Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3986

Appeal PA17-549

Ministry of Natural Resources and Forestry

August 28, 2019

Summary: This is a third party appeal of an access decision made by the Ministry of Natural Resources and Forestry (the ministry). The ministry granted access to the records at issue, which relate to the Bala Falls Hydro-Electric project. A third party appealed the ministry's decision to this office, claiming the application of the mandatory exemption in sections 17(1)(a) and (c) (third party information), as well as the discretionary exemptions in sections 16 (prejudice defence of Canada), 18(1)(c) and (d) (economic and other interests), 18(1)(g) (proposed plans, projects or policies of an institution) and 20 (danger to safety or health). During the inquiry, the requester raised the possible application of the public interest override in section 23.

In this order, the adjudicator finds that portions of one record are exempt from disclosure under section 17(1) of the *Act*, and that the public interest override in section 23 does not apply to this information. In addition, she does not allow the appellant to raise the possible application of the discretionary exemptions in sections 16, 18(1) or 20, and orders the remaining records at issue to be disclosed either in whole, or in part, to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* (the *Act*), R.S.O. 1990, c.F.31, as amended, ss. 16, 17(1)(a), 17(1)(c), 18(1)(c) and 20.

Orders and Investigation Reports Considered: Orders P-257, P-777, P-1137, PO-1939 and PO-3032.

Cases Considered: Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3.

BACKGROUND:

[1] This order disposes of the issues raised as a result of a third party appeal of an access decision made by the Ministry of Natural Resources and Forestry (the ministry). The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

- Emails or letters to and from specified staff at the ministry to or from anyone regarding the proposed Bala Falls hydro-electric plant; and
- Emails or letters between a specified staff member at the ministry and another individual and/or the Ontario Provincial Police regarding the requester or the Ball Falls hydro-electric plant.

[2] The ministry notified a third party, a provider of hydro-electric design and engineering services, of the request, and subsequently issued its decision, granting partial access to the records. The ministry denied access to some of the information, claiming the application of the mandatory exemption in section 17(1) (third party information) of the *Act*.

[3] The third party, now the appellant, appealed the ministry's decision to this office. The requester did not appeal the ministry's access decision.

[4] During the mediation of the appeal, the appellant advised the mediator that some of the records that the ministry intended to disclose should be withheld. The appellant advised the mediator that the mandatory exemption in section 17(1) applied, as well as the discretionary exemptions in sections 14(1)(i) (security), 14(1)(l) (facilitate commission of an unlawful act), 16 (prejudice defence of Canada), 18(1)(a),(c),(d) (economic and other interests), 18(1)(g) (proposed plans, projects or policies of an institution) and 20 (danger to safety or health) of the *Act*. The requester advised the mediator that he continued to seek access to the records, as per the ministry's decision. The ministry disclosed the records which are not at issue in this appeal to the requester.

[5] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I am the adjudicator and I initially sought representations from the appellant and the ministry. I received representations from both the appellant and the ministry. In the appellant's representations, it advises that it is no longer relying on the exemption in section 14(1). Therefore, section 14(1) is no longer at issue in this appeal. The appellant also provided consent to disclose the following records to the requester:

- A0302581 - pages 139 and 141;
- A0302839 – page 226;

- A0304196 – pages 2644 and 2645;
- A0304281 – pages 3071 and 3073; and
- A0304429 – pages 3319 and 3320.[1]

[6] I then sought representations from the requester, who, in turn, provided representations. He advised that he is relying on the representations made by a requester/appellant in a previous appeal made to this office, involving a request for records to the ministry relating to the Bala Falls project. The representations the requester is relying on are posted on a publicly-available website. I then shared the requester's and the ministry's representations with the appellant in accordance with this office's *Practice Direction 7*. The appellant provided reply representations.

[7] For the reasons that follow, I find that some of the records that the ministry decided to disclose are exempt from disclosure under section 17(1) of the *Act*, and that the public interest override in section 23 does not apply to these records. I do not allow the appellant to raise the possible application of the discretionary exemptions in sections 16, 18(1) or 20, and I order the remaining records at issue to be disclosed either in whole, or in part, to the requester, in accordance with the ministry's decision.

