

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3812

Appeal PA15-495

Northern Ontario Heritage Fund Corporation

January 31, 2018

Summary: The appellant requested records relating to specified funding applications from the corporation. The corporation located responsive records and contacted an affected party to seek its view on disclosure. The corporation decided to grant partial access to the records citing section 17(1) (third party information) to withhold the remainder. The requester appealed. In this order, the adjudicator upholds the corporation's decision and dismisses the appeal.

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

Orders and Investigation Reports Considered: PO-2027 and PO-2152

BACKGROUND:

[1] The Northern Ontario Heritage Fund Corporation (the corporation) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to records relating to funding applications. Following discussions between the corporation and the requester, the request was clarified and narrowed as follows:

Access to records relating to applications made to [the corporation] in 2013 and 2014 by [named company #1, named company #2 and named company #3]. This includes any information in the application phase of the process such as emails, applications and evaluations up to the

Minister's Approval letter to the client. Information relating to agreements that have already been finalized and posted is excluded.

[2] Prior to making its decision on access to the records identified as responsive to this request, the corporation notified three affected parties, in accordance with section 28(1)(a) of the *Act*, to seek their views regarding disclosure of the records. After considering the submissions, the corporation issued a decision to the requester granting partial access and citing the mandatory exemptions at section 17 (third party information) and 21 (personal privacy) of the *Act* to deny access to the remaining information.

[3] The requester (now the appellant) appealed the corporation's decision.

[4] In the course of mediation, the mediator spoke with the appellant, the corporation and one affected party.

[5] The appellant indicated that they were only seeking the information relating to one affected party. As a result, records relating to two of the affected parties are no longer at issue in this appeal.

[6] The mediator contacted the affected party to which the records remaining at issue relate to discuss consent to disclose information to the appellant. This affected party provided consent to the corporation to disclose certain information to the appellant. Accordingly, the corporation disclosed portions of pages 20, 30, 43, 119, 129, 132 and 133. As a result, these portions are no longer at issue in this appeal.

[7] The corporation indicated that they had relied on section 21 to deny access to only a date of birth (a portion of page 6) and a resume (pages 33-34). The appellant indicated that they were not seeking this information. As a result, this information and the application of section 21 are no longer at issue in this appeal.

[8] The appellant further advised that they continue to seek access to all the withheld information remaining at issue. The corporation indicated that they continue to deny access to this information, pursuant to section 17(1)(a) of the *Act*.

[9] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*. During the course of my inquiry I sought the representations of the parties, including the affected party and a third party consultant. Representations were shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Direction 7.

[10] In this order, I uphold the decision of the corporation and dismiss this appeal.

RECORDS:

[11] The records at issue are two funding application packages, each including a business plan and two project evaluation reports (PERs) relating to the funding applications.

DISCUSSION:

[12] The only issue before me is whether the mandatory exemption at section 17(1) applies to the records.

[13] Section 17(1) states, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

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

[15] 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

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

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

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

[16] The types of information listed in section 17(1) 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

- (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.³

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.⁴

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.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

³ Order PO-2010.

⁴ Order PO-2010.

⁵ Order PO-2010.

⁶ Order PO-2010.

might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁷

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.⁸

Representations:

[17] In the corporation's representations, it states that the information contained in the records at issue falls squarely within the categories of information contemplated by section 17. It states that the information was supplied with an express expectation of confidentiality and argues that the release could give rise to a reasonable expectation of harm both to the third parties and the corporation.

[18] The corporation refers to the Supreme Court of Canada decision in *Merck Frosst Canada Ltd. V. Canada (Health)*⁹ where it held that the terms "financial, commercial, scientific, or technical," should be given their ordinary dictionary meaning. The corporation submits that it is non-controversial that the records at issue all contain detailed technical, commercial, financial and trade secret information of importance to the third party in pursuing its business ventures. Specifically, it notes that the application forms and business plans include a breakdown of planned purchases and expenditures on equipment, building leases/construction, marketing, employee training, information on vendors and suppliers, pricing and distribution plans, and other commercial information. It also notes that the records contain technical information pertaining to the composition and design of speciality drilling equipment, the proposed suppliers of the equipment and research and development plans.

