Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3633

Appeal PA15-352

Ministry of Transportation

July 20, 2016

Summary: In this appeal, the requester seeks access to records of non-compliance with respect to Area Maintenance Contracts (AMCs) for Ontario highways. The ministry decided to disclose these records. The appellant, who is the contractor under AMCs for four regions, opposes this decision, and claims that sections 17(1)(a) and (c) (third party information) apply. In this order, the adjudicator finds that these sections do not apply, and finds in the alternative that, if they did apply, the public interest override in section 23 would apply. The adjudicator orders the records to be disclosed to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a) and (c) and section 23.

Orders and Investigation Reports Considered: Orders MO-2262, MO-2686 and PO-2169.

Cases Considered: *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.); *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] The Ministry of Transportation (the ministry) enters into Area Maintenance Contracts (AMCs) with private companies to perform maintenance work on Ontario

highways. In this appeal, the records at issue are records of non-compliance relating to AMCs that were entered into by the ministry with one company (the appellant).

[2] The requester submitted a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to various records relating to "current area maintenance contracts for Ontario's highways." Only part 8 of the request, as clarified, remains at issue. In his clarification, the requester stated that he:

> …would be satisfied with a database format copy (ie: in a format that is compatible with, or can be exported to, Excel), of the complete "Record of Non-Compliance" reports for each contract area, over the term of each current contract….

[3] Following notification to a number of affected parties (including the appellant) under section 28(1)(a) of the *Act*, the ministry issued an access decision to the requester and the affected parties advising of its decision to disclose responsive records in part.

[4] Under part 8 of the request, the ministry's decision was to disclose the responsive portions of the records, in full. The ministry did not claim any exemptions for these records, and only redacted non-responsive portions.

[5] The ministry also informed the affected parties that they had 30 days to appeal the ministry's decision to disclose information about them. Two affected parties did so. The appellant in this appeal is one of the affected parties who appealed. The appellant objects to the ministry's decision to disclose four reports of non-compliance (the records at issue). The requester did not appeal the ministry's decision to deny access to other records.

[6] This appeal therefore addresses the four records responsive to part 8 of the request to which the appellant seeks to deny access. These records relate to four regions of the province where the appellant is the contractor under an AMC. The appellant claims that sections 17(1)(a) and (c) (third party information) apply to these records.

[7] The appeal was assigned to a mediator pursuant to section 51 of the *Act*. During mediation, the requester confirmed that he is pursuing access to the records at issue. The requester also raised the possible application of the public interest override found in section 23 of the *Act*.

[8] Following mediation, the appeal moved on to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[9] During the inquiry, I invited and received representations from the appellant, the requester and the ministry. Representations were exchanged in accordance with *Practice Direction 7* issued by this office.

[10] In this order, I uphold the ministry's decision to disclose the records and dismiss the appeal. Sections 17(1)(a) and (c) do not apply. In the alternative, if either or both of these sections had been found to apply, I would have ordered disclosure under the public interest override in section 23 of the *Act*.

RECORDS:

[11] The records at issue consist of the responsive portions of four records of non-compliance[1] for four regions serviced by the appellant. In particular, the records identified by the ministry as 5a, 5b, 5c and 5d remain at issue.

ISSUES:

A. Do the mandatory exemptions at sections 17(1)(a) and/or (c) of the *Act* apply?

B. Does the public interest override at section 23 of the *Act* apply?

DISCUSSION:

A. Do the mandatory exemptions at sections 17(1)(a) and/or (c) of the *Act* apply?

[12] Sections 17(1)(a) and (c) 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,
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> > (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

[13] 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

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[1] (sometimes also referred to as "non-conformance" in the parties' representations)

[2] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)

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]

[14] For section 17(1) to apply, the party resisting disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; 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

[15] The appellant claims that disclosure of the records would, by inference, disclose trade secrets, technical information and/or commercial information.

[16] These types of information have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[4]
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> *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

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[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[4] Order PO-2010.

> prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[5]
>
> *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.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]

Representations

[17] With respect to part 1 of the test, the appellant submits:

> The Contractor's[8] procedures for conducting highway maintenance require the Contractor to apply its technical and scientific knowledge, e.g. concerning the application of sand and salt and other maintenance procedures, to address a variety of road conditions. The Contractor is concerned that disclosure of the records of non-conformance would by inference disclose the Contractor's operating procedures, i.e. commercial information, technical information and/or trade secrets of the Contractor, as those terms have been previously defined in Orders of the Office of the Information and Privacy Commissioner, or perceived weaknesses in the Contractor's operating procedures.