RECORDS:

[8] The records remaining at issue are the following:

Appellant's Record Number	**Ministry's Record Number**	**Page Number(s)**	**Nature of the record**
Record 1	A0302581	140	A portion of an email.
Record 2	A0302839	227 to 229[2]	A portion of an email containing minutes of a meeting.
Record 3	A0304184	2564 to 2579 and 2584 to 2618	An amended water management plan.
Record 4	A0304281	3072	A portion of an email.[3]

[1] The ministry has not claimed any exemptions with respect to these records. Accordingly, I will order the ministry to disclose these records in their entirety to the requester.
[2] I note that the appellant's copy of this email is labelled A0302839 pages 2 to 4. In any event, it is the same record.

PRELIMINARY ISSUE:

[9] As previously stated, the requester provided representations, and also advised this office that he is relying on representations made by another requester in a previous appeal involving the ministry and the Bala Falls project, which he states he obtained permission to use for purposes of this appeal. The appellant wrote to this office, taking the position that the requester's recycling of previous representations was inappropriate partly because the records in the two appeals were different.

[10] I have reviewed the records in both appeals and I confirm that they are different, a fact which I will take into account when considering the arguments made by the requester.

ISSUES:

A. Does the mandatory exemption at sections 17(1)(a) and/or (c) apply to the records?

B. Should the third party be permitted to raise the discretionary exemptions in sections 16, 18 and 20?

DISCUSSION:

Issue A: Does the mandatory exemption at sections 17(1)(a) and/or (c) apply to the records?

[11] The appellant is claiming the application of sections 17(1)(a) and/or (c) to the records remaining at issue. 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,
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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;
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> . . .

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[3] The content in record A0302581, page 140 is duplicated in record A0304281, page 3072 with the exception of introductory greetings.

b. result in undue loss or gain to any person, group, committee or financial institution or agency; or

[12] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] 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.[5]

[13] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

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

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

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

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[6]
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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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[4] *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.*).
[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[6] Order PO-2010.

prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[7]

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.[8] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[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.[10]

Representations

[15] The appellant submits that the records contain scientific, technical, commercial and/or financial information related to the appellant's operations and/or the Bala Falls project, or a combination thereof.

[16] The ministry submits that some of the records may contain information that might meet the first part of section 17(1). The requester submits that it appears the appellant has not met the first part of the test, as there is no evidence that the records contain trade secrets or scientific information. However, the requester also implies that there may be technical information in the records.

Analysis and findings

Record A0302581, page 140 and Record A0304281, page 3072

[17] I am considering these records together because the content is essentially identical, with the exception of introductory greetings. I find that these emails contain commercial information because they relate to the buying of the Bala Falls project by the ministry. I also find that these records do not contain scientific, technical or financial information.

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[7] Order PO-2010.
[8] Order PO-2010.
[9] Order P-1621.
[10] Order PO-2010.

Record A0302839, pages 227-229

[18] This record is part of an email and contains minutes of a meeting. As was the case above, I find that this record contains commercial information because it relates to the buying/selling of the Bala Falls project. This record does not contain scientific, technical or financial information as contemplated by the first part of the three-part test.

Record A0304184, pages 2564 to 2579 and 2584 to 2618

[19] This record is an amended water management plan. I find that it contains commercial information, as it relates to the selling of the Bala Falls project to the ministry. This records also contains, I find, technical information because it contains information that was prepared by a professional in the field which describes the construction and operation of a structure and process, namely the Bala Falls project. I further find that this record does not contain either scientific or financial information for the purpose of the first part of three-part test in section 17(1).

[20] As a result, having found that all four records contain commercial information and one record also contains technical information, I find that part one of the three-part test has been met with respect to the records at issue. I will now consider whether the records meet the second part of the three-part test.