[19] In reference to the Project Evaluation Reports (PERs), the corporation notes that in assessing and evaluating the application form and business plans, the third party consultant in the PERs repeated the information contained in the application form and business plan and also described further technical, commercial and financial information gathered in the due diligence process. The corporation notes that the records outline a detailed and specific financial plan which includes cost breakdowns, salaries of employees, projected operating costs, sources of funding and historic profit and loss records.

[20] The corporation notes that the PERs analyze the information provided by the affected party in order to review and assess its proposed project for a variety of risks and to recommend to the corporation whether to approve or decline the application for

⁷ Order P-1621.

⁸ Order PO-2010.

⁹ 2012 SCC 3.

funding.

[21] In its representations, the affected party submits that the information being sought constitutes informational assets of the company worthy of protection under section 17. It states that in particular, the information contained in the funding application packages constitutes commercial information and/or financial information belonging to the affected party. It provided examples of the information contained in the funding application being:

- the company's financial statements and models/projections
- business plans which detail the company's marketing initiatives, sales plans, distribution model, labour force, intentions for technological innovation, overhead and operational costs
- details of the company's efforts to expand its business
- information of the company's efforts to obtain funding for the expansion of its business.

[22] In the appellant's representations, it states that the corporation makes vague claims with respect to the records containing trade secret, commercial, technical or financial information. It suggests that the corporation is making bald statements without particulars or detailed and convincing, or any, evidence, that the factual information contained in the records "is so intertwined with the third party's information that it is not possible to disclose without disclosing exempt information." The appellant suggests that these statements are devoid of the detail necessary to establish that the information in the records meets the criteria of trade secret, commercial, technical or financial information such that they should be withheld in their entirety.

[23] The appellant also submits that the PERs do not contain information of a protected type that was supplied by the third party consultant to the corporation. The appellant submits that while it is possible the PERs contain financial or other information relating to the affected party, the evaluation of such information in the form of a PER does not transform such evaluative material into protected information.

[24] With regard to the affected party's representations, the appellant states that the affected party provided examples of information in the records it alleges constitutes commercial and/or financial information without actually demonstrating how that information falls into the definitions of commercial and/or financial information as set out in various IPC orders.

[25] The affected party provided reply representations noting that the term "financial information" refers to "information relating to money and its use or distribution and must contain or refer to specific data." It refers to Order PO-2010 where examples of financial information included cost accounting method, pricing practices, profit and loss

data, overhead and operating costs. It argues that the information contained in the funding application package constitutes informational assets worthy of protection.

[26] The affected party agrees with the corporation that the funding application could also constitute technical information and trade secret information. Specifically, the affected party notes that the information meets the criteria to constitute trade secret information because it includes a drawing, formula, compilation, programme, method, technique or process or information contained in a product or mechanism that:

1. is used in a trade or business
2. is not generally known in that trade or business
3. has economic value to the company due to the fact that it is not generally known
4. the company expends effort to maintain its secrecy.

[27] Further, the affected party submits that the information in the records constitutes technical information as it falls under the category of applied science. The information, it asserts, particularly with respect to the company's technological innovation, was prepared by a professional in the field and would describe the construction, operation or maintenance of the company's proprietary equipment.

[28] The third party consultant, who completed the PERs submits that the PER contains trade secrets as it sets out the methodology and framework it designed for the provision of financial advisory services. It further asserts that information about these processes could be destructive to its methodology and fee structure if that information was disclosed.

[29] The third party consultant also submits that the PER contains technical information noting that "financial advisory engagements" of this sort are specialized. The third party consultant states that it has developed a specific framework for identifying and analyzing financial information and management structures as they apply to development projects from the private and public sectors, including the corporation. It notes that this proprietary information is closely guarded and protected by it, its partners and employees at every level.

