Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3570

Appeal PA14-399

Office of the Public Guardian and Trustee

January 27, 2016

Summary: The appellant made a request to the Office of the Public Guardian and Trustee (the OPGT) under the *Act* for records relating to an escheats sale of patents by the OPGT. The OPGT granted access to one record, but denied access to the remainder of the records on the basis of several exemptions from disclosure found in the *Act*: the mandatory personal privacy exemption at section 21(1), the mandatory exemption for records containing third party information at section 17(1), the discretionary exemption at section 18(1)(e) for records that contain "positions, plans, procedures, criteria or instructions" to be applied to government negotiations, and the discretionary exemption for records containing advice and recommendations at section 13(1). The appellant appealed. In this order, the adjudicator upholds the OPGT's decision in part, and finds that two records are partially exempt from disclosure pursuant to the section 13(1) exemption. She finds, however, that none of the exemptions claimed by the OPGT apply to the remaining information and orders that this information be disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 13(1), 17(1), 18(1)(e) and 21(1).

Orders Considered: Orders 141, PO-1786-I, PO-2226, P-1502, P-3435, PO-3207, PO-2225, PO-2435, MO-2363 and MO-2927.

BACKGROUND:

[1] The Office of the Public Guardian and Trustee (the OPGT) received the following

request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an escheats sale of the assets of a particular company:

> I ... am submitting a formal request under the Freedom of Information Act for FULL documentation and information regarding the "Escheats" sale of assets that has taken place … between 2010-2014.
>
> Escheats sale took place with the "Office of the Public [Guardian] and Trustee"
>
> Requesting the full Documentation and information for,
>
> Escheats sales of assets "intellectual property" of [a named company]…

[2] The OPGT located eleven responsive records and issued a decision granting access to one of them. Access to the remainder was denied, with the OPGT claiming the application of the mandatory personal privacy exemption at section 21(1), the mandatory exemption for records containing third party information at section 17(1), the discretionary exemption at section 18(1)(e) for records that contain "positions, plans, procedures, criteria or instructions" to be applied to government negotiations, and the discretionary exemption for records containing advice and recommendations at section 13(1).[1]

[3] The requester, now the appellant, appealed the OPGT's decision to this office.

[4] As no mediated resolution proved possible, the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I started my inquiry by seeking and receiving representations from the OPGT and two individuals who were involved in the transaction referred to in the request (the affected parties). Their representations were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The appellant made representations which were also shared with the OPGT and counsel for the affected parties. Reply representations were then received from the OPGT and counsel for the affected parties. [2]

[5] In this order, I uphold the OPGT's decision in part. I find that records 6 and 9 are exempt from disclosure, in part, pursuant to the discretionary exemption for advice and recommendations at section 13(1) of the *Act*. I order the disclosure of all remaining information on the basis that none of the claimed exemptions apply to it.

---

[1] The OPGT also relied on the mandatory exemption for cabinet records at section 12 of the *Act* for one record, but abandoned that argument during the adjudication stage of the appeal.

[2] Following receipt of the affected parties' reply representations, I decided that the interests of a third individual may be affected by the outcome of this appeal. Counsel for the affected parties confirmed that he also represents the interests of this individual, whose interests are aligned with those of the other affected parties. Counsel did not request to file additional representations on behalf of this individual.

RECORDS:

[6] The ten records at issue are letters, a note to file, emails, and an agreement. They are listed on the index of records set out below, modified from the one provided by the OPGT to the appellant and this office.

Record	Pages	Exemptions applied by the OPGT
1	1-2	s. 17(1), 21(1)
2	3-4	s. 17(1), 21(1)
3	5	s. 17(1), 21(1)
4	6	s. 13(1), 18(1)(e)
5	7	s. 17(1), 21(1)
6	8	s. 13(1), 17(1), 18(1)(e), 21(1)
7	9-11	s. 17(1), 21(1)
8	12-15	s. 17(1), 21(1)
9	16-17	s. 13(1), 17(1), 18(1)(e), 21(1)
10	18	s. 13(1), 17(1), 21(1)

ISSUES:

A. Do records 1-3 and 5-10 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory personal privacy exemption at section 21(1) apply to records 1-3 and 5-10?

C. Does the mandatory exemption for third party information at section 17 apply to records 1-3 and 5-10?

D. Does the discretionary exemption for economic and other interests of the Government of Ontario at section 18(1)(e) apply to records 4, 6 and 9?