Part 2: supplied in confidence

[21] 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.[11]

[22] 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.[12]

[23] 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]

[24] 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

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[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.
[13] Order PO-2020.

- 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; and
- prepared for a purpose that would not entail disclosure.[14]

Representations

[25] The appellant submits that the records at issue were supplied in confidence to the ministry because the information was communicated to the ministry on the basis that it was confidential and that it was to be kept confidential, and likely would not have been communicated in the same way if there had been no expectation of confidentiality. The appellant further submits that the information in the records was not otherwise disclosed or available from sources to which the public has access. All of these factors, the appellant argues, lend in favour of an expectation of confidentiality.

[26] The appellant goes on to state:

> The second element is also met because it is a reasonable implication that when [the appellant] or [the appellant's] contractors supply information to the [ministry], either directly or indirectly through another federal or provincial government department in the context it has shown such intention in that case, that such supply would not be intended to be shared with the public, and would remain confidential as between [the appellant], [the appellant's] contractors, the [ministry], and other related departments of government.

[27] The ministry submits that the appellant has not provided record-by-record evidence about how the records were supplied in confidence to the ministry. It further submits that the mere act of supplying information to the ministry does not create a reasonable expectation of privacy, and there is no indication that the ministry provided the appellant with any explicit assurance of confidentiality. Further, the ministry argues that its obligations under the *Act* were or should have been known to the appellant, given the history of access requests related to the Bala Falls project. Those requests and subsequent disclosures were very similar to the current request.[15] Lastly, the

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[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.
[15] For example, see Order PO-3841.

ministry submits that it is clear that the records at issue were created in the context of processing an application subject to the ministry's regulatory authority, which is not a process in which an applicant typically would expect confidentiality.

[28] The requester submits that the appellant has not met its burden of proof with respect to whether the records were "supplied in confidence" for the purposes of the second part of the three part test in section 17(1).

[29] In reply, the appellant reiterates the arguments made in its original representations and further submits that to adopt the reasoning of the other parties would mean that all communications and drawings submitted to provincial agencies or ministries must fail the second part of the third party test, which runs "afoul" of the intent and purpose of the exemption.[16] The appellant goes on to argue that this is clearly a case where the records were implicitly provided in confidence, given the sensitive nature of the records, and that it has consistently opposed the disclosure of this type of information. It further submits that the ministry treats these records as confidential.

[30] The appellant goes on to argue that at no point in time did the ministry communicate either verbally or in writing that the process being engaged in was a public one, where an applicant would not typically expect confidentiality, and that such a disclaimer was never provided in any of the ministry's communications to the appellant. The appellant submits that the process being engaged in resembled a business relationship, involving the exchange of information and fees in return for regulatory approval. The appellant states:

> Simply because this was an approvals process does not negate an expectation of confidentiality. It would be absurd to claim that such a process should involve a default presumption of non-confidentiality – in a business-like transaction, any default presumption should be that the information being exchanged is confidential, especially in light of the exemptions set out in the *Act* and upon which [the appellant] now relies.
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> [emphasis added]

Analysis and findings

Record A0302581, page 140 and Record A0304281, page 3072

[31] As previously stated, the substantive contents of these emails are duplicates. I find that these emails were not supplied by the appellant to the ministry. On the contrary, in these emails, the ministry is providing direction to the appellant regarding

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[16] For example, see Orders P-479 and P-1595.

the appellant's proposed submission for an amendment to the water management plan. The ministry sets out, in general terms, what it required in respect of the amendment submission. To be clear, the information set out in these emails was not supplied by the appellant to the ministry, and, consequently, does not meet part two of the three-part test in section 17(1). Therefore, I find that these emails are not exempt from disclosure under section 17(1) because the information for which the appellant is claiming section 17(1) was not supplied to the ministry. As no other exemptions have been claimed with respect to these records, I will order the ministry to disclose them to the requester.