[18] The appellant's initial representations included a copy of its submissions to the ministry when it received notice of the request under section 28(1)(a) of the *Act*, where it stated that ". . . disclosure of the records would, by inference, release trade secrets, technical and/or commercial information concerning the operations of [the appellant]. . . ." Later in its submissions to the ministry, the appellant states that ". . . disclosure would provide the reader with the ability to infer trade secrets, technical and/or commercial information."

[19] The appellant did not argue that the records actually contain these types of information, nor did it explain which information in the records would give rise to such an inference, or the process by which such an inference could be drawn. Nor is this evident from a review of the records.

[20] The requester's representations focus on the public interest override in section

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[5] Order PO-2010.
[6] Order PO-2010.
[7] Order P-1621.
[8] In the representations of both the ministry and the appellant, the latter is sometimes referred to as "the Contractor."

23 (as discussed below) and do not address section 17(1).

[21] The ministry submits that ". . . while the records have been generated under a contractual arrangement, they contain nothing of a commercial or technical nature, but rather are operational in substance."

Analysis

[22] On the issue of "trade secrets," the appellant has not provided any evidence to substantiate that its processes are not generally known in the trade or business of highway maintenance, or that these processes have economic value from not being generally known, or that they have been the subject of efforts that are reasonable under the circumstances to maintain secrecy. The appellant has therefore failed to substantiate three of the four requirements enumerated above, each of which must be established in order to demonstrate that something is a trade secret. I have reviewed the records in detail, and did not find evidence there to support a finding that these requirements have been met. I find that the records do not contain or reveal trade secrets.

[23] Under the heading of "technical information," although the records contain a very limited amount of information that refers very generally to steps that are taken to remedy deficiencies, the appellant has not explained how they contain or reveal "information prepared by a professional in the field" that "describes the construction, operation or maintenance of a structure, process, equipment or thing." In my view, the very limited information in the records is much too general to qualify as technical information. There is no description of actual operating procedures, nor any explanation of how road maintenance operations are to be carried out. I find that the records do not contain or reveal technical information.

[24] As regards "commercial information," although the records arise from a contractual relationship that involves the sale of services by the appellant to the ministry, they do not "relate solely to the buying, selling or exchange of merchandise or services," as referred to in the definition of commercial information, above. Order MO-2686 found that pricing information, product information and a customer/client list qualify as "commercial information." By contrast, in Order MO-2262, information about the progress of a construction project was found not to qualify as commercial information. In this appeal, the records provide operational details relating to highway maintenance, and in my view, they are akin to records outlining the progress of a project. They do not pertain to the negotiation or establishment of contractual terms or to other aspects of commerce such as price lists, product information or customer lists. I find that the records do not contain or reveal commercial information.

[25] With one possible exception, I also find that the records do not contain or reveal the other categories of information referred to in section 17(1). The possible exception relates to portions of the records that refer to "consequences of non-compliance."

Although the appellant does not make this argument, these portions might qualify as "financial information."[9] However, as discussed under part 2 of the test, below, this information was generated by the ministry and not "supplied," and is therefore not exempt under section 17(1).

[26] Accordingly, subject to that possible exception, I find that part 1 of the test is not met. I will, nevertheless, address parts 2 and 3 of the test.

Part 2: supplied in confidence

Supplied

[27] 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.[10]

[28] 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.[11] I have already noted under my Part 1 analysis, above, that the appellant has not explained how the records could give rise to inferences about information that was "supplied," and I find that this basis for concluding that the information was "supplied" within the meaning of section 17(1) is not established. I will now consider whether any other basis for finding that the information was "supplied" is established in the circumstances of this appeal.

Representations

[29] As already noted, the requester's representations do not expressly address section 17(1). The representations of the appellant and the ministry on the issue of "supplied" have a particular focus in two distinct areas: (1) what information was actually provided to the ministry by the appellant? and (2) what is the impact of the contractual term indicating that data provided is the property of the ministry?

[30] I will address these two areas in turn.

What information was actually provided to the ministry by the appellant?

