

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3892

Appeal PA16-510

York University

October 17, 2018

Summary: York University received a request under the *Freedom of Information and Protection of Privacy Act* for access to various records related to a large donation made to the university to establish a specific institute. Following notification of the affected party donor, York issued an access decision granting partial access to the responsive records, which included the Donor Agreement. The affected party submitted an appeal to this office objecting to disclosure of any part of the agreement. There was no appeal of York's access decision by the requester. This order reviews the application of the mandatory exemptions for third party information and personal privacy in sections 17(1) and 21(1) only to those portions of the Donor Agreement York intended to disclose. The adjudicator finds that neither exemption applies, and she orders the identified portions of the agreement disclosed to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 17(1), 21(1)(f), 21(2)(a), 21(2)(e), 21(2)(h) and 21(2)(i) and 21(3)(f).

Orders and Investigation Reports Considered: Order PO-2905.

Cases Considered: *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139.

OVERVIEW:

[1] An individual submitted a request under the *Freedom of Information and*

Protection of Privacy Act (FIPPA or the Act) to York University (York or the university) for access to records related to a donation made to York by a named individual and the related creation of a specific institute.

[2] York notified the donor as an affected party (the donor) in accordance with section 28(1) of the *Act* to provide the individual with an opportunity to make submissions about the possible disclosure of records responsive to the request. Following notification, the university issued a decision granting partial access to the records. Portions of the records were withheld under sections 17(1)(a) to (c) (third party information), 18(1)(c) (economic or other interests) and 21(1) (personal privacy).

[3] The donor appealed the university's decision to disclose a severed version of the donor agreement (Donor Agreement) to this office, which appointed a mediator to explore the possibility of resolution. During mediation, the appellant argued that the portions of the Donor Agreement that York intended to disclose ought to be withheld pursuant to sections 17(1) and 21(1) of *FIPPA*. York confirmed its decision to grant partial access to the record and to withhold the remaining portions under sections 17(1)(a), (b) and (c), 18(1)(c) and 21(1) of the *Act*. However, since the requester did not have an active, concurrent appeal respecting York's access decision, only the portions of the record that York would have disclosed to the requester remained at issue. Further, since the university did not claim section 18(1)(c) in relation to any portions it decided to disclose, that exemption was removed from the scope of the appeal. It was not possible to resolve the appeal through mediation and the file moved to the adjudication stage for an inquiry.

[4] I started my inquiry by seeking representations from the appellant. In the Notice of Inquiry that I sent to the appellant, I emphasized that only certain portions of the Donor Agreement were at issue in the appeal. The representations I received address the issues as though the entire record is at issue.¹ After reviewing the appellant's representations, I decided it was not necessary to seek submissions from York or the requester.

[5] This order addresses the application of sections 17(1) and 21(1) to the specific portions of the record that are at issue in this appeal. I make no findings with respect to whether any exemption applies to the remaining portions of the Donor Agreement that York agreed to withhold and for which there is no active appeal by the original requester. I find that the parts of the donor agreement that York decided to disclose are not exempt under sections 17(1)(a), 17(1)(c) or section 21(1) as claimed by the appellant. I uphold York's decision to disclose the identified portions to the requester.

¹ The appellant also provided arguments on section 18 (economic or other interests of government), which is not before me because York claimed it only in relation to redacted portions of the record that are not at issue.

RECORDS:

[6] At issue are portions of pages 1-5 of a seven-page Donor Agreement between the named individual and York University and a one-page cover memo, in its entirety.

ISSUES:

- A. Do the portions of the Donor Agreement at issue contain “personal information” according to the definition in section 2(1) of the *Act*?
- B. Are the portions of the Donor Agreement at issue exempt under the mandatory personal privacy exemption in section 21(1)?
- C. Are the portions of the Donor Agreement at issue exempt under the mandatory third party information exemption in section 17(1)?

DISCUSSION:

[7] The appellant argued that the representations he submitted were completely confidential. During the inquiry, I did not decide the issue of their confidentiality under the IPC’s confidentiality criteria in *Practice Direction 7*.² One of my obligations in deciding this appeal is to provide written reasons adequately explaining the basis of my decision regarding York’s decision to disclose portions of the Donor Agreement.³ While this order sets out a general non-confidential summary of the appellant’s arguments, I have considered the appellant’s entire representations in reaching my decision.

A. Do the portions of the Donor Agreement at issue contain “personal information” according to the definition in section 2(1) of the *Act*?