Record A0302839, pages 227-229

[32] This record consists of the last three pages of an email from the ministry to the appellant, other third parties, and staff of the ministry and another ministry. Included in the email are the minutes of a meeting in which the sender of the email and its recipients participated. I find that the information in this email, with one exception, was not supplied by the appellant to the ministry, but rather the information was provided by the ministry to the participants in the meeting. In addition, I find that the content of the minutes consists of directions provided by the ministry to the appellant and other third parties. As a result, I find that this information was not supplied to the ministry and the second part of the two-part test has not been met. Consequently, I find that this information is not exempt from disclosure under section 17(1). As no other exemptions have been claimed with respect to this record, I will order the information that was not supplied to the ministry by the appellant to be disclosed to the requester.

[33] However, I find that the second half of item 4 in the minutes, located on the fourth page of the email was, in fact, supplied to the ministry, representatives of another ministry and other third parties. I also find that this information was not supplied "in confidence" to the ministry. I accept the ministry's argument that not all information that is supplied by a third party is necessarily supplied "in confidence." I find that there is no indication on the face of the record, either explicitly or implicitly, that the person who provided the information to the individuals who attended this meeting did so "in confidence," nor am I persuaded that the appellant had a reasonable expectation that this information would be held "in confidence." Consequently, I find that the second part of the three-part test has not been met with respect to the remaining portion of this record. As no other exemptions have been claimed with respect to this information, I will order the ministry to disclose it to the requester.

Record A0304184, pages 2564 to 2579 and 2584 to 2618

[34] This record is an amended water management plan that was prepared by the appellant for another third party, for the purpose of submission to the ministry. I am satisfied that this record was supplied by the appellant to another third party, which in turn, supplied it to the ministry. I accept the appellant's argument that it implicitly had a reasonable expectation that this record was supplied "in confidence." As a result, this record has met the requirements of the second part of the three-part test in section 17(1). I will now determine whether the third part of the test has been met.

Part 3: harms

[35] 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]

[36] The failure of a party resisting disclosure to provide detailed 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.*[18]

[37] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for sufficient evidence to support the harms outlined in section 17(1).[19]

Representations

[38] The appellant submits that the Supreme Court of Canada's findings in *Merck Frosst Canada Ltd. v. Canada (Health)*[20] should be the test applied in determining a party's reasonable expectation of harm under the *Act*. In *Merck*, the Supreme Court of Canada set out the test for economic harm in the third party exemption in section 20(1)(c) of the federal *Access to Information Act.* The Court held that the harm must be well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure would, in fact, result in such a harm.

Record A0304184, pages 2564 to 2579 and 2584 to 2618

[39] With respect to the specific harms that could reasonably be expected to result should this record be disclosed, the appellant argues that both sections 17(1)(a) and (c) apply for the following reasons:

- the appellant's competitive position could reasonably be expected to be significantly prejudiced by revealing sensitive and detailed technical drawings and information, or commercial information to market competitors, which could be used by those competitors;

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[17] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.
[18] Order PO-2435.
[19] Order PO-2435.
[20] 2012 SCC 3 at para. 206 (SCC) (*Merck*).

- revealing premature construction plans could jeopardize or delay the Bala Falls project because someone could use the information to intentionally sabotage the construction or to erect road blocks.[21] What may reasonably be apprehended as verbal and/or written threats to sabotage the Bala Falls project have been made, as well as scuba divers and protesters interfering with the completion of the work. This delay and/or interference would prevent the appellant from fulfilling many of its contractual obligations, exposing it to a risk of undue financial loss for both a breach of contract and a diminution of profits; and

- the appellant would suffer significant prejudice to its competitive position through the potential loss of future retainers with other contracting partners if its proprietary information were released to competitors or the general public.

[40] The ministry submits that the appellant has not provided any evidence or argument about how the disclosure could reasonably be expected to result in any of the harms enumerated in section 17(1), and has not demonstrated how the prospect of disclosure of the records would give rise to a reasonable expectation of harm or loss.

[41] The requester's representations on part three of the three-part test, in my view, are not relevant, as they deal with a different third party than the appellant in this appeal, and different records. However, I note that in his representations, the requester asks that the public interest override be applied wherever "appropriate and/or desirable."