[31] In its initial representations during the inquiry, the appellant submits that it ". . . supplies information to the [ministry] concerning the conditions that gave rise to the notice of non-conformance including the contractor's response to those conditions." It also refers to its earlier submissions to the ministry at the request stage, and submits

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[9] "Financial information" refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs. See Order PO-2010.
[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.

further:

> . . . the Contractor is required to provide assistance, reports and data to the [ministry] with respect to the Contractor's method of performing its highway maintenance responsibilities and its actual performance under the Area Maintenance Contracts. In providing this information to the [ministry], it was the Contractor's expectation that the information would be held in confidence. The information was provided as part of a collaborative effort to resolve highway maintenance issues in a timely and effective manner. . . .

[32] The ministry submits that the information in the records was not "supplied" within the meaning of section 17(1). The ministry states:

> The records are compiled based on the data supplied by an Automated Mobile Data Collection System (AMDCS) the appellant is required to install on its motorized equipment pursuant to its Area Maintenance Contract (AMC) with the Ministry and on other records, such as patrol diaries that the contractor is contractually obliged to provide to the Ministry. The relevant AMC provision reads in part:
>
> > **1005.04.15 Automated Locator Requirements**
> >
> > The Contractor is required to install and maintain an Automated Mobile Data Collection System (AMDCS) for all motorized equipment, including sub-contracted equipment working on the Contract for periods of more than 2 weeks. All sub-contracted equipment providing electrical maintenance and pavement markings must be equipped with AMDCS. [...]
> >
> > The system shall be capable of tracking, storing and reporting movements and actions, in Real-time, for all vehicles including patrol trucks, Winter Vehicles and general purpose vehicles every 10 to 12 seconds while in use, 24 hours a day, 7 days a week.
> >
> > [...]
> >
> > The AMDCS must be capable to read and transmit all data captured by the Electronic Spreader Control units in all Spreaders and/or combination units.
> >
> > [...]

> The Contractor shall provide, at its cost, access to electronic data via a web browser on a continual basis. Access shall be provided to the Contract Administrator or designee. The Owner[12] reserves the right to request manually downloaded data at any time, including equipment or spreader controller(s).
>
> The Contractor shall provide to the Contract Administrator, not less frequently than every two weeks, a complete copy of electronic data. The Contractor shall provide the electronic data in XML 1.1 (second edition) format.

Accordingly, to the extent that information in the records did not originate with the Ministry, it is data which has been *observed* and *monitored* by the Ministry, albeit by remote electronic means. Had the information been recorded by Ministry personnel accompanying the appellant's staff and equipment, it is unlikely that such information would be considered to have been "supplied" by the appellant. The Ministry submits that the functioning of the AMDCS should be viewed as more analogous to the monitoring by the Ministry of operations provided on its behalf by the appellant, rather than to the supply to the Ministry of the appellant's information. [Emphasis added by the ministry.]

[33] The ministry also submits, with respect to information recorded by the AMDCS, that:

> . . . the automatic transmission of the data must be considered in connection with the nature and extent of the information being sent. In this case, some of the information consists of generic factual material recorded by the AMDCS device. The rest has been added by the Ministry.

[34] In record 5a, which the ministry says is different than the other records because it contains more detail, the ministry submits that "this detail consists of information which was added or compiled by the Ministry. . . ."

[35] The ministry also submits that if some information in the records is found to have been "supplied," "the totality of the information supplied in the records at issue relates to the location and date of the non-compliance (or non-conformance)."

[36] The appellant's reply representations address this line of argument by dividing some information in the records into three categories: (1) entries for which AMDCS is the only way to determine non-compliance; (2) entries which could be determined by AMDCS or other means, and (3) entries which are not identifiable by AMDCS. It has highlighted the latter two categories in copies of the records accompanying its reply

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[12] "Owner" is a reference to the ministry.

representations, and submits that these categories were "supplied" as required under the AMC. It submits that the highlighted information described in categories (2) and (3) was "supplied." It also submits that the "vast majority" of entries fall under category (3).

[37] It is not clear whether, by making this argument, the appellant is conceding that the information in the records that it has not highlighted was not "supplied" within the meaning of section 17(1). But that is one plausible interpretation.