[30] Finally, the third party consultant submits that the PER contains commercial information as it was prepared as a part of a commercial enterprise and can properly be considered to contain "commercial information."

[31] In the appellant's sur-reply representations, they suggest that the information in the PERs is not a protected type under the *Act*, in so far as it plainly does not belong to, and is not about, the third party consultant as the information in the PERs relates to the affected party whose application was being evaluated. The appellant submit that the PERs are not, and do not contain, any informational asset of the third party consultant.

Finding:

[32] On my review of the records I find that the withheld information in the two funding applications along with the accompanying business plans contains information that qualifies as commercial and financial information. These records include a breakdown of planned purchases and expenditures on equipment, building leases/construction, marketing, employee training, information on vendors and suppliers, pricing data and distribution plans as well as other commercial and financial information. I find that all of this information satisfies the requirements of the first part of the test under section 17(1) as it is commercial and financial information.

[33] In addition, I also find that the PERs contain financial and commercial information. On my review of the PERs, I find that they contain financial information relating to money and its use or distribution and refer to specific data including cost accounting methods, overhead and operating costs. The information in the record also qualifies as commercial information as it contains information that describes in general terms the services to be provided by the affected party should the proposed funding be approved, as well as describing processes, methodologies and techniques employed by the consultant in performing an analysis of the funding applications. The PERs repeat much of the commercial and financial information set out in the application forms and business plans and describe further commercial and financial information that the third party consultant gathered in the due diligence process. I therefore find that the first part of the section 17(1) test is established with respect to the information found in the PERs.

[34] As I have found that the PERs contain commercial and financial information, I am not required to also examine if they also contain trade secret information.

Part 2: supplied in confidence

Supplied

[35] 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

[36] 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

[37] 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 provisions of a contract, in general, have been treated as mutually generated, rather

¹⁰ Order MO-1706.

¹¹ Orders PO-2020 and PO-2043.

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.¹²

In confidence

[38] 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.¹³

[39] 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.¹⁴

Representations:

[40] In its representations, the corporation asserts that all the records at issue were supplied to it by third parties with an absolute and express expectation of confidentiality. The corporation notes that the application forms and business plans were submitted in order to seek funding for proposed projects. The corporation submits that the nature of the information supplied is highly sensitive financial information and that applicants are assured of confidentiality and the corporation consistently resists disclosing this type of information.

[41] The corporation states that the third party consultant who provided due diligence services is under contract to supply those services including the PER to the corporation. The corporation notes that the contract for service with the third party consultant includes provisions with regard to confidentiality of the PER and sets out that it is to be

¹² 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*).

¹³ Order PO-2020.

¹⁴ 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.

disclosed only to those parties necessary to the application review and decision-making process. In fact, the corporation states that because of previous issues with inadvertent and inappropriate release of these PERs, a confidentiality warning has been added to the banner of every PER, including the two at issue in this appeal.

[42] The affected party notes in its representations, that it had a reasonable expectation of confidentiality at the time it supplied the information in the funding applications to the corporation. It notes that the information in the application packages is sensitive and not available from public sources and was only made available to the corporation on a confidential basis and for the purpose of obtaining funding for a business venture.

[43] The appellant suggests that there is no supporting evidence or particulars that the records were supplied by third parties. They state that the corporation has not provided evidence that the information available in the records is not otherwise publicly available and the third party simply makes blanket statements that the information is sensitive and not publically available.

[44] With respect to the confidentiality warning on the PERs, the appellant argues that it is well established that merely asserting that a document is confidential and exempt from disclosure does not make it so.

[45] The third party consultant states that the report was supplied directly to the corporation by it and was provided in confidence. It refers to the confidentiality clause written at the beginning of the document in bold red letters noting that this was added in order to not compromise the competitiveness, professional reputation and business integrity of the third party consultant.