[42] In reply, the appellant reiterates that the threshold for harm, as established by the Supreme Court of Canada in *Merck*, is that the future risk of harm is somewhere between possible and probable, In other words, the appellant argues that it does not need to prove that there is a 50 percent or more risk of a consequence or harm occurring; there could still be a less than 50 percent risk of a consequence or harm occurring. This threshold would still meet the third part of the test in section 17(1).

[43] The appellant also provided evidence by way of affidavit, sworn by one of its Regional Managers. The affiant submits that the appellant provided engineering services, specializing in industrial facilities, hydroelectric design, environmental management and water resources. He further argues that the engineering industry in Ontario is competitive, and the limited engineering firms that consult for renewable

[21] The appellant notes that it has been advised by another third party that it has previously received what may be reasonably apprehended as verbal and/or written threats to sabotage the project, and has experienced scuba divers and protestors interfering with the completion of the project.

energy projects further increases the competitive market, as there are always competitors seeking to replace each other, or take the market share.

[44] The affiant swears that the disclosure of the records would severely prejudice the appellant's economic interests, and could result in undue financial loss. In particular, the affiant submits that there has been extremely vocal and demonstrated resistance from members of the public against the Bala Falls project. If disclosed, the records would likely be exploited by activists who are closely monitoring the commencement of the Bala Falls project, and whose sole mission is to prevent the project from being commenced or completed. The affiant goes on to argue that the threat of harm to the project by activists would be amplified if the records are disclosed, as the disclosure of the technical information and drawings could be of assistance to the activists who have an intention to cause harm. If the project is delayed, the affiant submits, the appellant's ability to adhere to construction timelines would be significantly jeopardized, exposing it to a risk of undue financial loss for both a breach of contract and a diminution of profits.

[45] The appellant then responded to the requester's submission that the public interest override applies. It submits that the requester has not submitted proper representations on this issue that warrant a response, but that, in any event, the public interest override does not apply. The appellant acknowledges that there is a general public interest in providing information relating to the Bala Falls project to members of the public, and ensuring that the project is not shrouded in secrecy. This has already been accomplished, the appellant submits, through the disclosure of a large amount of information about the project, and which is adequate to address any public interest considerations.

[46] The appellant further submits that the records at issue contain information only relating to interests that are essentially private in nature, and do not relate to the public expenditure of funds or taxpayer money in any way. Lastly, the appellant argues that there is a more compelling public interest in the non-disclosure of the records at issue.

Analysis and findings

[47] With respect to the appellant's reference to the *Merck* case, there is nothing in that decision which necessitates a departure from the requirement that a party provide sufficient evidence to support its claim under section 17(1).

[48] The remaining record at issue, record A0304184, is the proposed amendment to the Muskoka River Water Management Plan. It contains the following information:

Page Number	**Nature of the record**
2564	Cover letter from the appellant to another third party.

2565 – 2572	Memorandum from the appellant to another third party. Contains background information, including a description of the project, the consultation process, operational changes, and the anticipated impacts of the project.
2573 – 2575	Cover page and letter from the Ministry of the Environment to another third party.
2576 – 2578	Cover letter from a third party to the Ontario Power Generation Inc. (OPG), with an attached document that was prepared by the OPG.
2579	Cover page.
2584 – 2587	Cover page and cover letter from a third party to the Ontario Power Generation Inc. (OPG), with an attached document that was prepared by the OPG. Pages 2585 to 2587 are exact duplicates of 2576 to 2578.[22]
2588 – 2596	Proposed Operating Plan, including water levels, bypass flow, minimum and concession flows, conditions placed on the facility by the Ministry of the Environment, operational characteristics and compliance considerations.
2597	Cover page.
2598-2599	Water Level Charts.
2600-2602	Cover page and letter from Fisheries and Oceans Canada to the Canadian Environmental Assessment Agency and Transport Canada.
2603-2604	Cover page and letter from Transport

[22] As they are exact duplicates, I have removed pages 2585, 2586 and 2587 from the scope of the appeal.

