Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4590

Appeal PA21-00591

Ministry of the Environment, Conservation and Parks

January 16, 2025

Summary: An individual asked the ministry for access to environmental information relating to an industrial site in St. Catharines formerly owned by the appellant. The appellant appealed the ministry's decision to grant partial access to responsive records, claiming they are exempt under the mandatory exemption for third party information in section 17(1). The appellant also claimed that some of the records contain employee personal information. The adjudicator finds that the records are not exempt under section 17(1) and do not contain personal information. She upholds the ministry's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1) (definition of "personal information") and 17(1).

Orders Considered: Orders P-373, MO-1263 and PO-3459.

OVERVIEW:

[1] The Ministry of the Environment, Conservation and Parks (the ministry) received a request for access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to environmental information about an industrial plant site in St. Catharines. The request was for access to:

> All Environmental concerns, Orders, Spills, Investigations/prosecutions, Waste Generator number/classes and Environmental Compliance Approvals/Certificates of Approval (including air, renewable energy, waste

> water, waste sites, and waste systems) from 2010 to present for [a specific address] St. Catharines, Ontario.

[2] The request identified five third parties, named and numbered companies, as owners of the property.

[3] Before issuing a decision, the ministry notified these third parties pursuant to section 28(1) of the *Act* to give them the opportunity to make representations. One gave its consent to disclose some information to the appellant. The others did not respond.

[4] After the section 28(1) notification period passed, the ministry issued a decision to the requester granting partial access to responsive records. One of the third parties, the appellant in this appeal, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC), claiming that the records are exempt under the mandatory exemption for third party information in section 17(1) of the *Act*.[1]

[5] The parties, including the requester, participated in mediation. The appeal was not resolved and was transferred to the adjudication stage of the appeal process. I conducted a written inquiry, during which the appellant and the ministry submitted representations.

[6] In this order, I find that the records are not exempt under the mandatory exemption in section 17(1) for third party information. I also find that the records do not contain personal information as defined in section 2(1) of the *Act*, an issue raised by the appellant during the inquiry. I uphold the ministry's decision and dismiss this appeal.

RECORDS:

[7] There are 357 pages of records at issue, consisting of records pertaining to PCB storage sites, decommissioning reports, certificates of analysis and environmental analytical reports, and Environmental Site Assessments (ESAs) for an industrial plant site in St. Catharines formerly owned by the appellant. The records also include email correspondence between the ministry and the appellant regarding the site. The records at issue are numbered as follows:[2] pages 920-928; 976-983; 985-989; 1869-2010; 2016-2088; 2101-2219; and 2226.

[8] In its representations, the appellant states that it is "no longer pursuing the confidential treatment of the materials forming pages 2101-2219, other than to the extent that those materials contain personal identifiable information of [the appellant's] employees or other individuals." Therefore, I will not consider whether section 17(1) applies to the records at pages 2101-2219, inclusive. I will, however, consider whether

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[1] The appellant wrote in its appeal that it did not receive the section 28(1) notification from the ministry and therefore did not make submissions to the ministry opposing disclosure at that time.

[2] The pages at issue are identified in the parties' representations and the mediator's report. The pages have been numbered by the ministry.

these records contain "personal information" under Issue B in this order.

ISSUES:

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

B. Do the records contain "personal information" as defined in section 2(1), and if so, whose personal information is it?

DISCUSSION:

Issue A: Does the mandatory exemption at section 17(1) for third party information apply to the records?

[9] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[3] where specific harms can reasonably be expected to result from its disclosure.[4]

[10] Section 17(1) states in part that:

> 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…[5]

[11] For section 17(1) to apply, the party arguing against disclosure must satisfy each

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[3] *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*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[5] Section 17(1)(d), which has not been raised by either party, relates to information "supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute."

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.