[46] The appellant provided sur-reply representations in this appeal stating that the information in the PER is not of a protected type under the *Act* in so far as it plainly does not belong to, and is not about, the third party consultant. They state that the information in the PER relates to the affected party application that was being evaluated. The appellant asserts that the PER is not, and does not contain, any informational asset of the consultant

[47] The appellant submits that the PER does not contain information of a protected type that was supplied by the third party consultant to the corporation. While it is possible that the PER may contain financial or other information relating to the affected party, the evaluation of such information in the form of the PER does not transform such evaluative material into protected information. The appellant submits that such information could not be considered to have been supplied by the third party consultant and presumably, since it is the affected party's information being evaluated it was supplied by the affected party to the corporation, and then from the corporation to the third party consultant, for the purpose of conducting the evaluation, not the other way around.

[48] The third party provided further representations responding to the appellant's sur-reply. It noted that in Order PO-2152, which the appellant referenced with regard to their harms argument, that Record 2 in that appeal was an evaluative report or assessment similar to the PER. The third party consultant notes that in that order, the IPC held that the record was "a report prepared by a consultant under the terms of its contract for services and transmitted to the Ministry with a cover letter summarizing the outcome of its review." It was therefore found by the IPC to have been "supplied" for the purposes of s. 17(1) of the *Act*.

Finding:

[49] In this appeal, the records at issue are records created by third parties for the purpose of both applying for funding and due diligence in processing that application. Therefore, I find that they were supplied by the third parties to the corporation.

[50] In examining the circumstances surrounding the submission of the grant application packages, including the attached business plans by the affected party, I find that these records were supplied to the corporation with a reasonably-held expectation that they would be treated confidentially. The records contain business information of a sensitive nature including, but not limited to, details concerning a new venture.

[51] I reject the appellant's suggestion that the third party consultant did not supply the PERs as the information in them was provided to third party by the corporation who in turn received the information from the affected party. In Order PO-2152, which the appellant referenced in their harms argument, Adjudicator Donald Hale when determining if a consultant's report was supplied in confidence states that "the very nature of the information contained in the report which is the subject of this request can be construed as having been provided with an expectation of confidentiality by both the original supplier of the information, (the leasing company) and the consultant who then evaluated it." Adjudicator Hale went on to determine that the consultant supplied the information in the report in confidence to the institution despite receiving much of that information from the institution. In this appeal, I also find that the third party consultant supplied the PERs to the corporation and that there was an expectation of confidentiality. The PERs include explicit language that clearly marks the report as confidential.

[52] Clearly the corporation, the affected party and the third party consultant were of the view that the information which is reflected in the record at issue was supplied to the corporation with an expectation that it would be treated as confidential. I further find that this expectation was reasonably-held, particularly given the highly-competitive nature of the specified industry and the financial advisory consultation business. Accordingly, I find that the commercial and financial information contained in the records was supplied by the affected and third parties and meets the requirements of the second part of the test under section 17(1).

Part 3: harms

[53] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁵

[54] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁶

Representations:

[55] The corporation references section 17(1)(b) in its representations noting that this subsection applies where disclosure of a record could reasonably be expected to result in similar information no longer being provided to an institution where it is in the public interest that similar information continues to be supplied. The corporation notes that it operates in the public interest to stimulate economic growth and opportunity in Northern Ontario by providing grants and loans that may not be available from more conventional sources. Through this funding provided by the corporation, it states, jobs are created, innovation is pursued and the entire provincial economy benefits.

[56] The corporation submits that if applicants did not have confidence that their detailed financial information would be protected, particularly from competitors in the marketplace, then they would be unlikely to apply to the corporation resulting in lost opportunity and lost potential for greater economic growth and development. The corporation also submits that it is in the public interest that it conducts appropriate due diligence when considering applicants and proposed projects so as not to put public funds at undue risk. It notes that the corporation relies on due diligence services provided by the expert, third party consultant and if that consultant cannot have confidence that their report is protected, they may be unwilling to provide this critical service in future.