[8] York did not claim section 21(1) as a basis for denying access, based on its view that the agreement does not contain personal information. However, York was prepared to withhold the appellant’s signature at his request, a position not challenged by the original requester, who does not seek access to it.

[9] Since the appellant maintains that section 21(1) applies, I invited representations

² Under section 7.07 of this office’s *Code of Procedure*, an Adjudicator may provide some or all of the representations received from a party to the other party or parties in accordance with *Practice Direction 7*. This approach acknowledges the fact that procedural fairness generally requires some degree of mutual disclosure of the arguments and evidence of all parties. See, for example, Orders 164, P-207 and MO-3643.

³ *New Brunswick (Board of Management) v. Dunsmuir* 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 47. The aim is to demonstrate justification, transparency and intelligibility within the decision-making process.

in support of the application of the personal privacy exemption to the remaining portions of the agreement at issue. However, review of section 21(1) requires a prior determination of whether the portions of the record at issue contain "personal information" and, if so, to whom it relates. The reason for this is that the personal privacy exemption can only apply to *personal* information, which is defined in section 2(1) of *FIPPA*. The parts of the definition that are relevant in this appeal state that:

"personal information" means recorded information about an identifiable individual, including, ...

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved, ...

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[10] This list of examples of personal information is not exhaustive, and information that does not fall under paragraphs (a) to (h) may still qualify as personal information.⁴

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

[12] As suggested, the appellant claims that the agreement contains his personal information and elaborates on this position in his confidential representations.

[13] It bears repeating that significant portions of the Donor Agreement are not at issue because there is no appeal by the requester of York's decision to disclose a redacted version of the record, including the appellant's signature and other information. These portions will not be disclosed as a result of this order.

[14] Based on my review of the relevant portions of the Donor Agreement, I am satisfied that some of the information at issue constitutes "personal information," according to the definition of that term in section 2(1), because it is about the appellant as a benefactor in this context. I will review the possible application of section 21(1) to

⁴ Order 11.

⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

these portions. Although other information at issue in the agreement may or may not constitute personal information, my findings under section 21(1) make it unnecessary to decide that point.

B. Are the portions of the Donor Agreement at issue exempt under the mandatory personal privacy exemption in section 21(1)?

[15] In my review of this issue, I considered the appellant's confidential arguments respecting the application of section 21(1) to the portions of the Donor Agreement that York intended to disclose and which I concluded, above, contained the appellant's personal information.

[16] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. None of the section 21(1)(a) to (e) exceptions can apply in the circumstances of this appeal. Section 21(1)(f) allows disclosure if it would not be an unjustified invasion of personal privacy. This determination requires a consideration of additional parts of section 21, including the factors in section 21(2) and the presumptions in section 21(3). Section 21(4) lists situations that would not be an unjustified invasion of personal privacy, although none has any application in this appeal.

[17] The appellant provided submissions on the presumption against disclosure in section 21(3)(f) and the factors in sections 21(2)(a), (e), (h) and (i). These sections state that:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny; ...

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm; ...

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Representations

[18] The appellant provided representations about the application of the presumptions and factors outlined above, which he asked remain confidential. I have reviewed the appellant's representations, including the orders he cites, in reaching my decision.

[19] In comments made earlier in the appeal process, the original requester argued that there is public interest in the record because the appellant received "perks" from the university as a result of his donation, which are worthy of scrutiny. The original requester also noted that his access requests to two other universities for the same information resulted in full disclosure of those donor agreements.

Analysis and findings

[20] To begin, the orders relied upon by the appellant do not support the position that donation records, such as the Donor Agreement in this appeal, are typically withheld under section 21(1) in full. In all of these orders, the institutions had disclosed significant portions of the records at issue in the first instance and, consequently, review by the adjudicator related to the application of exemptions to limited and specific severances.

[21] In the "personal information" analysis above, I confirmed that personal information about the appellant as a benefactor would be reviewed under section 21(1). Based on my consideration of that particular information, and the appellant's complete confidential representations, I find that its disclosure would not result in an unjustified invasion of personal privacy under section 21(1)(f).

[22] First, I am not satisfied that disclosure of the limited personal information of the appellant in the Donor Agreement would result in a presumed invasion of personal privacy under section 21(3)(f). While the agreement contains information that relates generally to financial activities of the appellant, neither the value of the donation to York nor any other personal information, qualifies as a "description" of the appellant's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. I find that the section 21(3)(f) presumption does not apply. In this context, therefore, my analysis turns to reviewing the factors in section 21(2) to determine if they weigh against, or in favour of, disclosure of the limited personal information at issue.