[12] In this case, the parties submit that the records contain technical and scientific information and that they were supplied to the ministry in confidence, so that parts 1 and 2 of the test are met. Below I find that the third part of the test is not met. Consequently, I do not need to consider parts 1 and 2 of the test because, if one part of the three-part test is not met, section 17(1) cannot apply to the records.

Part 3 of the section 17(1) test: harms

[13] As the party resisting disclosure, the appellant cannot simply assert that the harms under section 17(1) are obvious based on the records and must provide detailed evidence about the risk of harm if the records are disclosed. While harm can sometimes be inferred from records themselves or the surrounding circumstances, a party resisting disclosure 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*.[6] The appellant must show that the risk of harm is real and not just a possibility,[7] although the appellant 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.[8]

Representations

The appellant's representations

[14] The appellant submits that the records contain historical information about past environmental and operational activities, including PCB management, soil and groundwater remediation, spill response efforts, and waste management practices, all of which it says were addressed many years ago.

[15] The appellant argues that disclosure of PCB-related information in the records may

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[6] Orders MO-2363 and PO-2435.
[7] *Merck Frosst Canada Ltd. v Canada (Health)*, [2012] 1 S.C.R. 23.
[8] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-3; *Accenture Inc. v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

cause public confusion that could impact its corporate reputation. The appellant says that it has made public statements about its operations and PCBs, and that disclosure of records containing information about PCB management, in addition to impacting its reputation, could prejudice its competitive position in the marketplace by damaging its reputation with customers, negatively influencing their purchasing decisions, and "perhaps even discouraging sales."

[16] The appellant says it is concerned that, notwithstanding the fact that the records show compliance with ministry regulations in place during the time covered by the records, they will be quoted out of context and without adequate explanation to the requester, who the appellant says "may possibly" be interested in creating controversy for their own motives. The appellant says that, while it sold its facility in 2014, the site remains vacant, and much controversy has been made about its state since the sale. The appellant says it has been diligent in its ongoing efforts to seek the property's development and says that use of the records "during this critical period of having the property available for future use may impugn these efforts and serve no useful societal purpose."

The ministry's representations

[17] The ministry submits that it specifically considered the possibility of harm to the appellant's competitive position as contemplated in section 17(1)(a) and determined that there was insufficient evidence of a reasonable risk of such harm from disclosure.

[18] The ministry also says that section 17(1)(b) does not apply in the context of this case because disclosure could not reasonably be expected to result in similar information no longer being supplied to it by the appellant or others. Specifically, the ministry says it has a regulatory mandate and authority under the *Environmental Protection Act*[9] (the *EPA*) to compel the provision of information like that which is at issue. The ministry says that, given this authority, disclosure of the records at issue would not reasonably be expected to result in similar information no longer being supplied to it, especially where it is in the public interest that similar information continues to be so supplied. Citing Order PO-3896, the ministry submits that the IPC has previously considered the application of section 17(1)(b) to reports concerning environmental contamination and clean-up efforts provided to the ministry in the context of its administration of the *EPA* and has found that there is a public interest in making the maximum amount of information in the area of environmental contamination and clean-up efforts available.

[19] The ministry also submits that it does not have evidence that the records at issue, if disclosed, could reasonably be expected to result in undue loss for the appellant or undue gain to its competitors or any other entity, as contemplated in section 17(1)(c).

[9] R.S.O. 1990, c. E.19.

Analysis and findings

[20] In assessing whether the appellant has met the harms test under section 17(1), I must determine whether the appellant has demonstrated a reasonable expectation that the specific harms contemplated in sections 17(1)(a) to (c)[10] would result from disclosure of the records at issue.

[21] As noted above, sections 17(1)(a) to (c) contemplate three specific harms from disclosure of third party information: (a) significant prejudice to the competitive position or significant interference with contractual or other negotiations of a third party; (b) a reasonable expectation that similar information will no longer be supplied to the institution when it is in the public interest that it continue to be; and (c) undue loss to a third party or undue gain to another person or entity.