[57] The appellant states that in order to satisfy part three of the test under section 17, the corporation must provide "detailed and convincing evidence" to establish a reasonable expectation of harm. They state that the need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms set out in section 17 and refer to

¹⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁶ Order PO-2435.

Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner).¹⁷

[58] The appellant submits that the corporation and the affected party have provided no evidence, including an affidavit or other, to demonstrate that disclosure of the information in the records would cause harm. Instead, the appellant asserts, that the parties have submitted letters containing bald, vague, self-serving and generalized assertions regarding alleged harms.

[59] With regard to the PERs, the appellant states that the third party consultant was presumably retained by the corporation and so the corporation now owns the report. They state that there is nothing that could be considered to belong to, or have been supplied by, the third party consultant.

[60] The appellant also submits that the affected party has not provided "detailed and convincing" evidence to support its assertion that disclosure could reasonably be expected to cause prejudice to its competitive position. They refute the affected party's statement that if its business plan was disclosed, its competitors would have the opportunity to execute those plans and block the affected party from executing the plan itself or that it will enable its competitors to prepare their own applications with reduced time and expense. The appellant states that this is pure conjecture that is utterly unconvincing and entirely lacking detail or specifics. Referring to *Merck*, the appellant submits that the affected party's provided reasons for harm are "fanciful, imaginary or contrived" and do not meet the test under section 17.

[61] With regard to the corporation's reliance on section 17(1)(b) (impede supply of similar information), the appellant submits that no evidence, detail or explanation was provided for how or why companies would be hesitant to apply for funding or consultants unwilling to consult on future projects if the records are disclosed. They further state that the affected party and third party consultant knew that the information they provided to the corporation was subject to freedom of information legislation and as a result should not be surprised that the information may be disclosed to third parties.

[62] The affected party addressed the issue of harms in its representations. They submit that disclosure of the information in the records would directly reveal the company's proprietary information to its competitors significantly prejudicing the competitive position and resulting in financial loss. It states that the information contained in the funding application packages reveal the company's sources of funding as well as details about its business plans for a five-year period. It notes that the specified market is a highly competitive industry.

[63] The affected party states that it has invested significant resources in

¹⁷ (1998), 41 O.R. (3d) 464 (C.A.).

development of its business plans which are currently in implementation. Consequently, it argues, it is reasonable to expect that the disclosure of the information at issue will jeopardize the company's competitive position in the market. Specifically, they state that if the information contained in the business plans is publically disclosed, competitors will have the opportunity to not only execute on the plans themselves but also block the company from executing its own plan.

[64] In addition, the affected party submits that the information contained in the funding applications could be used by competitors to structure their own funding application packages. It states that preparation of the funding application package is a time-consuming process with significant costs incurred and, therefore, providing the information contained in the funding application packages would accord an unfair advantage to competitors as they will be able to prepare their applications with reduced time and expense.

[65] Finally, the affected party submits that the disclosure of this information could also be reasonably expected to interfere with the company's contracts for the following reasons:

- a. the disclosure could result in a loss of the affected party's competitive position in the market and thus, limit its ability to repay the loans provided to it by the corporation and other financial institutions; and
- b. the disclosure could interfere with the affected party's ability to negotiate additional funding in the future as the commercial banks providing funding to it likely will not agree to provide funding, if the information forming the basis of the company's competitive advantage in the market is public knowledge.

[66] In the third party consultant's representations, it states that disclosure of the PERs could reasonably be expected to prejudice its competitive position. The consultant notes that it has developed expertise in the field of financial advisory services and that the information in the report is clearly capable of commercial application by its competitors. It notes that among other things, its competitors could use the information to copy its process and methodology to compete unfairly or undercut it in providing these specialized services. The third party consultant notes that its interest in this information is worthy of protection because it has devoted considerable time, energy, expertise and resources to developing these processes, methods and techniques to be able to provide the highest level of service to a targeted clientele. It notes that this methodology is well-tested by it and is widely used in its practice concerning engagements of a similar nature.