E. Does the discretionary exemption for advice and recommendations at section 13(1) apply to records 4, 6, 9 and 10?

F. Did the OPGT exercise its discretion under sections 13(1) and/or 18(1)(e)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do records 1-3 and 5-10 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[7] The OPGT argues that records 1-3 and 5-10 are exempt from disclosure pursuant to the mandatory personal privacy exemption at section 21 of the *Act.* Since section 21 can only apply to "personal information",[3] it is necessary to decide whether the record contains personal information and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and

---

[3] Section 21(1) provides that "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, …"

> replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[8] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[4]

[9] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) 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.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[10] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[5] Even if information relates to an individual in a professional, official or business capacity, however, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[6]

[11] Also, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[7]

Representations

[12] The OPGT submits that some of the records (records 1, 2, 3, 5, 7 and 8) contain information that identifies a third party (a lawyer) in his professional capacity, but that

---

[4] Order 11.
[5] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[6] Orders P-1409, R-980015, PO-2225 and MO-2344.
[7] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

disclosure of the records is likely to reveal the identity of the third party's clients. It argues that these records include correspondence sent to an institution of a private and confidential nature, and therefore fall within the ambit of section 2(1)(f) of the definition of personal information. The OPGT relies on Order PO-1880, upheld on judicial review in *Ontario (Attorney General v. Pascoe*, [2002] O.J. No. 4300 (C.A.)).

[13] The OPGT further submits that record 8 contains the names and addresses of the affected parties, as well as their employment history and financial transactions, and that this information falls under the definition of personal information in paragraphs 2(1)(b), (d) and (h). It submits that records 9 and 10, too, contain information about the affected parties' employment history and financial transactions.

[14] The affected parties submit that the records contain their personal information, but do not elaborate.

[15] The appellant, on the other hand, submits that the affected parties were acting in their business capacities and not in their personal capacities when they purchased the escheated assets from the Crown. As a result, the appellant argues, the information relating to the affected parties is not their "personal information".

Analysis and findings

[16] In Order PO-2225, former Assistant Commissioner Tom Mitchinson discussed this office's approach to the definition of personal information when an individual is engaged in a business activity. In that appeal, the information at issue was a list of non-corporate landlords owing a debt to the Ontario Rental Housing Tribunal. The former Assistant Commissioner stated:

> Previous decisions of this office have drawn a distinction between an individual's personal and professional or official government capacity, and found that in some circumstances, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (Orders P-257, P-427, P-1412, P-1621). While many of these orders deal with individuals acting as employees or representatives of organizations (Orders 80, P-257, P-427, P-1412), other orders have described the distinction more generally as one between individuals acting in a personal or business capacity…
>
> Based on the principles expressed in these orders, the first question to ask in a case such as this is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? In my view, when someone rents premises to a tenant in return for payment of rent, that person is operating in a

> business arena. The landlord has made a business arrangement for the purpose of realizing income and/or capital appreciation in real estate that he/she owns. Income and expenses incurred by a landlord are accounted for under specific provisions of the *Income Tax Act* and, in my view, the time, effort and resources invested by an individual in this context fall outside the personal sphere and within the scope of profit-motivated business activity.
>
> I recognize that in some cases a landlord's business is no more sophisticated than, for example, an individual homeowner renting out a basement apartment, and I accept that there are differences between the individual homeowner and a large corporation that owns a number of apartment buildings. However, fundamentally, both the large corporation and the individual homeowner can be said to be operating in the same "business arena", albeit on a different scale. In this regard, I concur with the appellant's interpretation of Order PO-1562 that the distinction between a personal and a business capacity does not depend on the size of a particular undertaking. It is also significant to note that the TPA requires all landlords, large and small, to follow essentially the same set of rules. In my view, it is reasonable to characterize even small-scale, individual landlords as people who have made a conscious decision to enter into a business realm. As such, it necessarily follows that a landlord renting premises to a tenant is operating in a context that is inherently of a business nature and not personal.
>
> The analysis does not end here. I must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?
>
> In my view, there is nothing present here that would allow the information to "cross over" into the "personal information" realm. The fact that an individual is a landlord speaks to a business not a personal arrangement. As far as the second point is concerned, the information at issue does not reveal precisely why the individual owes money to the Tribunal, and the mere fact that the individual may be personally liable for the debt is not, in my view, personal, since the debt arises in a business, non-personal context. The fact that monies owed have not been fully paid is also, in my view, not sufficient to bring what is essentially a business debt into the personal realm, nor is the fact that a landlord may be prohibited by statute from commencing an application under the *TPA*.

