

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-3540-F

Appeal PA11-501-2

University of Ottawa

October 15, 2015

Summary: The university received a request for access to copies of all emails sent between the university's President and his Chief of Staff in a specified one-year period. The university granted partial access to the responsive records. It found that some of them are excluded from the *Act* pursuant to the labour relations exclusion at section 65(6). Further, it withheld other records and portions of records, relying on several exemptions found in the *Act*, including the exemption for third party information at section 17(1). The appellant appealed. In Interim Order PO-3502-I, the adjudicator upheld the university's decision that some records are excluded from the *Act* under section 65(6). She found, further, that some of the remaining records or parts of records are exempt from disclosure pursuant to the exemptions claimed by the university. She deferred consideration of the application of section 17(1) to seven records pending notification of third parties. In this final order, she does not uphold the university's application of section 17(1) to the records and orders it to disclose them to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 17(3).

OVERVIEW:

[1] This order disposes of the remaining issue raised as a result of the University of Ottawa's (the university) decision in response to the appellant's access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The issue decided in this order is whether seven records are exempt from disclosure pursuant to the mandatory exemption for third party information at section 17(1) of the *Act*.

[2] The appellant's access request was for all emails sent between the university's President and his Chief of Staff over a specified period in 2010-2011. The university located over three hundred responsive records and issued a decision that provided the appellant with partial access to these records. It found that the *Act* did not apply to some records pursuant to the exclusionary provision at section 65(6) of the *Act*, which excludes certain employment and labour relations records from the *Act*. It also denied access to some records, either in whole or in part, on the basis of various exemptions, including the mandatory third party information exemption at section 17(1) of the *Act*.

[3] The appellant appealed the university's decision to this office. In Interim Order PO-3502-I, I found that some of the records at issue are excluded from the operation of the *Act* by virtue of the exclusion for labour relations and employment records at section 65(6). Of the remaining records, I found that some are exempt or partially exempt from disclosure pursuant to various exemptions under the *Act*.¹ However, I deferred consideration of the potential application of the mandatory third party exemption at section 17(1) to seven records for which the university claimed that exemption, pending notification of the third parties to whom the records relate.

[4] Following the release of Interim Order PO-3502-I, I notified five third parties of the appeal and invited representations from them. Representations were filed by four of the third parties, all of whom advised that they had no objection to the release of the records pertaining to them. One third party requested that a small amount of personal information of an individual (not the appellant) be removed from record 164. The appellant subsequently confirmed to this office that he is not pursuing access to the personal information in that record.

[5] In this order, I do not uphold the university's decision to withhold the records pursuant to section 17(1) of the *Act*, and I order it to release the records to the appellant.

RECORDS:

[6] The records at issue are emails between the university and various third parties, and are numbered 143, 164, 209, 219, 270, 271 and 272. The portion of record 164 containing some personal information is not at issue.

¹ I found that some records were exempt, in whole or in part, pursuant to the discretionary exemptions for advice and recommendations at section 13(1) and solicitor-client privilege at section 19. I found, further, that some records are exempt or partially exempt pursuant to the mandatory personal privacy exemption at section 21(1). I did not uphold the university's application of 18(1) (economic interests of Ontario) to the records.

ISSUE:

[7] The only issue to be decided in this final order is whether the mandatory exemption at section 17(1) applies to records 143, 164, 209, 219, 270, 271 and 272.

DISCUSSION:

[8] The university argues that the records contain commercial information supplied to it by third parties and are exempt pursuant to the mandatory third party information exemption at section 17(1), which 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,

(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;

[9] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.² 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.³

[10] 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;
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.

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Representations

[11] The university submits that the records contain commercial information relating to the exchange of services between the university and third parties. It submits that the discussions set out in the withheld correspondence all took place at a senior level, between the President and others within the university and beyond, and that these discussions were confidential. Further, the university submits that the records reveal information that was supplied by third parties to the university.

[12] The university goes on to submit that disclosure would result in such information not being provided to the university again. It submits that, at the commencement of or during the relationship between the university and a third party, high level exchanges of communications will often take place between the third party and senior executives of the university, including the President. The university submits that it is important to these discussions that third parties be able to share information freely, and that if they learn that information which they provide may be disclosed, they may not be willing to engage in similar high-level strategic discussions. As a result, the university will be prejudiced in its ability to negotiate new projects and undertakings with third parties.