[23] In order for section 21(2)(e) to apply, the evidence must demonstrate that the pecuniary damage or harm to the individual involved is present or foreseeable and that this damage or harm would be "unfair." The appellant's concerns on this factor relate to alleged pecuniary harms resulting from disclosure of information related to his

charitable endeavors. The information York intends to disclose simply does not bear this concern out. In my view, disclosure of this particular information could not reasonably be expected to result in the damage to the appellant's endeavors that is described in his confidential representations because it does not reveal any specific approach, nor would it permit inferences of it. I find that the factor at section 21(2)(e) does not apply in this appeal.

[24] The applicability of the related factor for unfair reputational damage in section 21(2)(i) is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.⁷ The possibility that the information may be publicly discussed does not necessarily mean that its disclosure could unfairly damage the reputation of the individual.⁸ On my review of the information at issue, I conclude that the evidence does not support the appellant's claim of a reasonable expectation of harm to his reputation, let alone reputational damage qualifying as "unfair," for the purpose of section 21(2)(i). In this case, the fact that there could be exposure to media or public scrutiny as a result of this particular information being disclosed does not persuade me that harm would result or that any resulting harm would be unfair.⁹ I find that section 21(2)(i) has no application in this appeal.

[25] The factor at section 21(2)(h) may be found to apply if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. The factor requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁰ I reject the claim that section 21(2)(h) applies because of the confidential marking or any purported presumption of confidentiality inherent in donor agreements. The appellant provides no persuasive evidence to support a presumed confidentiality of donor agreements; nor do past IPC orders suggest such a finding. Further, York's decision to disclose a severed version of the Donor Agreement, and its position that section 21(1) did not apply to it, do not support any mutual understanding of complete confidence. On my review of it, the agreement specifically contemplates disclosure of some features of the donation through a public announcement. This has occurred and resulted in release of some of the very details that the appellant opposes disclosure of in this appeal under *FIPPA*. Given the limited personal information that is at issue, I do not find there to have been a reasonably held expectation of confidentiality by the appellant regarding it. I find that the factor in section 21(2)(h) does not apply.

[26] The appellant raises the public scrutiny factor in section 21(2)(a) and claims that it does not apply in this appeal for the reasons described in the confidential

⁷ Order P-256.

⁸ Orders PO-2789 and PO-2664.

⁹ Orders PO-2230 and PO-2789.

¹⁰ Order PO-1670.

representations. Although I have not set out these representations here, I have carefully reviewed them, including the orders cited in support of the arguments. Section 21(2)(a) contemplates disclosure in order to subject the activities of an institution to public scrutiny.¹¹ As then-Assistant Commissioner Brian Beamish concluded in Order PO-2905, it is not necessary that the institution's activities relate to spending money or that the issues addressed in the records have been the subject of public debate, although these features would favour its application. Institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 21(2)(a),¹² which is to ensure an appropriate degree of scrutiny of government and its agencies by the public. In this situation, I find that the subject matter of the Donor Agreement, including the portions at issue under section 21(1), which relate to a large donation to a public institution for the purpose of establishing a specific institute of study, does suggest a public accountability interest. The requester's comments regarding the rationale and circumstances of requesting the information provide some support for this point. After reviewing the personal information in the Donor Agreement that is at issue, I am satisfied that its disclosure may be expected to shed some light on the manner in which York acknowledges and administers donations of this nature. I find that the factor in section 21(2)(a) applies.

[27] Given my finding that the section 21(2)(a) factor favouring disclosure applies and that there are no applicable factors favouring non-disclosure, I find that disclosure of the limited personal information of the appellant at issue would not result in an unjustified invasion of his personal privacy under section 21(1)(f). Since the exception in section 21(1)(f) applies, I find that section 21(1) does not apply and that the information at issue is not exempt on that basis.

C. Are the portions of the Donor Agreement at issue exempt under the mandatory third party information exemption in section 17(1)?

[28] York concluded that section 17(1) does not apply to the portions of the Donor Agreement it decided to disclose. The appellant argues that sections 17(1)(a) and (c) apply to that information. As the party resisting disclosure, the appellant bears the onus of establishing that section 17(1) applies to those portions of the Donor Agreement. The relevant parts of section 17(1) 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, if the disclosure could reasonably be expected to,

¹¹ Order P-1134.

¹² Order P-256.

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

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

[29] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹³ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.¹⁴

[30] For section 17(1) to apply, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is commercial or financial 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 the harms specified in paragraphs (a), (b), (c) or (d) of section 10(1) will occur.