[22] While the appellant has articulated concerns that align broadly with the language of the harms in sections 17(1)(a), (b) and (c), the appellant has not identified or provided evidence to substantiate which of the harms outlined in these sections it believes disclosure could reasonably be expected to cause. Based on my review of the appellant's representations, the records and the ministry's representations, it is my understanding that the appellant is implicitly invoking the harms in each of sections 17(1)(a), (b) and (c).

[23] As also noted above, the appellant as the party resisting disclosure must provide detailed evidence about the risk of harm if a record is disclosed, and that the risk is real and not just a possibility. General concerns or speculative assertions are insufficient to meet the harms test.

[24] The appellant argues that disclosure could harm its corporate reputation and therefore its competitive position, which I understand to be the harm contemplated in section 17(1)(a). However, the appellant has not provided evidence sufficient to establish a reasonable risk of harm to its competitive position from disclosure. I find that the appellant's claims that disclosure "could" negatively affect its corporate reputation, customers' buying decisions and "perhaps" impact sales lack the requisite detail to explain how or why these outcomes are likely to result from the disclosure, and do not establish a connection between disclosure and the competitive harms described in section 17(1)(a).

[25] I also find that the appellant has not connected its concern that the requester may quote the records out of context or use them for motives adverse to the harms test in any of sections 17(1). In Order PO-3459, the IPC dismissed a similar concern, where a third party argued that public disclosure of a report could create an erroneous impression. The adjudicator in that case found that if there were concerns about potential misinterpretation, the third party would have the opportunity to correct any

[10] As noted above, section 17(1) contemplates a fourth harm in subsection (d), for labour relations disputes. Neither party, implicitly or explicitly, has raised section 17(1)(d) and I am satisfied that it is not relevant in this appeal.

misunderstanding and provide updated information if necessary. In Order P-373, evidence regarding harm that could result from a negative interpretation of the information contained in the records was found not to be sufficient to establish the third part of the test under section 17(1)(a) and/or (c). Such evidence was found to consist of generalized assertions of fact in support of what amounted to speculation of possible harm. I find that the same is true here and find that the mere assertion of harms by the appellant is speculative and falls short of the evidence required to uphold the application of either section 17(1)(a) and/or (c) in the circumstances.

[26] Regarding the ESAs contained in the records, past IPC orders have found that disclosure of ESAs does not meet the harms test under section 17(1)[11] and that such disclosure cannot reasonably be expected to significantly prejudice the competitive position of a third party as contemplated by section 17(1)(a) or result in undue gain or loss as contemplated by section 17(1)(c). In Order MO-1263, the Assistant Commissioner rejected a claim by the City of Toronto that disclosure of an ESA could reasonably be expected to prejudice a third party's competitive position or result in undue loss [12] where the "need for remediation efforts to deal with potential environmental contamination on the property…is a known fact." I find that this reasoning applies here, and I adopt it. The appellant's representations indicate that environmental concerns on the site are known; this is reflected in the appellant's representations that disclosure could lead to confusion given the appellant's prior public statements about remediation efforts at the site, particularly with respect to PCB contamination.

[27] I also accept the ministry's position that the harms in section 17(1)(b) – that disclosure could result in similar information no longer being supplied to the ministry where it is in the public interest that it continue to be so supplied – have not been made out. Past IPC orders have found that this section does not apply where a ministry has the authority to compel the provision of information where it is in the public interest that similar information continue to be so supplied.[13] I accept the ministry's representations that it has the authority under the *EPA* to compel production of information necessary to assess environmental contamination and to ensure that remedial actions are undertaken in accordance with its mandate and the *EPA*. I find that, given this authority and the ministry's regulatory mandate, disclosure of the records would not reasonably be expected to result in similar information no longer being supplied to the ministry, because the ministry can compel the provision of similar information in the future. In other words, where the appellant does not supply the information to the ministry voluntarily, it may be required to do so under the authority granted to the ministry by the *EPA*.[14]