[13] The university further submits that the existence of a reasonable expectation of harm arising from disclosure can be inferred from the nature and circumstances of the communications.

[14] The appellant submits that these records do not relate to "informational assets". He points out that the subject of record 164 is "visit to country", and the subject of record 209 is "country". He submits that there is likely to be at least some information contained in those records that is not exempt pursuant to section 17(1). He also points out that records 143 and 219 appear to relate to internal matters at the university, and at least some content in these records does not relate to a third party.

[15] As noted above, I notified the five third parties of this appeal and provided them with the opportunity to make representations. One of the third parties did not respond. The others responded as follows:

- One third party stated that the records relating to it "may be released to the [appellant]".
- One third party stated that it had "no concerns regarding the disclosure of the information" contained in the records pertaining to it.
- One third party stated that it had "no objection" to the information pertaining to it being released to the appellant, but requested that a small amount of personal information be removed. As indicated above, the appellant is no longer pursuing this information.

- One third party stated that it was “ok with [the] request” as it relates to the records relating to it.

[16] The third parties did not file representations beyond these statements.

Analysis and findings

[17] I will begin by addressing the relevance of the fact that some of the affected parties have consented and/or not objected to the disclosure of the record pertaining to them. Section 17(3) of the *Act* states:

A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

[18] If section 17(1) applies to a record, and the third party does not consent to its disclosure, the institution shall refuse to disclose it. If, however, the third party consents to its disclosure, the institution may disclose it, or may also withhold it. The effect of section 17(3) is to turn the mandatory exemption at section 17(1) into a discretionary one. An institution must exercise its discretion and on appeal, the Commissioner may decide whether the institution has failed to do so.

[19] The first question is whether section 17(1) applies to the records. As noted above, for section 17(1) to apply, the institution and/or the third party must satisfy each part of a three-part test.

Parts 1 and 2: commercial information supplied in confidence

[20] I have not found it necessary to make a determination as to whether parts 1 and 2 are satisfied. Assuming, without deciding, that they are, I find that section 17(1) does not apply because the third part of the test is not satisfied; that is, for the reasons set out below, the university has not established that disclosure of the record gives rise to a reasonable expectation that the harm specified in paragraph (b) of section 17(1) will occur.

Part 3: harms

[21] To meet this part of the test, the institution and/or the third party must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.⁴ 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 other circumstances. However, only in exceptional circumstances would such a determination

⁴ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.⁵

[22] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 17(1).⁶ Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.⁷

[23] As indicated above, the university submits that disclosure would result in similar information not being provided to the university again. It submits that if the third parties learn that information they provide may be disclosed, they may not be willing to engage in similar high-level strategic discussions in future. As a result, the university will be prejudiced in its ability to negotiate new projects and undertakings with third parties.

[24] However, the university’s representations do not provide further reasons or evidence in support of its argument. I find that its representations fall short of the sort of detailed and convincing evidence that is required to establish part 3 of the test. Instead, its representations amount to speculation of possible harm. From my independent review of the records, I find that the harm is not inferable from the face of the records. Although the university submitted that the harm can be inferred from the circumstances of the communications, it did not elaborate. As noted previously, none of the third parties who were notified of the appeal objected to the disclosure of the records. I find that this is some evidence that neither they nor other entities with whom the university may engage in strategic discussions will cease to engage in similar discussions with the university in the future as a result of disclosure of the records.

[25] I conclude that the university has not discharged its onus and that there is no reasonable expectation of the harm identified by the university occurring if the records are disclosed. Therefore, section 17(1) does not apply to them. Given my conclusion, section 17(3) does not come into play.

ORDER:

1. I order the university to disclose records 143, 164, 209, 219, 270, 271 and 272 to the appellant, with the exception of the information highlighted in yellow on the copy of record 164 that is enclosed with the university’s copy of this order. This disclosure is to take place by **November 20, 2015** but not before **November 13, 2015**.

⁵ Order PO-2020.

⁶ Order PO-2435.

⁷ *Ibid*.

2. In order to ensure compliance with provision 1 of this Order, I reserve the right to require the university to provide me with a copy of the records disclosed to the appellant.

Original Signed by: _____

Gillian Shaw
Adjudicator

_____ October 15, 2015