	Canada to a third party.
2605	Map of the Bala Falls area.
2606-2612	Technical Drawings of the project prepared by the appellant.
2613-2618	Proposed Changes to the Muskoka River Water Management Plan.

[49] The appellant's argument with respect to section 17(1)(a) is that its competitive position could reasonably be expected to be significantly prejudiced by revealing sensitive and detailed technical drawings and information, or commercial information to market competitors, which could be used by those competitors, resulting in the potential loss of future retainers with other contracting partners.

[50] Based on my review of the appellant's representations, and the record at issue, I find that the technical information at pages 2589-2599, 2615, 2616, and portions of pages 2566, 2567, 2570, 2571, 2572 and 2617, as well as the technical drawings at pages 2606 to 2612 are exempt from disclosure under section 17(1)(a). In my view, these pages contain proprietary information belonging to the appellant, which meets the third part of the three-part test in section 17(1)(a). The sole reason that I have come to this conclusion is because I find that the disclosure of the format and substance of these technical drawings, as well as the format of the technical information could be reasonably expected to be used by a competing engineering firm to prejudice the appellant's competitive position with respect to future projects they might be competing for.

[51] With respect to the requester's position that the public interest override applies, I find that the public interest override in section 23 does not apply to the technical information that I have found to be exempt under section 17(1). While I agree with the requester and the appellant that there is a significant public interest in the Bala Falls project, and in particular, the impacts of it on the community, I find that the disclosure of the detailed technical information at issue in this record would not address the public interest in the project as a whole. I also note that a significant amount of information has already been disclosed by the ministry regarding this project, and that a significant amount of information is available to the public online about this project. In sum, I find that there is not a compelling public interest in the disclosure of the technical drawings and detailed technical information that I have found to be exempt under section 17(1).

[52] Turning to the remaining portions of this record, I find that they have not met part three of the three-part test in section 17(1) and are, therefore, not exempt from disclosure under this exemption. Past orders of this office have found that in order for section 17(1)(a) to apply, the risk of harm to the third party must be in relation to the competitive or negotiating position of the third party. I find that the remaining pages of

this record consist of either:

- simple cover pages;
- a map which is in the public domain;
- information that is already in the public domain about the Bala Falls project;
- general background information about the project;
- information about consultations made in preparation for the project; or
- conditions imposed by various ministries or agencies on another third party.

[53] In my view, the appellant has not established that the disclosure of this particular information could reasonably be expected to significantly prejudice its competitive or negotiating position.

[54] Turning to section 17(1)(c), the appellant's argument is that revealing construction plans prematurely could jeopardize or delay the Bala Falls project because someone could use the information to intentionally sabotage the construction of the project, or to erect road blocks. What may reasonably be apprehended as verbal and/or written threats to sabotage the Bala Falls project have been made, as well as scuba divers and protesters interfering with the completion of the work. If the project is delayed, the appellant's ability to adhere to construction timelines would be significantly jeopardized, exposing it to a risk of undue financial loss for both a breach of contract and a diminution of profits.

[55] As is the case with section 17(1)(a), I find that the remaining information at issue is not exempt under section 17(1)(c). The appellant's arguments centre around the harm that would reasonably be expected should the technical information and drawings be disclosed. I have already found this information to be exempt under section 17(1)(a). As previously stated, the remaining information at issue is either simple cover pages, directives from various ministries or government agencies, already available to the public, or substantially similar to information already available to the public. I find the appellant's argument that the disclosure of the remaining information in the record could be used to intentionally sabotage the construction of the project or to erect road blocks, resulting in undue loss to it, to be speculative. I find that the appellant has not provided sufficient evidence that the disclosure of the remaining information at issue could be reasonably expected to cause it undue financial loss.

[56] The appellant is also seeking to raise three discretionary exemptions to this record, which I consider below.

Issue B: Should the appellant be permitted to raise the discretionary exemptions in sections 16, 18 and 20?