Analysis

[38] To summarize these arguments, the appellant submits that it "supplied" information to the ministry concerning the conditions that gave rise to the notice of non-compliance, including the contractor's response to those conditions. In response, the ministry submits that information conveyed by means of AMDCS is monitored and observed by the ministry through a conduit that the appellant was contractually required to install and maintain. According to the ministry, this is analogous to having an on-site ministry observer to record the information, which the ministry says would not likely be considered to have been "supplied" to it within the meaning of section 17(1).

[39] In reply, the appellant submits that: the "vast majority" of the information is not discernible via AMDCS; some data is ascertainable via AMDCS or other means; and some is ascertainable only via AMDCS. As already noted, the appellant provided highlighted records to indicate which information was "supplied" to the ministry.

[40] The thrust of this argument appears to be that the highlighted information in the records was "supplied" as it was not, or was only partly, ascertainable via AMDCS. Accordingly, so the argument goes, even if I accept the ministry's analogy between information it receives via AMDCS and information a ministry observer would see if such an individual were at the site, the highlighted information must have been "supplied" or the ministry would not have it.

[41] This argument is not well-delineated in the appellant's representations, leaving me to attempt to parse its implications, as I have done here. It also leaves the status of the information that was provided via AMDCS unclear.

[42] I am inclined to support the view that information provided via AMDCS was not "supplied;" rather, it was observed by the ministry by means of electronic transmission equipment that, as a contractual term, the appellant was required to install. That does not mean, however, that information provided by the appellant by other means of reporting was "supplied" within the meaning of section 17(1).

[43] It is also apparent that a substantial amount of information in the records,

including information about the consequences of non-compliance,[13] was generated by the ministry and not "supplied." Such information does not meet part 2 of the test and is clearly not exempt under section 17(1).

[44] Under these circumstances, it is not entirely clear what, if any, information in the records was in fact provided to the ministry by the appellant. However, I have concluded that it is not necessary to decide the "supplied" issue on this basis. As outlined below, this issue can be determined based on the contractual term determining that data given to the ministry under the contract is the ministry's property. I now turn to that analysis.

What is the impact of the contractual term indicating that data provided is the property of the ministry?

[45] The ministry makes the following further submissions based on contractual terms that make it the owner of the information:

> Further, to the extent that any of the information was generated by the AMDCS or is otherwise provided pursuant to the AMC by the appellant, the AMC provides that any such information is the sole property of the Ministry:
>
> > **4.25 Ownership and Copyright**
> >
> > For the purpose of this Section, *all material, including data, plans, procedures and programs prepared, conceived of or produced or caused to be prepared, conceived of or produced and delivered in the performance of this Agreement by or on behalf of the Contractor shall be referred to as the "Information", and shall be the sole property of the Ministry*, subject to the Contractor's existing intellectual property and / or license rights. The Contractor covenants that the Ministry shall be the sole owner of the Information and that none of such Information shall infringe the copyright, patent or other right of any other person. For the purpose of the Copyright Act, R.S.C. 1985, Chapter C.42, as amended, the Contractor acknowledges that all Information has been or will be prepared under the direction and control of the Ministry, and the copyright shall belong to the Ministry. The Contractor waives any moral rights it may have under the Copyright Act, concerning the Information. [Emphasis added by the ministry.]
> >
> > [...]

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[13] which, as noted above under part 1, might qualify as "financial information"

In Order PO-2169, the Assistant Commissioner held that such information cannot be "supplied" for the purposes of s. 17(1):

> In my view, barring exceptional circumstances that are not present here, it is not possible to "supply" information within the context of section 17(1) if the information in question belongs to the government. As the Williams Commission made clear in speaking to the purpose of the third party commercial exemption, "it is designed to protect the information assets of non-government parties rather than information relating to commercial matters generated by the government itself". It is clear and unambiguous from the wording of section 13.2 of the pro forma Drive Clean performance agreement that "the data collected as a result of an emissions test are the sole and exclusive property of the Province". The province's ownership rights are confirmed in the wording of its agreement with its Drive Clean database service contractor, which uses the term "Provincial Proprietary Information" when referring to the contents of the database. Simply put, the information gathered at the various facilities during the course of conducting emissions testing and fed into the computer terminal provided by the Ministry in accordance with the performance contract, belongs to the province and not to the facility. As such, it cannot be "supplied" to the Ministry for the purposes of section 17(1). [Emphasis added by the ministry.]