[67] The third party consultant submits that competitors could use the information in the record to save themselves money and time in developing their own procedures and methodologies. It refers to Assistant Commissioner Liang's Order-PO-3154 which it states supports that where global firms conduct business in highly competitive markets,

the release of financial and strategic information, "would provide a competitor with a competitive advantage that they would not have if the information were not revealed." Further, the third party consultant states that the release of severed or redacted documents, "would either reveal exempt information, allow an individual to ascertain the content of the withheld information from the information disclosed or result in disconnected snippets of information being revealed."

[68] The appellant provided reply representations in this appeal. In their reply representations, the appellant states that although the third party consultant objects to disclosure of its report, the corporation, in its access decision, or in its prior representations, had no such objection. The appellant submits that the information in the PERs is not of a protected type under the *Act* in so far as it plainly does not belong to, and is not about, the third party consultant as the information in the PER relates to the third party applying for the funding and therefore does not contain any informational asset of the third party consultant.

[69] The appellant argues that even if the PER could be considered to contain protected forms of information, that were supplied in confidence, there is no "detailed and convincing evidence about the potential for harm." They assert that the third party consultant's representations are comprised of a series of bald statements and highly generalized and speculative assertions of harm and suggests that a considerable portion of its argument deals with matters that may be relevant to section 13 (advice or recommendations) and section 18 (economic and other interests).

[70] The appellant refers to Order PO-2152 where it suggests that the IPC rejected a similar argument made by a consultant about alleged harms that would result from disclosure of a report they had prepared. It argues that the generalized arguments made by the consultant in that order are virtually identical to the arguments advanced by the third party consultant in this appeal.

[71] The third party consultant refers to the specialized nature of the type of a financial advisory engagement with the corporation and the risk of exposure to it as the PER at issue contains its financial assessment of applicants to the corporation for funding. The PER reflects the approach the company takes and the criteria it uses in issuing any financial assessment of this nature. It states that it is a report on what it considers material in assessing the financial strength of an entity for which a government body is considering funding. It submits that the release of this information would provide its competitors with a template for conducting a financial assessment of this nature.

Analysis and finding:

[72] The following discussion considers whether the information remaining at issue satisfies the third part of the three-part test for exemption.

[73] The appellant cited PO-2152 as a precedent to establish that the PERs should be disclosed. The report at issue in that case consisted of "a more generalized review of the chronology of the leasing arrangements" between a third party and the government body. In PO-2152, former Assistant Commissioner Tom Mitchinson noted that the records did not "include an analysis of specific terms and conditions of the leases, nor [did] it provide ... detailed explanations of how to interpret the data contained." In contrast, the PERs at issue here consist of detailed financial analysis prepared by the third party consultant and includes extensive explanations as to how to interpret the data. This is more analogous to a report in Order PO-2027, where the records at issue consisted of an evaluation of contractual provisions that weighed "the benefits to the Ministry and [identified] potential problems for it."

[74] In Order PO-2027, Adjudicator Donald Hale noted that "[t]he records also contain extremely detailed financial spreadsheets outlining and providing analysis on all of the financial aspects of the agreements." Adjudicator Hale held that "the methodologies employed by the consultant in conducting its review would be revealed [if disclosed] and could reasonably be expected to be used by its competitors in bidding on and performing work of a similar nature through the Ministry or another client." The adjudicator found that the methodologies contained in the report were unique and belonged to the consultant and that their disclosure to competitors "could reasonably be expected to result in undue loss to the consultant and undue gain by its competitors, as contemplated by section 17(1)(c) of the *Act*."

[75] As noted, the third party claiming an exemption under section 17(1) 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.