[57] The appellant takes the position that the discretionary exemptions in sections 16, 18 and 20, apply to record A0304184, which is the proposed amendment to the Muskoka River Water Management Plan. I have already found that most of the technical information and the technical drawings are exempt from disclosure under section 17(1); therefore this information is no longer at issue, but the remainder of this record remains at issue.

[58] Some exemptions in the *Act* are mandatory; if a record qualifies for exemption under a mandatory exemption, the head of an institution "shall" refuse to disclose it. However, a discretionary exemption uses the word "may" and in choosing that language, the Legislature expressly contemplated that the head of the institution retains the discretion to claim (or not) such an exemption to support its decision to deny access to a record. The ministry did not claim these discretionary exemptions.

[59] A number of past orders have considered the issue of whether a party other than the institution can claim a discretionary exemption.[23] Generally, where a third party raises the possible application of a discretionary exemption, the adjudicator must consider the situation before her in the context of the purposes of the *Act* in order to decide whether the appeal might constitute the "most unusual of circumstances."

Representations

[60] The appellant acknowledges that the threshold for a third party raising a discretionary exemption is in the "most unusual of circumstances," and submits that it has met this threshold. In support of its position, the appellant refers to Order PO-3601, in which former Adjudicator John Higgins stated:

> As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. **This result would occur, for example, where release of a record would seriously jeopardize the rights of a third party.**

[23] Most often cited are Orders P-1137 and PO-1705. See also Orders MO-2635, MO-2792 and PO-3489.

[emphasis added]

[61] The ministry submits that the discretionary exemptions in the *Act* are there to protect an institutional interest, and that a third party's request for a discretionary exemption would only be considered "in the most unusual of cases."[24] In addition, the ministry submits that this office has consistently held that the burden of proof falls on a third party to show that extraordinary circumstances apply, and that it must provide sufficient evidence to justify the extraordinary approach of allowing a third party to claim a discretionary exemption. In this case, the ministry submits, the appellant has not provided evidence that there is an extraordinary and rare situation justifying non-disclosure of the record.

[62] The ministry further submits that in its review of the records in this appeal, it considered all of the claimed discretionary exemptions, and found no basis to conclude that there is potential for the specific types of harm which the respective exemptions are intended to prevent, or that the circumstances are such that they warrant a third party claim for these discretionary exemptions.

Sections 16 and 20

[63] Section 16 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

[64] Concerning the exemption in section 16, the appellant submits that the "unusual threshold" is met because of the unique nature and context of the Bala Falls project. Section 16, it argues, is intended to protect vital public security interests and "must be approached in a sensitive manner, given the difficulty of predicting future events affecting the defence of Canada and other countries."[25]

[65] The appellant goes on to state:

> It is submitted that in a heightened era of security and national defence, there is a more pressing and immediate need to protect structures such as the ones proposed for the Bala Falls project. The . . . record in this case contains scientific/technical drawings or scientific/technical reports that

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[24] See for example, Orders P-1137, P-777, PO-3512 and PO-3032.
[25] See Order PO-3506.

> are extremely detailed and reveals information about the material, design and operation of the Bala Falls Project. Disclosure of this information, in the wrong hands, could reasonably be expected to jeopardize and/or endanger the security of the Bala Falls Project and any other surrounding structure, which could also reasonably be expected to prejudice the broader defence of Canada. It is not difficult to see how release of this information would aid in potential targeted acts of terrorism or sabotage.

[66] Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[67] Concerning the exemption in section 20, the appellant submits that it is intended to protect individuals from serious threats to safety or health, and that this office has held in past orders that the term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization. The appellant goes on to rely on Order PO-1939, where a threat to safety as contemplated in section 20 is not restricted to an actual physical attack.