[17] I agree with the former Assistant Commissioner's reasoning, and apply it to the circumstances before me.

[18] The first question I must ask myself is "in what context do the names of the individuals appear?" From my independent review of the records, I conclude that the information in them arises out of the affected parties' professional activities. I cannot be more specific about the affected parties' professions without revealing their identity. However, the records all relate to the transaction referred to in the appellant's request for information, and the affected parties' information appears in that context. This is a business, or professional context, not a personal one.

[19] The second question is whether there is something about the information at issue that, if disclosed, would reveal something of a personal nature about the affected parties. The OPGT submits that the information reveals the affected parties' addresses, financial transactions and employment history.

[20] I find that there is no employment history information contained in the records. Information about individuals acting in the normal course of their professional duties does not reveal their "employment history" within the meaning of that term in the *Act*. Further, the records do not contain the home addresses of the affected parties.

[21] As for the financial transactions revealed by the records, they take place in a business context, not a personal one. This office has previously found that the fact that a financial transaction may ultimately have an impact on an individual's personal finances does not reveal anything personal about them.[8] I agree. I also note that my conclusions on this issue are consistent with other decisions of this office in which information about the amounts paid to consultants for professional services was found not to be the personal information of those consultants.[9]

[22] Before leaving this issue, however, I acknowledge the appellant's reliance on Order PO-1880. In that order, the adjudicator appeared to accept that a physician's billing information is personal information.

[23] A number of other previous orders of this office have considered the issue of whether OHIP billings reveal personal information of doctors. In those orders, this office has concluded that OHIP billings that can be connected with specific doctors are the personal information of those doctors. For example, in Order P-1502, the Commissioner found that payment to a physician for services rendered in connection with the prescription of home oxygen services was a "financial transaction" within the meaning of the "personal information" definition found in paragraph 2(1)(b) of the *Act*, and therefore qualified as personal information. This approach was followed in Order PO-3200.

[24] However, and as noted by Assistant Commissioner Sherry Liang in Order PO-3435, that approach can be contrasted with the treatment of other professionals whose

---

[8] See Order PO-3207.
[9] See Order PO-2435 and MO-2363.

billing information has been ordered disclosed under the *Act*. For example, in Order PO-3207, Assistant Commissioner Liang found that information about legal fees paid to a lawyer by a hospital was not exempt from disclosure under the personal privacy exemption, as it was not personal information. In Orders MO-2363 and MO-2927, this office found that the details of fee arrangements between government institutions and professional consultants did not qualify as the personal information of the consultants.

[25] For the purposes of this appeal, it is not necessary for me to reconcile the differing approaches outlined above. This appeal does not involve physicians' billing information. I agree with the approach taken in Orders PO-2225, PO-2435, MO-2363 and MO-2927, and have applied the reasoning found in those orders to the circumstances before me in this appeal.

[26] To conclude, I find that there is nothing about the information at issue that, if disclosed, would reveal something of a personal nature about the affected parties. As a result, I conclude that the records do not contain the personal information of the affected parties. None of the parties argued that the records contain the personal information of any other individuals, and I find that they do not.

Issue B: Does the mandatory personal privacy exemption at section 21(1) apply to records 1-3 and 5-10?

[27] Because I have found that none of the records contain "personal information", the personal privacy exemption at section 21(1) cannot apply. Section 21(1) only applies to "personal information".

Issue C: Does the mandatory exemption for third party information at section 17 apply to records 1-3 and 5-10?

[28] The OPGT argues that records 1-3 and 5-10 are exempt from disclosure pursuant to sections 17(1)(a) and (c) of the *Act*, which state:

> 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;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[29] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[10] 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.[11]

[30] 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

[31] The types of information listed in section 17(1) have been discussed in prior orders:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[12]
>
> *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 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.[13]
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to

---

[10] *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.*).
[11] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[12] Order PO-2010.
[13] Order PO-2010.

> both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[14] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[15]

Representations

[32] The OPGT submits that the records refer to the sale of two U.S. patents related to a method, apparatus and system for compressing data and accordingly contain scientific, technical and commercial information.

