**Information and Privacy Commissioner,
Ontario, Canada**

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

ORDER PO-3505

Appeal PA13-158

University of Western Ontario

June 30, 2015

Summary: This appeal is from Western University's decision to deny records, in whole and in part, relating to the licensing agreement between itself and organization. The adjudicator considers the application of the mandatory exemption in section 17(1) (third part information) and the discretionary exemptions in sections 13(1) (advice or recommendations), and 18(1) (economic or other interests) to the following records: notes, emails, draft communications and draft agreements. The university's decision is upheld in part.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 13(1), 17(1), and 18(1)(e).

Orders and Investigation Reports Considered: Orders PO-3059-R and PO-3150.

OVERVIEW:

[1] The appellant made a request to Western University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the university's license agreement between itself and an organization which represents the owners of reproduction rights and that distributes royalties to Canadian writers, visual artists and publishers (the affected party). The original request was subsequently clarified to include the following:

1. All documents, communications, and records, including all correspondence between [the university] (or any of its agents and employees) and [an identified company] (or any of its agents and employees), pertaining to the university license agreement dated [a specified date] ("the agreement"). This request is for the period January 30, 2011 and the date of this request.

2. Any records, documents, communications and correspondence, agendas or minutes pertaining to the implementation and operation of Clause 11 of [the agreement] (Survey of Bibliographic and Volume Data). This request is for the period of January 30, 2011 and the date of this request.

[2] In response to the request, the university issued a fee estimate and interim access decision. The decision noted that certain records would qualify for exemption under section 17 (third party information), 18 (economic or other interests) and/or 19 (solicitor-client privilege) of the *Act*. The decision also noted that several third parties would be notified of the request as required by section 28 of the *Act*.

[3] After receiving the fee estimate and interim access decision, the appellant further clarified her request and excluded all records that would be exempt under section 19 of the *Act*.

[4] The university then issued its final decision, granting partial access to the responsive records, and denying access to certain records on the basis of the exemptions in sections 13 (advice or recommendations), 17, 18 and 19(c) of the *Act*. The appellant appealed this decision to this office.

[5] At mediation, the appellant confirmed that she was not appealing the fee, nor was she appealing the part of the decision that certain records were not responsive to her request.

[6] During the inquiry in this appeal, the adjudicator with carriage of the appeal, sought and received representations from the university, two affected parties and the appellant. One of the affected parties is the University of Toronto and the other affected party is the organization that represents the owners of the reproduction rights for Canadian writers, visual artists and publishers. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] The appeal was then assigned to me to complete the order. As the appellant specified that she did not wish to pursue access to any records withheld under the

solicitor-client privilege exemption in section 19, I removed those records[1] for which this exemption was claimed from the scope of the appeal.

[8] In this decision, I uphold the university's decision in part. I order the university to disclose records I find not exempt under section 18(1)(e) and uphold the university's decision with regard to the application of section 13(1).

RECORDS:

[9] I have removed the records withheld under section 19(c) from the scope of the appeal. These records are not included in this index. As the appellant did not wish to pursue access to the information identified as not responsive to her request, I have also removed these records from the scope of the appeal.

Doc. No.	Description of Records	Disclosure and Exemption claimed
1.9	Email from named individual to named individual dated January 27, 2012	Withheld in full – section 13(1)
1.10	Communication strategy (version 5)	Withheld in full – section 13(1)
1.12	Communication strategy (version 1)	Withheld in full – section 13(1)
1.13	Communication strategy (version 2)	Withheld in full – section 13(1)
1.14	Communication strategy (version 3)	Withheld in full – section 13(1)
1.15	Communication strategy (version 4)	Withheld in full – section 13(1)
1.16	Joint Media Release (version 1)	Withheld in full – section 13(1)
1.17	Joint Media Release (version 2)	Withheld in full – section 13(1)
1.18	Joint Media Release (version 3)	Withheld in full – section 1 3(1)
1.19	Joint Media Release (version 4)	Withheld in full – section 13(1)
1.26	Draft Backgrounder (version 1)	Withheld in full – section 13(1)
1.27	Draft Backgrounder (version 2)	Withheld in full – section 13(1)
1.40	UWOFA response to agreement dated February 7, 2012	Partial disclosure – section 13(1)

[1] This includes records: 1.1, 1.2, 1.3, 1.4, 1.5, 1.6 and 1.7.