[28] Finally, the appellant contends that disclosure may hinder ongoing efforts to develop the site for future use. However, this claim is not supported by evidence

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[11] See, for example, Orders MO-1263, MO-1503, MO-1974, MO-2922 and PO-2558, where the exemption for third party information was not upheld where it was claimed for ESAs.
[12] Sections 10(1)(a) and (c) of the *Municipal Freedom of Information and Protection of Privacy Act.*
[13] See, for example, Orders PO-1666, PO-1803, PO-2629, PO-3459, and PO-3916.
[14] Orders PO-1666, PO-1803, PO-2629 and PO-3896.

demonstrating a connection between the disclosure of historical records and any of the harms contemplated in sections 17(1)(a), (b) or (c). The appellant has not provided details or evidence explaining how disclosure of the records could impede or affect development plans in a manner that is contemplated by the harms set out in these subsections.

[29] For all of these reasons, I find that the appellant has not established that disclosure of the records at issue could reasonably be expected to result in the harms contemplated under any of sections 17(1)(a), (b), and/or (c).

[30] Since I have found that the third part of the test for harms in section 17(1) has not been met, the records cannot be exempt under section 17(1) even if the first two parts of the test – concerning the type of information and whether it was supplied to the ministry in confidence – are met. Accordingly, for these reasons, I find that the records at issue are not exempt under section 17(1).

[31] The appellant submits in its representations that there is no compelling public interest in disclosure of the records, language taken from the public interest override in section 23 of the *Act*, and distinct from the public interest contemplated by section 17(1)(b), above (which considered the supply of information that is in the public interest to an institution). Because I have found that the information is not exempt under section 17(1), the public interest override in section 23 is not relevant and cannot apply in this case.

[32] I will next consider the appellant's submission that pages 2101-2219 contain personal information belonging to its employees or others.

Issue B: Do the records contain "personal information" as defined in section 2(1) and if so, whose personal information is it?

[33] The appellant submits that pages 2101-2219 of the records contain personal information, writing in its representations that:

> …various pages in the materials contain personally identifiable information of individuals. While we have not highlighted the personal information of [the appellant's] employees and others appearing in the materials, should a decision be made to release the documents, we would ask that this information receive confidential treatment and [be] redacted accordingly.

[34] The appellant did not address any specific personal privacy exemption over these pages in its representations.

[35] The definition of personal information in section 2(1) does not apply to information that identifies individuals in a business, professional or official capacity. Section 2(1) defines personal information as "recorded information about an identifiable individual" and contains a non-exhaustive list of examples of personal information that includes an

individual's name where it appears with other personal information relating to them or where disclosure would reveal other personal information about them.[15] Section 2(3) of the *Act* states that 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."

[36] Based on my review of the records at issue, I find that the names, titles and contact information of individuals identified in the records clearly fit within section 2(3) because this information identifies these individuals in a business or professional capacity only, and its disclosure would not reveal something of a personal nature about them.

[37] With respect to signatures of individuals identified in the records, the IPC has found that whether a signature is personal information depends on the context in which it appears. In cases where the signature is contained in records created in a business, professional or official context, the IPC has found that it is generally not about the individual in a personal sense and would not normally fall within the definition of "personal information."[16]

[38] I find that the individuals whose signatures appear in the records signed the documents in a business or professional capacity, not a personal one. In such circumstances, these signatures are their business or professional information, not personal information. I find that they therefore cannot qualify for exemption under a personal privacy exemption in the *Act*.

[39] For all of these reasons, I uphold the ministry's decision and dismiss this appeal.

ORDER:

1. I uphold the ministry's decision and dismiss this appeal.
2. The ministry shall disclose the records at issue to the requester by **February 21, 2025**, but not before **February 15, 2025**.

Original Signed by: January 16, 2025

Jessica Kowalski
Adjudicator

[15] Paragraph (h) of section 2(1).
[16] Orders MO-1194 and PO-3174.