Part 1: type of information

[31] The appellant’s position is that the Donor Agreement contains commercial and financial information for the reasons described in the confidential representations. These types of information have been defined in past orders as follows:

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.¹⁵ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹⁶

¹³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

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

¹⁵ Order PO-2010.

¹⁶ Order P-1621.

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.¹⁷

[32] I adopt these definitions in my analysis.

[33] As previously noted, the appellant's representations on section 17(1) are based on the premise that the entire Donor Agreement is at issue. Viewed from the perspective of the information actually before me under section 17(1), I do not find the portions at issue to reveal anything specific about the appellant's commercial interests; there is no information relating to the buying, selling or exchange of merchandise or services. Accordingly, I find that the information at issue does not fit within the definition of "commercial information" for the purpose of section 17(1).

[34] Regarding the assertion that the record contains "financial information," my review of the portions of the Donor Agreement that are at issue indicates that they do not consist of "accounting methods, pricing practices, profit and loss data, overhead and operating costs," or other qualifying information. However, to the extent that some parts of the agreement before me contain specific financial information about the donation, I find that those limited portions fit within the definition of "financial information."

Part 2: supplied in confidence

[35] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.¹⁸ Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.¹⁹

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

[37] The appellant's position on part two of the section 17(1) test acknowledges that the Donor Agreement represents a negotiated agreement, but lays claim to intentions of confidentiality for both parties. The confidential representations include arguments on why disclosure of the (entire) Donor Agreement would allow the requester and the

¹⁷ Order PO-2010.

¹⁸ Order MO-1706.

¹⁹ Orders PO-2020 and PO-2043.

²⁰ Order PO-2020.

public to make accurate inferences about certain confidential matters, such that the information qualifies as having been “supplied” for the purpose of section 17(1).

Analysis and findings

[38] The contents of a contract or agreement 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 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.²¹

[39] The appellant’s representations acknowledge the reality that the Donor Agreement is a negotiated agreement. Moreover, the appellant’s confidential submissions do not provide a basis for me to distinguish the Donor Agreement at issue in this appeal from the contracts or agreements typically dealt with under section 17(1). The Donor Agreement is not a record dealing with purely private philanthropic intentions, but rather relates to a specific, publicly-known donation made by a publicly-identified individual to York for the establishment of a specific institute. The Donor Agreement contains terms that both parties are presumed to have agreed upon as evidenced by their signatures. I am not persuaded by the representations or content of the portions York intended to disclose to the requester that the information was “supplied” to York for the purpose of part two of the test for exemption under section 17(1).

[40] In reaching this conclusion, I also considered whether these portions of the agreement might fit within the exceptions to the general rule that agreements are not “supplied.” In particular, I considered the suggestion that the “inferred disclosure” exception applies because disclosure would permit the requester (or public) to make accurate inferences about certain matters related to the appellant. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.²² Even if the types of matters described by the appellant in the confidential representations were the type of “third party information” section 17(1) was intended to protect, the information at issue provides no support for the appellant’s assertion that its disclosure would permit accurate inferences to be made about those matters. Therefore, I find that the exception for “inferred disclosure” does not apply.

[41] The portions of the Donor Agreement at issue reveal similarly insufficient support

²¹This 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*), as well as numerous subsequent Divisional Court decisions.

²² Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

for a finding that the immutability exception to the "supplied" rule applies. From my review of it, these portions do not contain information supplied by the appellant that could be construed as not susceptible to negotiation.²³

[42] I am not persuaded that the portions of the Donor Agreement at issue were "supplied" to York by the appellant, and the information therefore fails to satisfy part two of the three-part test under section 17(1).

[43] As stated previously, all three parts of the test under section 17(1) of the *Act* must be met for the exemption to apply. Given my finding that the information at issue does not qualify as "supplied," it is not necessary for me to consider the "in confidence" component of part 2 or the "harms" requirement in part 3. My analysis ends here with the finding that section 17(1) does not apply to the portions of the Donor Agreement that York decided to disclose to the requester.

[44] I uphold York's decision to disclose the portions of the Donor Agreement identified on the record provided to me, and I dismiss the appellant's appeal.

ORDER:

1. I order York to disclose the intended portions of the Donor Agreement to the requester by **November 22, 2018** but not before **November 16, 2018**.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require York to provide me with a copy of the record disclosed to the requester.

Original Signed by: _____
Daphne Loukidelis
Adjudicator

October 17, 2018 _____

²³ *Miller Transit*, above at para. 34.