1.50	Email from named individual to other named individuals dated February 28, 2012	Withheld in full – section 13(1)
1.51	Response to McGill Daily Interview	Withheld in full – section 13(1)
1.52	Email from named individual to named individuals dated February 28, 2012	Withheld in full – section 13(1)
1.53	Email from named individual to named individuals dated February 28, 2012	Withheld in full – section 13(1)
1.54	Email from named individual to named individual dated March 6, 2012	Withheld in full – section 13(1)
2.18	Email from named individual to named individual dated March 8, 2012 and email dated March 1, 2012	Withheld in full – sections 17(1)(a), (c), 18(1)(e), (f), (g)
2.19	Email from named individual to named individual dated March 8, 2012	Partial disclosure – sections 13(1), 17(1)(a), (c), 18(1)(e), (f), (g)
2.25	Email from named individual to named individual dated April 3, 2012	Partial disclosure – sections 17(1)(a), (c), 18(1)(e), (f), (g)
2.44	Email from named individual to named individual dated April 25, 2012 and email dated April 25, 2012	Withheld in full – sections 13(1), 18(1)(e), (f), (g)
2.47	Email from named individual to named individual dated May 1, 2012	Partial Disclosure – sections 17(1)(a), (c), 18(1)(e), (f), (g)
2.48	Email from named individual dated May 8, 2012 containing another email dated May 1, 2012 and another email dated April 26, 2012	Withheld in full – sections 17(1)(a), (c), 18(1)(e), (f), (g)
2.49	Email from named individual to named individual dated May 16, 2012	Partial disclosure – sections 17(1)(a), (c), 18(1)(e), (f), (g)
2.65	Email from named individual to named individual dated June 11, 2012	Withheld in full – sections 18(1)(e), (f) and (g)
2.66	Email from named individual to named individual dated June 11, 2012 and containing email dated June 11, 2012	Withheld in full – sections 13(1), 18(1)(e), (f), (g)
2.73	Email from named individual to named individual dated June 25, 2012	Withheld in full – sections 13(1), 18(1)(e), (f), (g)
2.78	Email from named individual to named individual dated July 17, 2012	Withheld in full – sections 18(1)(e), (f), (g)
2.80	Email from named individual to named individual dated September 14, 2012	Partial disclosure – sections 17(1)(a), (c), 18(1)(e), (f),

		(g)
2.90	Email from named individual to named individuals dated October 9, 2012	Withheld in full – sections 17(1)(a), (c), 18(1)(e), (f), (g)
2.91	Network Proposal	Withheld in full – sections 17(1)(a), (c), 18(1)(e), (f), (g)
2.97	Email from named individual to named individual dated November 2, 2012 containing email dated October 29, 2012	Withheld in full – sections 17(1)(a), (c), 18(1)(e), (f), (g)
2.98	Email from named individual to named individual dated November 8, 2012 containing two emails dated November 2, 2012 and October 29, 2012	Partial disclosure – sections 17(1)(a), (c), 18(1)(e), (f), (g)

ISSUES:

A. Does the discretionary exemption at section 13(1) apply to the records?

B. Does the discretionary exemption at section 18(1)(e) apply to the records?

C. Does the mandatory section 17(1) exemption apply to the records?

D. Did the university exercise its discretion under sections 13(1)?

DISCUSSION:

A. Does the discretionary exemption at section 13(1) apply to the records?

[10] The university submits that a number of the records are exempt under section 13(1) of the *Act* which states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[11] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[2]

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[2] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

[12] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[13] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [3]

[14] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[15] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations. [4]

[16] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant. [5]

[17] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 13(1). [6]

[18] The university's specific submissions on the application of section 13(1) to the records are as follows:

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[3] See above at paras. 26 and 47.

[4] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[5] *John Doe v. Ontario (Finance)*, cited above, at para. 51.

[6] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

- Records 1.9, 1.10, 1.12, 1.13, 1.14, 1.15, 1.17, 1.18, 1.19, 1.26 and 1.27 are records relating to the formulation of a response to certain sensitive communication issues passing between the university's communications department and the office of the provost and various drafts of communications records to be employed by the university in explaining its decision to enter into the agreement with the affected party.

- Records 1.40, 1.50, 1.51, 1.52, 1.53 and 1.54 are records related to the formulation of a recommended response to a specific party.

