

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4791

Appeal PA22-00191

Ministry of Transportation

February 26, 2026

Summary: The Ministry of Transportation received a request for access to highway 407 ETR Schedule 22 Annual Reports for 2019, 2020 and 2021. The ministry notified an affected third party of the access request and issued a decision denying access to the reports under the mandatory third party information exemption in section 17(1). The adjudicator upholds the application of the third party information exemption and dismisses the appeal.

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

OVERVIEW:

[1] The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Transportation (the ministry) for the

407 Express Toll Route (ETR) Schedule 22 Annual Reports for each year between 2002 and 2021.

[2] In accordance with section 28 of the *Act*, the ministry notified 407 ETR Concession Company Limited (the affected party) of the access request and asked for its views as to whether the records should be disclosed to the appellant. In response, the affected party provided submissions to the ministry in which it objected to disclosure of the records because they are exempt from disclosure under the mandatory exemption in section 17(1) (third party information) of the *Act*.

[3] The ministry then issued a decision letter to both the appellant and the affected party denying access to the records under section 17(1).

[4] The appellant was dissatisfied and appealed the ministry's access decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the appeal. During mediation, the appellant narrowed his access request to the Schedule 22 Annual Reports for 2019, 2020 and 2021. The appeal was not resolved during mediation and was moved to adjudication where an adjudicator may conduct an inquiry.

[5] An IPC adjudicator conducted an inquiry and received representations from the ministry and the affected party. She shared the ministry's complete representations with the appellant, but withheld portions of the affected party's representations for confidentiality reasons in accordance with the IPC's *Code of Procedure*. The adjudicator invited the appellant to provide representations. The appellant did not provide representations but confirmed his interest in proceeding with the appeal.

[6] In this order, I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[7] The records at issue in this appeal are the highway 407 ETR Schedule 22 Annual Reports for 2019, 2020 and 2021.

DISCUSSION:

[8] The records at issue were prepared by the affected party pursuant to the highway 407 ETR Concession and Ground Lease Agreement (the CGLA) between the affected party and the Ontario Government. Schedule 22 of the CGLA establishes the framework by which the affected party is required to determine and set tolls on the highway 407 ETR, including by tracking traffic flow by geographic segment and calculating congestion payments in circumstances where tolls are set at levels that are high relative to traffic volume. The Schedule 22 reports are also subject to audit requirements set out in the CGLA and contain the traffic, tolling, and related information underlying those calculations.

[9] The sole issue in this appeal is whether the mandatory exemption at section 17(1) for third party information applies to the Schedule 22 Annual Reports at issue.

[10] Section 17(1) protects certain confidential information that businesses or other organizations provide to government institutions,¹ where specific harms can reasonably

¹ *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.*).

be expected to result from its disclosure.² Section 17(1)(a) which is relevant in this appeal, 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;

...

[11] For section 17(1)(a) 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) of section 17(1) will occur.

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

[12] The IPC has described the types of information protected under section 17(1), including:

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.³

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.⁴ The fact that a

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ Order PO-2010.

⁴ Order PO-2010.

record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁵

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.⁶

[13] The ministry submits that the Schedule 22 Annual Reports contain technical, commercial and financial information. The ministry submits that the information is technical as it contains traffic data, formulas and calculations which are used for transportation engineering, planning purposes, and the operation of highway 407 ETR. The ministry notes that parts of the information include detailed temporal and geographic characteristics regarding the use and demand for the highway, data on the effectiveness of specific tolling technologies, and other detailed charts, indexes, formulas, and calculations. It submits that the records contain commercial information regarding the selling of services – specifically, transponders and various fees for services and include information on toll-related customer demand, and customer use of highway 407 ETR. Finally, it submits that the records contain financial information as they include information on varying pricing practices, for example, on modifying tolling rates depending on specific factors.

[14] The affected party submits that the withheld information includes commercial and financial information. In the confidential portions of its representations, the affected party points to specific examples in the records to illustrate that the information contains this sort of information.

[15] After reviewing the withheld Schedule 22 reports, I find that portions of the withheld information qualify as technical information, specifically, data, formulas and calculations used for transportation engineering. However, this same information and other information in the records also qualifies as commercial and financial information since it relates to the selling of services, specifically, pricing practice fees for customer use of highway 407 ETR, fees for transponders and other services, and information on toll-related customer demand.

[16] As a result, I find that the first part of the three-part test is met.

Part 2 of the test: supplied in confidence

[17] The requirement that the information must have been “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁷ Information may qualify as “supplied” if it was directly supplied to an institution

⁵ Order P-1621.

⁶ Order PO-2010.

⁷ 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.⁸

[18] 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.⁹ 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.¹⁰

[19] The ministry submits that the Schedule 22 Annual Reports were prepared and provided to it directly by the affected party. The ministry notes that the affected party treated the records consistently in a manner that indicates concern for their protection from disclosure, and that in supplying the records, the affected party had an objective and reasonable expectation of confidentiality. The ministry states that the affected party supplied the records solely to demonstrate that it was in compliance with its obligations under the CGLA. The ministry notes that the Schedule 22 Annual Reports were not intended for public release and were not provided to it for any purpose that would entail disclosure. It submits that the records at issue have explicit wording that identifies them as confidential.