[33] The affected parties submit simply that the records contain "business information". The appellant's representations do not address this issue.

Analysis and finding

[34] As noted above, the records consist of letters, a note to file, emails, and an agreement. From my independent review of the records, I find that they do not contain any scientific or technical information. Although the records relate to the sale of patents, they do not contain any information about the processes or technologies that were the subjects of the patents. Rather, the records consist of letters passing between counsel leading up to the agreement, the agreement itself, and emails exchanged after the date of the agreement.

[35] I find, however, that the records contain commercial information because they relate to a commercial transaction and they contain information about the identity of the purchaser.[16] Some of the records also contain information about the purchase price and other financial matters.

Part 2: supplied in confidence

[36] 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.[17]

[37] 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.[18]

[38] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The

---

[14] Order PO-2010.
[15] Order P-1621.
[16] See Order PO-1786-I.
[17] Order MO-1706.
[18] Orders PO-2020 and PO-2043.

provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[19]

[39] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[20] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[21]

[40] 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.[22]

[41] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[23]

Representations

[42] The OPGT submits that the information in the records was supplied by an affected party to the OPGT in order to purchase the Crown's interest in the patents. It

---

[19] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[20] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[21] *Miller Transit*, above at para. 34.
[22] Order PO-2020.
[23] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

submits that the information was explicitly supplied in confidence and points out that records 2, 5, 7 and 8 are marked "private and confidential". It submits that, although it has no information regarding the intended use of the patents, it is reasonable to expect that the purchaser purchased them in order to commercialize them and did not want the information disclosed to individuals who may have possible competing commercial interests in commercializing these patents.

[43] The OPGT also submits that record 8, the agreement, contains some non-negotiated confidential information supplied by the affected party regarding the development and use of the patents.

[44] The affected parties submit that it was their understanding that their application under the *Escheats Act* was confidential and not subject to public review. They submit that their application contained confidential business information.

[45] The appellant's representations do not address this issue.

Analysis and findings

[46] Records 2, 5 and 7 are letters from the affected party's counsel to the OPGT's counsel. From my review of these records, I find that they contain commercial information that was supplied by the affected parties to the OPGT. Records 1 and 3 are letters from the OPGT's counsel to the affected parties' counsel. I find that the disclosure of these letters would reveal the information supplied by the affected parties to the OPGT, as would disclosure of the emails that are records 6, 9 and 10.

[47] Record 8 is the agreement, including an appendix. As noted above, subject to the "inferred disclosure" and "immutability" exceptions, the contents of a contract involving an institution and a third party are not generally considered to have been "supplied" for the purpose of section 17(1).

[48] From my independent review of the agreement, I find that the appendix falls within the immutability exception to the general rule. It clearly contains information supplied by the affected parties to the OPGT, rather than mutually negotiated terms.

[49] I also find that certain other portions of the agreement fall within the immutability exception. The agreement contains a "Whereas" section containing a considerable amount of background commercial information that was supplied to the OPGT by the affected parties, and was not mutually negotiated.

[50] I now turn to whether the information was supplied in confidence. The affected parties submit that petitions under the *Escheats Act* are confidential. Without making a finding one way or the other about whether that is in fact the case, I observe that the responsive records in this appeal (with the possible exception of records 1 and 4) do not address that petition. Rather, they address the sale of patents from the OPGT to the affected party/parties.

[51] I have also considered the OPGT's submission that the purchaser purchased the patents in order to commercialize them and likely did not want the information disclosed to individuals who may have possible competing commercial interests in commercializing these patents. In my view, this is a circumstance that may support a reasonable expectation of confidentiality.

[52] I do not need to make a firm conclusion on whether part 2 of the test is satisfied, however, because I find below that part 3 has not been met.

Part 3: harms

General principles

[53] The party resisting disclosure must demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but need not prove on the balance of probabilities that disclosure will in fact result in such harm. An institution must, however, provide evidence "well beyond" or "considerably above" a mere possibility of harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[24]

[54] The failure of a party resisting disclosure to provide this type of 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.*[25]

Representations

[55] The OPGT submits:

> The OPGT has no information regarding the intended use of these patents, and therefore is not in a position to comment on the extent of the harms that may be suffered if the information is disclosed. However, it is reasonable to expect that the purchaser intended to use the patents for commercial purpose and that disclosure of information related to the sale of these patents could significantly prejudice their position or interfere significantly with their contractual or other negotiations in commercializing of these patents and therefore these records come within the parameters of section 17(1)(a) and (c).