[19] With respect to the communication records, the university submits that its decision to enter into the agreement with the affected party was expected to be and was controversial and states:

> Upon entering into the Agreement, the vice provost met with communication staff to develop a communication strategy. These communications records as exchanged between the vice provost's office and the communications staff reflect the decision making process around the appropriate communication strategy to be employed by communication staff in justifying the agreement to university faculty, staff, students and the public.

[20] With respect to Records 1.40, 1.50, 1.51, 1.52, 1.53 and 1.54, the university provided the following submissions about the specific advice or recommendation given:

- Record 1.40 was partially released to the appellant. It is a record originally created by the faculty association at the university and the redacted portions contain advice from the vice-provost to the provost, which advice was added to the record after its publication. This advice was communicated by the vice-provost to the provost, deliberated upon and then incorporated into the latter's response to the faculty association in a letter dated February 13, 2012[7].

- Record 1.50 is an internal email from the university's legal counsel to the vice-provost, senior communication officials, and the executive assistant to the President and Provost. Record 1.51 is attached to Record 1.50. The university's legal counsel was asked to respond to a press inquiry made by a reporter at the student paper published at McGill University. In Record 1.50, legal counsel is seeking instructions from senior officials at the university with regard to his recommended responses contain Record 1.51.

[7] Letter was disclosed in full to the appellant.

- Record 1.52 consists of the recommendations of the vice-provost and a senior communication official to legal counsel with regard to his recommended response.

- Record 1.53 is an email chain containing the recommendations made in record 1.52. As a result of the deliberative process, legal counsel's responses were adjusted and made as part of telephone interview to the reporter. Some of those responses were then incorporated into the McGill publication.

- Record 1.54 is similar to Records 1.50 and 1.51. The university's legal counsel is asked to respond to a faculty member's inquiry about the university's agreement with the affected party. The record contains legal counsel's recommended response to the inquiry and legal counsel's email to the vice-provost seeking instructions on whether to proceed with the recommended response.

[21] The university also provided representations on the application of section 13(1) to a group of records (Records 2.19, 2.44, 2.66, 2.73) it identifies as "records related to survey requirement". The specific representations for this group of records were not shared with the appellant for the most part, due to confidentiality concerns. However, as background for the application of the exemption to these records, the university states:

> In reaching a settlement, [the university], [the] University of Toronto and [the affected party] agreed under section 11 of the Agreement to develop a mutually agreeable survey methodology and/or reporting structure for the provision of bibliographic and volume data to [the affected party] for royalty distribution purposes to the copyright owners and to be used to assess the appropriateness of the FTE rate for any extension term. At the time of the Agreement, neither [the university] nor the University of Toronto could agree on the exact survey methodology as such methodology would have to be reviewed internally within their respective communities to ensure the protection of privacy and academic freedom. The parties therefore agreed to ongoing negotiations concerning the survey and reporting methodology…The records withheld under this part of the request identify specific discussions and negotiations surrounding survey methodology and the reporting requirement.

[22] These records consist of emailed discussions between university staff.

[23] I have carefully reviewed the records and the representations submitted by the university. I have also considered the relationship between the parties and the nature of the agreement being discussed. I find that all of the records specified above contain

advice or recommendations for the purposes of section 13(1). I accept the university's representations that these records relate to the eventual agreement between the university, the University of Toronto and the affected party. I further accept that some of these records contain advice from staff at the university to staff at the University of Toronto about the agreement. I also find that the records also contain advice given by university staff about how to respond to inquiries about the agreement. Lastly, I find that the records identified as "survey related" contain university staff advice regarding how to meet the reporting requirement and the survey methodology for the Agreement. Accordingly, I find that section 13(1) applies to exempt these records from disclosure, subject to my finding on the university's exercise of discretion below.

B. Does section 18(1)(e) apply to the records?

[24] In its representations, the university withdrew its reliance on sections 18(1)(f) and (g), instead deciding to rely on section 18(1)(e) only, which states:

> A head may refuse to disclose a record that contains,
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> > positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario.

[25] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[8]

[26] In order for section 18(1)(e) to apply, the university must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.[9]

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[8] Toronto: Queen's Printer, 1980.
[9] Order PO-2064.