[20] The affected party submits that the reports at issue were supplied to the ministry in confidence. It notes that pursuant to the CGLA, Schedule 22 Annual Reports are provided on the basis that they are confidential.

[21] After reviewing the parties' representations and the withheld records, I agree with the ministry and the affected party that the Schedule 22 Annual Reports were supplied to the ministry by the affected party in confidence. The reports clearly indicate that they were prepared by the affected party and that they were supplied in confidence to fulfill a requirement of the CGLA. I accept the ministry and affected party's submission that, in supplying the information in the records to the ministry, the affected party reasonably

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

¹⁰ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

expected that the ministry would treat the information confidentially. I am satisfied that the affected party treated the information consistently in a way that indicates concern for confidentiality and that its expectation of confidentiality was reasonable considering the proprietary nature of the information.

[22] As a result, I find that the Schedule 22 Annual Reports were supplied to the ministry in confidence, and the second part of the test is met.

Part 3 of the test: harms

[23] 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. Parties resisting disclosure must show that the risk of harm is real and not just a possibility.¹¹ 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.¹²

[24] Sections 17(1)(a) seeks to protect information that could be exploited in the marketplace.¹³ To show that section 17(1)(a) is applicable the ministry and/or the affected party must provide detailed evidence that disclosure of the records could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party – the section 17(1)(a) harm.

[25] The affected party addresses the harms in sections 17(1) generally. In its confidential representations, it identifies some of the sensitive information contained in the Schedule 22 Annual Reports that it submits would reveal its business strategy and other sensitive commercial information, if disclosed. In its non-confidential representations, it submits that disclosure of the Schedule 22 Annual Reports would unfairly reveal the most highly sensitive aspects of its highway 407 ETR business. It states that this information could be exploited to predict or affect the asset value of the highway 407 ETR. It submits that in this appeal, disclosure of confidential information to the appellant, a well-known financial markets commentator who writes about the current and future value of the highway 407 ETR, presents a real opportunity for the information to be used in a manner that could negatively affect the value of highway 407 ETR. The affected party submits that the appellant's identity is relevant in considering the extent of the risk that the alleged harms will materialize. In support of its submission, it relies

¹¹ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹² *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.

¹³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

on a decision of the Divisional Court¹⁴ where the Court considered the identity of the requester when assessing the potential harm to the third party.

[26] The affected party submits that the freedom of information process should not be used to provide a private entity with an informational advantage that could impact the value of publicly traded companies in Canada and other global stock exchanges. The affected party states that the highway 407 ETR is one of a growing number of privately owned toll highway operators in North America. It submits that the value of the highway 407 ETR business is closely tied to its revenue potential. The affected party submits that disclosure of this information would make the information available to its competitors and therefore put it at a competitive disadvantage when bidding on potential business and could otherwise be harmful to its commercial interests in the Canadian and global markets.

[27] In its representations, the ministry indicates that it relies on the affected party's submissions addressing potential harm if the withheld information is disclosed. As noted, the appellant did not provide representations.

[28] Having reviewed the complete representations of the affected party and the records at issue, I am satisfied that the affected party has established that disclosure could reasonably be expected to give rise to the harm contemplated by section 17(1)(a).

[29] The Schedule 22 Annual Reports consist of detailed technical, financial and commercial information that is closely connected to the affected party's revenue potential and asset valuation. This is reflected in the withheld information, consisting of internal analysis, formulas, and assessments that are not publicly available. I accept that this information forms part of the affected party's confidential business information. In my view, this information goes beyond generalized or high-level information and instead reveals specific, business-sensitive information. I accept that this information is capable of being used to draw accurate inferences about the affected party's commercial position.

[30] I find that disclosure of the withheld information could reasonably be expected to significantly prejudice the affected party's competitive position within the meaning of section 17(1)(a). The disclosure of confidential technical, financial and commercial information of this nature would provide competitors or other market participants with insight into important aspects of the affected party's business that would not otherwise be available to them, resulting in an informational advantage. I accept that the value of the affected party's business is closely tied to its revenue potential, which is illustrated in the withheld information. Disclosure of the withheld information would reveal the affected party's business strategies and could reasonably be expected to result in an unfair advantage to other privately owned toll highway operators, to the detriment of the

¹⁴ *Trustees of the Bricklayers and Stonemasons Union Local 2 v. Information and Privacy Commissioner of Ontario and Canadian Bricklayers and Allied Craft Unions Members v. Information and Privacy Commissioner of Ontario*, 2016 ONSC 3821.

affected party's competitive position.

[31] In reaching this conclusion, I am mindful that disclosure under the *Act* is disclosure to the public at large. The question in this appeal is not whether a particular requester would use the information, but whether disclosure of the information itself could reasonably be expected to result in the harms set out in section 17(1). Having reviewed the withheld information, I am satisfied that the risk of harm arises from the nature of the information itself.

[32] Accordingly, I find that the third part of the test in section 17(1)(a) is met and the records are exempt from disclosure.

ORDER:

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

Original Signed by: _____
Alec Fadel
Adjudicator

February 26, 2026 _____