Accordingly, the Ministry submits that the information at issue in this appeal does not meet this part of the test.

[46] In reply, the appellant responds to the ministry's "ownership" argument by stating:

> We have taken note of the comments made in . . . the [ministry's] representations to the effect that information which belongs, by virtue of the contract terms, to the Ministry cannot be considered to have been "supplied". With all due respect to prior Orders of the Office of the Information and Privacy Commissioner, we find this statement rather surprising. Surely the agreement of the parties as to who will own the data does not alter the fact that the data originated with the Contractor and was "supplied" by the Contractor to the Ministry. By default, ownership of the data would have resided in the Ministry.

Analysis

[47] In this line of argument, the ministry submits that, under the contract, it owns all the data it has received concerning non-compliance, and based on Order PO-2169, this

means that the information was not "supplied" because it cannot be considered as an informational asset of the appellant. This argument is linked to the idea that the purpose of section 17(1) is to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. That concept is endorsed by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*,[14] (*Boeing Co.*) where the Court stated:

> As noted by the Commissioner in his reasons, the exemption in s. 17(1) is designed to protect the "informational assets" of private businesses and other organizations from which the government receives information in the course of carrying out its public responsibilities. . . .[15]

[48] Based on the contents of the agreement in this case, and the agreement in Order PO-2169, it is clear that similar circumstances to those in Order PO-2169 exist here with respect to data ownership. In Order PO-2169, the agreement stipulates that the data is the property of "the Province," and here it is the property of "the ministry." However, as the ministry is part of the executive branch of the Province, I do not see any distinction between ownership by the ministry, as opposed to the provincial government as a whole, for the purposes of this appeal. I find support for this view in the fact that in Order PO-2169, the right of ownership by the Province had the result that the information could not be "supplied to" a provincial ministry. Here, the information is the property of "the ministry," and if anything, this analysis applies even more clearly in that circumstance.

[49] As already noted, however, the appellant takes the position that Order PO-2169 is wrongly decided. I disagree.

[50] Order PO-2169 makes reference to the purpose of section 17(1) as "protection of information assets of non-government parties," a purpose that has been endorsed by the Divisional Court in *Boeing Co*., and concludes on that basis that the information could not have been "supplied" to the Ministry of the Environment.

[51] This view is consistent with the modern approach to statutory interpretation, which requires the words of a provision to be read "in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature".[16] It is also logical. As the appellant in Order PO-2169 succinctly puts it: "In order to supply something, it seems reasonable that it must be yours to supply." Moreover, the concept of "ownership" suggests that the owner has the right to decide what to do with its property, including a decision to disclose.

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[14] Cited at footnote 2, above.
[15] at para. 15 of the judgment.
[16] R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1; *Rizzo & RizzoShoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21

[52] Accordingly, because information provided to the ministry under the terms of the contract is the property of the ministry, I find that it was not "supplied" to the ministry. Information generated by the ministry itself was also not "supplied." In the result, none of the information at issue meets the requirement that it must have been "supplied" within the meaning of section 17(1).

[53] That being so, it is not necessary to consider whether the appellant had a reasonable expectation of confidentiality. Part 2 of the test is not met. As noted above, all three parts of the test must be met in order for section 17(1) to apply. Therefore, this conclusion provides a sufficient basis for finding that section 17(1) does not apply.

[54] Although I am not required to do so, I will go on to consider whether part 3 of the test is met.

Part 3: harms

[55] The party resisting disclosure must provide 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.[17]

[56] The failure of a party resisting disclosure to provide evidence of harm 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*.[18]

[57] The appellant submits:

> The records of non-conformance can reveal particularly challenging aspects of the Area Maintenance Contracts and can reveal areas in which the Contractor encountered difficulty in meeting contract conditions. Competitors will use this information to tailor their response to future bids in an attempt to persuade the [ministry] that they can provide a superior service.
>
> . . .
>
> If the records of non-conformance were disclosed, it is likely that there would be significant harm to the Contractor's competitive position in the

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

> marketplace. Its competitors would have detailed knowledge of its maintenance practices and procedures and would seize on its alleged shortcomings to attack it in bidding for further maintenance contracts.
>
> . . . [S]ome of the notices of non-conformance are subject to dispute resolution processes which have yet to be completed. In these circumstances, it would be premature to reveal such damaging information. Disclosure would result in undue loss to the Contractor and undue gain to its competitors in the highway maintenance industry.