[76] I find that I have been provided with sufficient evidence to establish that the analysis performed by the third party consultant on the information relating to the financing application of the affected party, falls within the ambit of section 17(1)(a) as its disclosure could reasonably be expected to prejudice significantly the competitive position of the consultant, as described above.

[77] In examining the records along with the representations of the parties, I find that the third party consultant has shown that releasing the PER could reasonably be expected to prejudice significantly its competitive position. I accept that the third party consultant has devoted considerable time, energy, expertise and resources to developing the processes, methods and techniques apparent in the PER form. I accept that in creating these processes, methods and techniques the third party has developed a well-tested methodology that sets it apart from its competitors and is capable of commercial application by its competitors. The undisclosed portions of the records (the PERs) consist of the consultant's evaluation of the financing applications. As such, they examine details of the company applying for funding in great detail, weighing the risks to the corporation and identifying potential problems for it. The records also contain detailed financial spreadsheets outlining and providing analysis on all of the financial

aspects of the arrangement.

[78] Similar to PO-2027, I find that the methodologies contained in the PERs are unique and belong to the third party consultant. I find that the methodologies employed by the third party consultant in conducting its review of the funding application would be revealed and could reasonably be expected to be used by its competitors in bidding on and performing work of a similar nature. In conclusion, I find that the corporation and the third party consultant have provided sufficient evidence to uphold the application of section 17(1) exemption with respect to the withheld information in the PERs.

[79] With respect to the affected party's funding applications and business plan, I find that the corporation and the affected party have provided me with sufficient evidence to establish a reasonable expectation of harm under section 17(1)(a) and (b). I accept the corporation's submission that if companies did not have the confidence that their detailed and sensitive financial information would be protected, particularly from competitors in the marketplace, then they would be unlikely to apply for funding from the corporation, resulting in lost opportunity and potential for the greater economic growth and development in Northern Ontario.

[80] I am satisfied that records provided by the affected party when applying for funding, which would reveal confidential commercial, financial and technical information about the company, qualifies for exemption under section 17(1)(b). Based on the representations of the parties, I find that disclosure of this information could reasonably be expected to result in similar information no longer being supplied to the institution by this affected party or similar companies. Further, it is in the public interest that the companies applying for funding be encouraged to be as transparent and fulsome with the information they provide the corporation. Accordingly, the withheld portions of the funding applications and attached business plans qualify for exemption under section 17(1)(b).

[81] Further, after a review of the records, I find that disclosure of the withheld information in the application forms and business plan would directly reveal the affected party's proprietary information to its competitors, thereby significantly prejudicing the competitive position and potentially resulting in financial loss. The withheld information in these records reveals the affected party's sources of financing, income statements as well as further details about its business plans year-over-year for five years. This information is not publicly available and I agree that disclosure would provide the affected party's competitors with details of its current and proposed hiring practices and its confidential business plans and may jeopardize its competitive position. The risk of harm is "well beyond the merely possible or speculative". In the circumstances, I find that section 17(1)(a) of the *Act* applies to exempt this withheld information.

[82] Under section 10(2) of the *Act*, if the corporation receives an access request that falls within one of the exceptions under sections 12 to 22, the corporation "shall

disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.” The corporation submits that portions of the record could be characterized as merely factual market and industry trends but notes that this “factual” information is so intertwined with the affected party’s commercial and financial information that it is not possible to disclose it without disclosing the exempt information. In addition, the corporation submits that the affected party’s information is so intertwined with the assessment and recommendations of the third party consultant that these records could not be severed in any meaningful way without revealing technical, commercial and financial information of the affected party.

[83] In my review of the records, I agree with the corporation that severing out the exempt information from the records would only result in disclosure of “disconnected snippets”, or “worthless”, “meaningless” or “misleading” information.¹⁸

[84] Therefore, I uphold the decision of the corporation and dismiss this appeal.

ORDER:

The appeal is dismissed.

Original Signed by: _____
Alec Fadel
Adjudicator

_____ January 31, 2018

¹⁸ See Order PO-1735, Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).