[27] The terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.[10]

[28] This office has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme".[11]

[29] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations but rather simply reflects mandatory steps to follow.[12]

[30] The university submits that Records 2.18, 2.19, 2.25, 2.44, 2.47, 2.48, 2.49, 2.65, 2.66, 2.73, 2.78, 2.80, 2.90, 2.91, 2.97, 2.98, set out the parties' plans with respect to the negotiations on the development of a mutually agreeable methodology as required by section 11 of the Agreement.

[31] The University of Toronto provided the following argument for the application of section 17(1)(a) and (c), but I find it is relevant to the discussion here:

> Record number 2.97 and the portions at issue of records 2.80 and 2.98 contain details of a confidential survey methodology that was worked out between the University and [the affected party] to assess the University's usage under the License and to inform the negotiations that were anticipated regarding renewal. Those negotiations are now under way, as indicated above. If the confidential sampling methodology were disclosed, it could reasonably be expected to prejudice significantly the University's competitive position or interfere significantly with its contractual negotiations regarding [the affected party].

[32] Based on my review of the records, I find that section 18(1)(e) does not apply to the withheld information. I find that the withheld information does not contain "positions, plans, procedures, criteria or instructions". Rather, I find that the emails contain discussions and communications between the three parties on how to come up with a mutually agreeable methodology. The withheld information does not contain a "pre-determined course of action" and instead relates to the development of an actual course of action. Disclosure of these discussions would not, in my view, reveal "positions, plans, procedures, criteria or instructions" to be applied to negotiations. This is especially evident because the affected party whom the university and the University of Toronto would be negotiating with, is a party to these communications.

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[10] Orders PO-2034 and PO-2598.
[11] Orders P-348 and PO-2536.
[12] Order PO-2034.

[33] In PO-3150, Adjudicator Cathy Hamilton provided the following rationale for section 18(1)(e) which is instructive in the present appeal:

> As stated above, the first part of the section 18(1)(e) test requires that the record contain positions, plans, procedures, criteria or instructions. As such, the first part of the test relates to the form of the record and not to its intended use. The authors of the Williams Commission Report commented on the reasoning behind the exemption at section 18(1)(e) at page 321:
>
> > There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project.
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> …
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> > Apart from premature disclosure of decisions, however, there are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.
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> With respect to the types of "negotiations" to recognize under this exemption claim, the Williams Commission Report recommended at page 323:
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> > The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the

> process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:
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> An agency may refuse to disclose:
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>> A document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.
>
> We favour the adoption of a similar provision in our proposed legislation.

[34] In the present appeal, disclosure of the information withheld under section 18(1)(e) would not inform the affected party of the university's bargaining position or strategy because the affected party is a party to these discussions. Accordingly, I find that university has not established parts 1 and 2 of the test for the application of this exemption and I find that it does not apply to exempt the information from disclosure. Records 2.65 and 2.78 were withheld under section 18(1)(e) only. As I have found that this exemption does not apply and no mandatory exemptions apply to them, I will order Records 2.65 and 2.78 to be disclosed to the appellant.

[35] The university and the University of Toronto also claim that the remaining records are exempt under sections 17(1).

C. Does the mandatory section 17(1) exemption apply to the records?

[36] In its representations, the affected party submitted that it has no objection to the disclosure of Records 2.18, 2.25, 2.47, 2.48, 2.49, 2.80, 2.90, 2.91, 2.97 and 2.98. The university has provided representations on the application of section 17(1) to these records, while the University of Toronto submits that section 17(1) applies to exempt Records 2.80, 2.97, and 2.98. Section 17(1) states, in part:

> 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, where 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.

[37] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[13] 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.[14]

[38] For section 17(1) to apply, the institution and/or the third party 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), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[39] The university and the University of Toronto submit that the emails contain commercial and technical information. The types of information listed in section 17(1) have been discussed in prior orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical

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[13] *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.*).

[14] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[15]

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[16] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[17]

[40] The university submits that the emails contain commercial and technical information relating to the obligation by the universities to develop a survey methodology.

[41] I find that Records 2.18, 2.25, 2.47, 2.48, 2.49, 2.80, 2.90, 2.91, 2.97 and 2.98 consist of emails between the affected party, the university and the University of Toronto. I further find that these emails relate to the development of a survey methodology and the abilities of the university and the University of Toronto's computer systems to provide the necessary information. I accept that the records contain technical and commercial information for the purposes of section 17(1) as they relate to the development of a survey methodology for the commercial agreement between the university, the University of Toronto and the affected party. Accordingly, part 1 of the test has been met by the parties.