[56] Counsel for the affected parties submits:

---

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

> Our clients strongly object to the release of these documents … our clients' understanding in the Application under the *Escheats Act* was that it was a petition to the Lieutenant Governor in Council and therefore confidential and not subject to public review.
>
> Our client's Application under the *Escheats Act* contained confidential personal and business information, the release of which could do serious damage to our clients personal and business interests.

[57] The appellant's representations do not address this issue.

Analysis and finding

[58] On the basis of the representations before me, and my own review of the records, I find that the OPGT and the affected parties have not established that disclosure of the records could reasonably be expected to result in either of the harms set out in sections 17(1)(a) and (c). The negotiations are now over and an agreement has been reached. The parties have referred me to very little evidence beyond their assertions that there is potential for other third parties to interfere with the affected party or parties' use of the patents. While the affected parties submit that disclosure could do serious damage to their business interests, they have not explained the basis for this assertion. Similarly, the OPGT suggests that there is potential for others to interfere with the affected parties' plans to commercialize the patents, but does not explain how disclosure of the records would lead to this result. I find that the evidence before me falls well short of establishing a risk that is "well beyond" or "considerably above" a mere possibility of harm.

[59] In coming to my conclusion, I have also considered the additional information submitted by counsel for the affected parties in his reply representations. For confidentiality reasons, I cannot be specific about that information. To the extent that this information is evidence of "harm", however, I observe that the "harm" appears to already be underway. The OPGT and the affected parties have not explained how disclosure of the records would result in any additional harm to the affected parties.

[60] As a result, I cannot conclude that disclosure of the records could reasonably be expected to prejudice significantly the affected parties' competitive position or interfere significantly with their negotiations; or result in undue loss or gain to them.

Conclusion

[61] As not all three parts of the test under section 17(1) are met, I find that the exemption at section 17(1) does not apply to any of the records for which it has been claimed.

Issue D: Does the discretionary exemption for economic and other interests of the Government of Ontario at section 18(1)(e) apply to records 4, 6 and 9?

[62] Record 4 is a memo to file apparently written by an OPGT staff member. Records 6 and 9 are emails between OPGT staff members. The OPGT submits that these records are exempt from disclosure pursuant to section 18(1)(e), which provides as follows:

> A head may refuse to disclose a record that contains,
>
> > (e) 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;

[63] 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*.[26]

Representations

[64] The OPGT submits that these records contain instructions to be applied to negotiations to be carried out with the affected party by the OPGT to sell the Crown's interest in the two patents. It submits that, as a result, section 18(1)(e) applies to the records.

[65] Neither the affected parties nor the appellant made representations on this issue.

Analysis and conclusions

[66] In order for section 18(1)(e) to apply, the institution 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.[27]

---

[26] Toronto: Queen's Printer, 1980.
[27] Order PO-2064.

[67] I find that the exemption at section 18(1)(e) does not apply to the records for which it is claimed. Although the records contain criteria that were applied to the negotiations with the affected parties, section 18(1)(e) applies only to negotiations that are ongoing or will be carried out in future.[28] The purpose of section 18 is to protect certain economic interests of institutions by exempting commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*. This rationale applies where negotiations are ongoing, but not when they have been completed. In the appeal before me, the negotiations have concluded and an agreement has been reached.

[68] I conclude, therefore, that the exemption at section 18(1)(e) does not apply to records for which it is claimed.

Issue E: Does the discretionary exemption for advice and recommendations at section 13(1) apply to records 4, 6, 9 and 10?

[69] The OPGT submits that records 4, 6, 9 and 10 are exempt pursuant to section 13(1) of the *Act*, which reads:

> 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.

[70] 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.[29]

[71] "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.

[72] "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. [30]

---

[28] See Order 141.
[29] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[30] See above at paras. 26 and 47.

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

[74] 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.[31]

[75] 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.[32]

[76] 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).[33]

[77] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information[34]
- a supervisor's direction to staff on how to conduct an investigation [35]
- information prepared for public dissemination.[36]

Representations

[78] The OPGT submits that records 4, 6, 9 and 10 were all created by employees of the OPGT and the Ministry of Finance. It submits that records 4, 6 and 9 were created

---

[31] 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.
[32] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[33] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.
[34] Order PO-3315.
[35] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[36] Order PO-2677.

for the express purpose of negotiating the sale of the two patents and that record 10 was created for the purpose of allocating the proceeds of sale between ministries. It submits that these records were not created for public knowledge but for internal use only and that if these records are released, it would inhibit the free flow of advice or recommendations within the office and to other ministries, which is vital to the efficient operation of the OPGT.