[58] In this regard, I note that most of the other companies whose AMCs were the subject of the request did not appeal the ministry's decision to disclose this type of information about them, and accordingly, it appears that this information would be available to the appellant, creating more of a level playing field. In my view, this substantially undercuts the appellant's "competitive harm" argument under section 17(1)(a).

[59] In addition, I am not persuaded that any gain realized by a competitor, or loss faced by the appellant, on the basis of the disclosure of information about non-compliance or non-conformity with an AMC would be "undue" as required under section 17(1)(c).

[60] In response, the ministry submits that the appellant's arguments ". . . amount to speculation." The ministry continues:

> The appellant's argument is that the mere fact that a particular issue, described in generic terms such as "Circuit Times" or "Bare Pavement Data", appears in combination with a municipality or highway, would provide competitors with important information that could cause competitive harm to the appellant. The Ministry submits that it is difficult to see how such information could be of any use to a potential competitor. It lacks the level of detail necessary to support such an assertion. Furthermore, the IPC has articulated in past Orders that the purpose of the exemption is not to shield third parties from competition or negative market consequences, but rather from possible significant prejudice to their competitive position - see Order PO-2497.
>
> The appellant also asserts that there are on-going disputes with the Ministry regarding non-conformance notices and that disclosure of the records would be premature until such disputes are resolved. Without conceding that such a disclosure could meet the harms test under s. 17(1), the Ministry notes that all of the matters listed in the records have been resolved and do not form any part of these disputes.

[61] The appellant's reply representations address the question of whether all

disputes are resolved and note that although the summaries indicate that they are, the financial penalty has yet to be addressed in some of these cases.

[62] The question of whether all disputes are resolved goes to the appellant's argument that disclosure would be premature. In that regard, I note that section 17(1) does not deal with the timing of disclosure and whether it should be postponed to avoid harm. Rather, the issue is simpler than that: could disclosure reasonably be expected to produce one or more of the harms outlined in section 17(1)? As already noted, in this case, the appellant relies on sections 17(1)(a) and/or (c).

[63] Having reviewed the records in detail, I agree with the ministry's assessment. It is difficult to see how the disclosure of the limited information in the records could reasonably be expected to "prejudice significantly" the appellant's competitive position or "interfere significantly" with its contractual or other negotiations under section 17(1)(a). I find that the appellant's arguments are not "well beyond the merely possible or speculative" as required to establish a reasonable expectation of harm.[19]

[64] Moreover, in my view, if disclosure of instances of non-compliance by the appellant results in gain to a competitor or loss to the appellant, with non-compliance by the appellant as a trigger for the gain and/or loss, it is difficult to see how such harm could be described as "undue" under section 17(1)(c). I also find that this argument is not "well beyond the merely possible or speculative."

[65] Accordingly, I find that a reasonable expectation of the harms in sections 17(1)(a) and (c) has not been established, and I find that part 3 of the test is not met.

Conclusion under section 17(1)

[66] As no part of the three-part test under sections 17(1(a) and (c) has been met, I find that these sections do not apply.

B. Does the public interest override at section 23 of the *Act* apply?

[67] I have found that section 17(1)(a) and (c) do not apply. However, I have decided to address, in the alternative, the question of whether the public interest override at section 23 would apply if I had concluded that either or both of these sections did apply.

[68] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the

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[19] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, (cited above at footnote 17) at paras. 52-4

> disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added.]

[69] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[70] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[20]

[71] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[21] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[22]

[72] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[23]

[73] Any public interest in *non*-disclosure that may exist also must be considered.[24] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[25]

[74] A compelling public interest has been found to exist where, for example:

- public safety issues relating to the operation of nuclear facilities have been raised[26]

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[20] Order P-244.
[21] Orders P-984 and PO-2607.
[22] Orders P-984 and PO-2556.
[23] Order P-984.
[24] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[25] Orders PO-2072-F, PO-2098-R and PO-3197.
[26] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

- disclosure would shed light on the safe operation of petrochemical facilities[27] or the province's ability to prepare for a nuclear emergency[28]

[75] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[76] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[29]

[77] The requester submits:

> I would like to urge the disclosure of these records. Quite simply, the dissemination of this information will benefit public health and safety, which is a stated aim of the [*Act*].
>
> The information would allow the public to understand how and whether area maintenance contractors are fulfilling their responsibilities to keep roads safe, and hold them and the government accountable. If contractors know that their compliance information is inaccessible to the public, they will face fewer consequences from the public for non-compliance. Such an outcome would increase safety risks for the public.

