were being provided in confidence. These records were clearly provided to the ministry by the appellant in order to provide information required under the *EPA*. Given these circumstances, I find that the records at issue were not:

- communicated to the ministry on the basis that they were confidential and that they were to be kept confidential, and
- were prepared for a purpose that would not entail disclosure.

[38] Therefore, I find that part 2 of the test under section 17(1) has not been met.

[39] Although I have found that part 2 of the test has not been established and for section 17(1) to apply, all three parts of the test must be met, I will also consider whether part 3, the harms component of the test under section 17(1), has been met.

### **Part 3: harms**

[40] 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>16</sup>

[41] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>17</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>18</sup>

[42] As submitted by the appellant, section 17(1)(c) seeks to protect information that

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<sup>16</sup> Orders MO-2363 and PO-2435.

<sup>17</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>18</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.

could be exploited in the marketplace.<sup>19</sup>

[43] The appellant's position on every record at issue is the same, namely:

Given the fact that there is ongoing Superior Court litigation as well as litigation before the Ontario Land Tribunal involving [the appellant and the requester], the release of this record could result in an undue loss.

[44] The appellant is concerned that the requester is circumventing the litigation process by seeking records under the *Act* that they should obtain through the litigation process. However, section 64(1) of the *Act* provides that:

This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

[45] Section 64(1) operates in such a way as to not restrict discovery or production mechanisms available to parties in litigation. It does not, however, create a substantive right of access parallel or adjunct to litigation. Discovery rights in litigation are separate from access rights under the *Act*. Commencement of litigation by the requester against the appellant is not relevant to the determination of whether the records are exempt under the *Act*.<sup>20</sup>

[46] In Order PO-2490, the adjudicator found that section 17(1) was not intended to protect a litigant's competitive position in civil litigation. He noted that previous orders have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and that the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.<sup>21</sup>

[47] The adjudicator relied on the finding in Order PO-2293, where former Assistant Commissioner Tom Mitchinson stated:

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.

[48] In Order MO-1481, the appellant was concerned that the requested information could be used to "either establish or strengthen an anticipated claim for damages." The adjudicator determined that even if it could be argued that the records be used for the same purpose, she was not persuaded that this would amount to undue loss or gain, as

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<sup>19</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>20</sup> See Order PO-4187.

<sup>21</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.

contemplated by section 10(1)(c).<sup>22</sup>

In Order PO-1912, Assistant Commissioner Mitchinson considered whether disclosure of certain records which may be relevant to a particular civil action would result in unfair exposure to pecuniary or other harm, pursuant to section 21(2)(e) of the *Freedom of Information and Protection of Privacy Act* (equivalent to section 14(2)(e) of the *Act*). He concluded that any determination of personal liability would be based on a finding to that effect by a court and, therefore, could not accurately be described as being “unfair”.

Although the wording of section 10(1)(c) is somewhat different from section 14(2)(e), both provisions address similar types of harms, and therefore the Assistant Commissioner’s comments are also relevant in this case. In my view, since any damages that may be awarded as a result of the potential legal proceedings in this case would be based on a finding by a court, in my view, this cannot be characterized as an “undue” loss. Accordingly, I find that section 10(1)(c) is not applicable in the circumstances.

[49] I agree with the reasoning of the adjudicators in Orders MO-1481, PO-2293, and PO-2490 and adopt it for the purposes of this appeal. I find too that section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institution and is not designed to protect a litigant’s position in civil litigation, as is claimed by the affected party. Damages that may be awarded as a result of the legal proceedings that the appellant is a party to in this case would be based on a finding by a court or tribunal and cannot be characterized as an “undue” loss under section 17(1)(c).

[50] Therefore, I find that the appellant’s argument about the use of the information in the records in another forum in and of itself does not result in a finding that information is exempt under the *Act*.<sup>23</sup>

[51] The appellant did not provide representations linking the disclosure of the actual information at issue and the harms set out in section 17(1)(c). I find that the appellant’s mere assertion that the release of the records could result in of undue loss given the ongoing litigation without any specific details referencing the information in the records or the specific harm that could occur is insufficient to meet the test as set out in section 17(1)(c). I find that litigation between the appellant and the requester in and of itself is not sufficient to trigger an undue loss or gain resulting from the disclosure of the information. I find that the harm contemplated in section 17(1)(c) has not been established

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<sup>22</sup> Section 10(1)(c) of the *Municipal Freedom of Information and Protection of Privacy Act* is the municipal equivalent to section 17(1)(c) of *FIPPA*.

<sup>23</sup> See also Order MO-2684 and PO-2490.

[52] The appellant is also concerned about certain several inaccuracies in the records at issue that may be misinterpreted, which may result in unnecessary reputational harm to it if disclosed. It pointed out two such errors in its confidential representations. Based on my review of this information, I find that the appellant can easily explain what this information in the records means, if it wishes to do so or is requested to do so in the litigation. Therefore, any inaccurate information in the records can be so clarified.<sup>24</sup> Nevertheless, I have not been provided with evidence by the appellant as to how these two errors can cause the appellant reputational harm that would result in undue loss as contemplated by section 17(1)(c), nor is the same apparent to me from my review of this information.

[53] In summary, I find that the appellant has not provided me with evidence to support a conclusion that if the information in the records was disclosed, it could reasonably be expected to experience an undue loss. Taking into consideration the contents of the records and the parties' representations, I find that the appellant has not provided the requisite evidence to establish a "reasonable expectation of harm" under section 17(1)(c) of the *Act*.

[54] As a result, I find that the third part of the test in section 17(1)(c) has not been met as the appellant has not provided sufficient evidence that the disclosure of the records could reasonably be expected to cause undue loss or gain to any person, group, committee or financial group or agency.

[55] As I have found that neither part 2 nor part 3 of the test under section 17(1) have been met in this appeal, the information that remains at issue is not exempt under section 17(1) and I will order the ministry to disclose it to the requester.

### ***Conclusion***

[56] I uphold the ministry's decision to grant partial access the records. I find that the information remaining at issue in the records is not exempt under section 17(1)(c). Below, I order the ministry to disclose it to the requester and I dismiss the appeal.

### **ORDER:**

1. I order the ministry to disclose the information that remains at issue in the records to the requester by **September 9, 2024**, but not before **September 3, 2024**.
2. I reserve the right to require the ministry to provide me with a copy of the records disclosed to the requester.

Original Signed by \_\_\_\_\_  
Diane Smith

August 2, 2024 \_\_\_\_\_

<sup>24</sup> See Order PO-4245

Adjudicator