[79] Neither the affected parties nor the appellant made representations on this issue.

[80] The OPGT also made some representations specific to each of the records which I will refer to as necessary below.

Analysis and findings

[81] The OPGT submits that record 4, a memorandum to file, contains recommendations with regard to the negotiating position in the sale of the Crown's interest in the two patents and actions to be taken should negotiations not be successful.

[82] From my independent review of the record, however, I find that it contains a direction from a manager to OPGT staff. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Record 4 does not contain such material. My finding in this regard is consistent with previous orders which have found that a supervisor's direction to staff does not constitute a "recommendation".[37]

[83] Records 6 and 9 are emails among OPGT staff. The OPGT submits that they contain a recommendation and supporting analysis by an OPGT employee with respect to the sale price.

[84] I agree with the OPGT that records 6 and 9 contain a recommendation from OPGT staff to more senior OPGT staff with respect to the sale price of the patents. Further, some of the other information in the record, if disclosed, would reveal the substance of that recommendation. Finally, none of the exceptions to the exemption found in section 13(2) apply to this information. I find, therefore, that the information is exempt under section 13(1) and I will uphold the OPGT's decision to withhold it. Since this information is readily severable from the remainder of the contents of the emails, I will order disclosure of the information that can be severed and released without revealing the recommendation.[38]

---

[37] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.). See also Order PO-3372.

[38] See section 10(2) of the *Act*.

[85] The OPGT submits that record 10 includes recommendations with regard to the allocation of the sale proceeds between ministries. From my review of the record, however, I find that the information in it does not constitute either advice or recommendations. The email does not contain any suggested course of action or a range of policy options; nor does it contain evaluative material. The information in it is better described as factual or background information.

[86] I conclude, therefore, that records 6 and 9 are exempt from disclosure, in part, pursuant to the discretionary exemption for advice and recommendations at section 13(1). Records 4 and 10 are not exempt under section 13(1).

Issue F: Did the OPGT exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

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

[88] In addition, the Commissioner may find that the institution 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
- it fails to take into account relevant considerations.

[89] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[39] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[90] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[40]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information

[39] Order MO-1573.
[40] Orders P-344 and MO-1573.

    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[91] The OPGT submits that, in deciding to withhold information under section 13(1), it considered all relevant circumstances in good faith, including the sensitive nature of the records at issue, the lack of relationship between the appellant and the affected parties, and the OPGT's obligation to maintain confidentiality pursuant to the *Public Guardian and Trustee Act*.[41]

[92] The appellant, on the other hand, asserts that the affected parties owed him a fiduciary duty and breached that duty when they purchased the patents from the OPGT.

[93] It appears, therefore, that the OPGT may have been mistaken in believing there was no relationship between the appellant and the affected parties. I stress the word "may", because I do not make any finding about the nature of the relationship, if any, between the appellant and the affected parties.

[94] I am not persuaded, however, that this is an instance where I ought to order the OPGT to re-exercise its discretion. The OPGT considered relevant circumstances as it understood them to exist at the time of the request. There is no evidence that it considered improper factors or exercised its discretion in bad faith. While the existence of a relationship between the appellant and the affected parties may be a relevant

---

[41] R.S.O. 1990, c. P.51.

factor in the exercise of discretion, the existence of such a relationship appears to be contested in this case. Taking into account these circumstances, I will not order the OPGT to re-exercise its discretion.

ORDER:

1. I uphold the OPGT's decision in part.

2. Records 6 and 9 are exempt, in part, from disclosure pursuant to section 13(1) of the *Act*. The portions that are exempt from disclosure are highlighted in yellow on the copies of these records attached to the OPGT's copy of this order.

3. I order the OPGT to disclose the remainder of the information at issue to the appellant by **March 3, 2016,** but not before **February 25, 2016.**

4. In order to verify compliance with order provision 3 above, I reserve the right to require the OPGT to provide this office with copies of the information disclosed to the appellant.

Original Signed by: January 27, 2016

Gillian Shaw
Adjudicator