Part 2: supplied in confidence

Supplied

[42] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[18]

[43] 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.[19]

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[15] Order PO-2010.
[16] Order PO-2010.
[17] Order P-1621.
[18] Order MO-1706.
[19] Orders PO-2020 and PO-2043.

In confidence

[44] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[20]

[45] Both the university and the University of Toronto submit that the technical information in the records was "supplied" for the purposes of section 17(1). The university states:

> The Third Party Survey Records were also supplied in confidence as part of the ongoing settlement discussions surrounding how the institutions would meet their contractual obligation to provide volume data to [the affected party]. These email exchanges identify proposals made by Western, [the affected party] and U of T related to the fulfillment of the survey requirement under section 11 of the Agreement.

[46] The University of Toronto's submissions relate to the confidentiality aspect of the supply of its information.

[47] As stated above, the affected party submitted that it has no objection to the disclosure of this group of emails.

[48] With the exception of Record 2.90 and 2.91, I find that the technical and commercial information was not supplied for the purposes of section 17(1). As stated in the university's representations, the emails contain exchanges of information including requests for information between the three parties. I cannot characterize these email discussions and exchanges between the three parties as communications where information is being supplied by the third parties to the institution. Instead, the communications between the three parties represent a dynamic discussion where questions are being asked and information is reviewed and forwarded on. I find that Records 2.18, 2.25, 2.47, 2.48, 2.49, 2.80, 2.97 and 2.98 were not supplied and thus do not meet the part 2 test for the application of section 17(1). I will, accordingly, order that they be disclosed.

[49] On the other hand, I accept that Records 2.90 and 2.91 were supplied by the affected party to the university and that the affected party had an implicit expectation of confidentiality when it supplied this information to the university.

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[20] Order PO-2020.

Part 3: harms

[50] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[21]

[51] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from 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.*[22]

[52] As stated above, the affected party to whom this information relates does not object to the disclosure of Records 2.90 and 2.91. The university has submitted representations on the application the reasonable expectation of the harm in section 17(1)(b) for all the records for which section 17(1) was claimed.

[53] The university argues that the affected party would no longer supply the information in the records to the university if disclosure occurs and that it is in the public interest that this information continues to be supplied. The affected party's consent to the disclosure of the information contradicts the university's argument and I find that the harm in section 17(1)(b) is not established for Records 2.90 and 2.91. Accordingly, I find that section 17(1) does not apply to exempt these two records from disclosure and I will order them disclosed to the appellant.

D. Did the institution exercise its discretion under section 13(1)?

[54] The section 13(1) exemption is discretionary, and permits the university to disclose information, despite the fact that it could withhold it. The university must exercise its discretion. On appeal, the Commissioner may determine whether the university failed to do so.

[55] In addition, the Commissioner may find that the university erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose

- it takes into account irrelevant considerations

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[21] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[22] Order PO-2435.

- it fails to take into account relevant considerations.

[56] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[57] The university did not specifically make arguments on its exercise of discretion, but I have reviewed the factors that it considered when applying the exemption including:

- the interests sought to be protected by the section 13(1) exemption
- whether the requester had a sympathetic or compelling need to receive the records
- whether disclosure of the information would increase public confidence in the institution
- the nature of the information and the fact that it was sensitive to the institution's relationship with the University of Toronto and the affected party.

[58] Based on my review, I find that the university's exercise of discretion was based on the proper consideration of these factors. I uphold the university's exercise of discretion to apply sections 13(1) to the records for which I have found are properly exempt under those exemptions.

ORDER:

1. I order the university to disclose Records 2.18, 2.25, 2.47, 2.48, 2.49, 2.65, 2.78, 2.80, 2.90, 2.91, 2.97 and 2.98 by providing the appellant with a copy of these records by **August 6, 2015** but not before **July 31, 2015**.

2. I uphold the university's decision with respect to the remaining records.

[23] Order MO-1573.

3. In order to verify compliance with Order provision 1, I reserve the right to require the university to provide me with a copy of the records sent to the appellant.

Original Signed By: June 30, 2015
Stephanie Haly
Adjudicator