[78] The ministry does not address section 23 in its representations.

[79] The appellant submits:

> In virtually every case where a non-conformance with contract conditions was identified by the [ministry], the Contractor has remedied the relevant conditions or deficiencies. . . . In other words, disclosure at this time would not promote public safety. The purpose of the public interest override is to inform the citizenry about the activities of government or its agencies to enable them to make informed political choices. We submit that disclosure of the records of non-conformance would not enlighten the public about the workings of government or its agencies. This is a simple matter of contract performance; it does not raise issues of public policy.
>
> . . .

[80] I disagree with the appellant's submission that disclosure of the records "would

[27] Order P-1175.
[28] Order P-901.
[29] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

not enlighten the public about the workings of government or its agencies." Public safety is one of government's major concerns. Non-compliance with the requirements of highway maintenance contracts could seriously threaten public safety. Accordingly, in my view, disclosure of records that show the extent of compliance, or otherwise, with highway maintenance contracts would shed light on an important operation of government, namely the need to maintain public highways in a manner that protects public safety.

[81] This analysis suggests that there is a public interest in the disclosure of the records, which are entirely concerned with the question of compliance with the appellant's AMCs. On the question of whether this public interest is "compelling," previous orders have defined this term as "rousing strong interest or attention." Although the evidence does not suggest that there has been any public outcry demanding the disclosure of these records, there are some matters that, almost by definition, rouse strong interest or attention. I find that this is the case with the records at issue because of their relationship to highway safety, regardless of whether they demonstrate compliance or non-compliance with contractual road maintenance standards.

[82] In my view, the records speak to the appellant's level of compliance with its AMCs and therefore, based on the foregoing analysis, they "rouse strong interest or attention." I find that there is a compelling public interest in the disclosure of the records. I have also considered whether there is a public interest in non-disclosure and I find that there is not.

[83] On the question of whether the compelling public interest "clearly outweighs" the purpose of the section 17(1) exemption, I note that in *Boeing Co.*,[30] the Divisional Court agreed that the exemption is "designed to protect the 'informational assets' of private businesses and other organizations from which the government receives information in the course of carrying out its public responsibilities."

[84] As already noted, the appellant argues under section 17(1) that the records "can reveal areas in which the Contractor encountered difficulty in meeting contract conditions" and that competitors would "use this information to tailor their response to future bids in an attempt to persuade the [ministry] that they can provide a superior service." In combination with the appellant's arguments under section 23, this suggests that, in the appellant's view, the protection of its competitive position is more important than the public's right to know the extent to which it complies with its highway maintenance obligations under its AMCs.

[85] In my view, the opposite is true. The public's ability to assess the extent to which the appellant complies with its contractual highway maintenance obligations, and

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[30] cited above at footnote 2.

thereby promotes highway safety, is more important than the appellant's competitive position and reputation. Again, I find this to be the case whether the records demonstrate significant compliance or non-compliance with contractual road maintenance standards. The important point is that the public should be able to determine whether road maintenance contracts are carried out in a way that protects public safety. Although the records are not a "report card" *per se*, they cast direct light on this subject.

[86] On the question of whether non-disclosure would be consistent with the purpose of the exemption, I note that, as outlined in my analysis under section 17(1), above, all information provided to the ministry by the appellant is the property of the ministry. Accordingly, non-disclosure would not be consistent with the purpose of section 17(1), to protect the "informational assets of third parties," as articulated in *Boeing Co*.

[87] For these reasons, I find that the compelling public interest in disclosure of the records clearly outweighs the purpose of the section 17(1) exemption. On this basis, the public interest override would mandate the disclosure of the records if I had found them exempt under section 17(1).

ORDER:

I uphold the ministry's decision to disclose the records. The appeal is dismissed. I order the ministry to disclose the records to the requester not earlier than **August 19, 2016** and not later than **August 25, 2016**.

Original Signed by: July 20, 2016

John Higgins
Adjudicator