[68] The appellant further submits that the release of the record would cause a tangible risk to the safety and health of the individuals who are responsible for securing the structures, involved in the construction of the project, and those who will remain at and operate the project once it is completed. The appellant states:

> [The appellant] submits that it is not necessary to show an actual current threat, but rather, it must only establish that the risk of harm is not fanciful or conjecture only. There are real risks to infrastructure and this risk outweighs the public's need for access to engineering drawings which are subject to scrutiny through government officials at several levels and approved by experts. The drawings have been vetted and approved; [the appellant] submits that there is little public good that can come from disclosure of these drawings at this point, but a substantial risk respecting the safety and security of the infrastructure and to the health and safety of surrounding individuals.

[69] The requester submits that, given his experience in patrolling a military base in anticipation of a terrorist attack, his participation in the full-blown invasion of another country in order to protect a water channel, his recent attendance at a military base, and his contacts with the Defence Department, he is in the best position to determine all judgments affecting national security.

[70] In reply, the appellant provided joint representations relating to the possible application of sections 16 and 20. The appellant also provided two affidavits to support its claim with respect to the application of these exemptions.

[71] With respect to the burden of proof, the appellant submits that, if allowed to claim the exemptions in sections 16 and 20, it must provide detailed and convincing evidence of harm well beyond the merely speculative, but need not prove that disclosure of the record will, in fact, result in such harm.

[72] The first affiant is an Assistant Professor at a Canadian university, who has published numerous publications on the topic of terrorism, domestic sabotage and counter-terrorism strategies. The affiant submits that several international and domestic terrorist organizations threaten Canadian national security. Some groups recruit Canadians to conduct attacks against critical infrastructure, including in the energy sector. Hydro-electric dams fall within the energy infrastructure sector and would be considered potential targets of digital and/or physical terrorism and sabotage. The affiant further submits that since October 2014, Canada's National Terrorism Threat Level has remained at medium, suggesting that a violent act of terrorism could occur. The affiant goes on to describe actual and thwarted acts of terrorism that have taken place in Canada, as well as international acts of terrorism that targeted critical energy infrastructure.

[73] The affiant further argues that terrorists and saboteurs usually spend time preparing their attacks, including information-gathering activities. The affiant states:

> Given the terrorist planning process, I believe the release of detailed engineering drawings of the proposed hydro-electric facility to members of the Canadian public may result in the online publication and dissemination of this information, increasing the overall security risk to the facility in the process.
>
> In reviewing these sensitive documents, I was able to identify certain information that could prove useful for conducting hostile actions, including acts of terrorism and sabotage against the site. The documents:
>
> - include information on the precise location of existing underground utility infrastructure, rail lines and public roads;
> - illustrate the exact configuration and geographic location of the facility's core components (including, for instance, the powerhouse);
> - detail the internal and external structural mechanisms of the dam itself;
> - reveal the planned phases of the site's development and construction.
>
> In my professional opinion, this information could prove useful to individuals or groups intent on attacking or disrupting the facility.

[74] The second affiant is the President of a security planning company, which provides security management and public safety consulting services to clients across the country. He submits that the electrical utility industry is a prime target for terrorists. He further submits that the North American Electric Reliability Corporation has published a guideline entitled "Security Guideline for the Electrical Sector Protecting Sensitive Information," which addresses potential risks that apply when deciding whether information should be made available to government agencies, third parties or to the public. The dissemination of sensitive information should only be given to authorities and trusted partners in confidence, with a legitimate need to know. The guideline refers to sensitive information as data or information that could be used by those intending to target electricity sector critical infrastructure, damage facilities, disrupt operations, or harm individuals.

[75] The affiants goes on to state:

> . . . Electrical and utility sector best practices govern that sensitive technical, mechanical, electrical, topology and architectural drawings are to be classified as "Restricted." Restricted is to be defined as "Company data or information regarding a critical asset, facility and/or system maintaining the reliability and security of the Bulk Electric System.
>
> It is my professional opinion that the release of data, documents, logs, drawings and other records to the public would produce a location vulnerability that would result in an increase in the probability of success of known and unknown threats assisting an attacker to potentially and successfully damage, sabotage and exploit the dam and the bulk electricity system for the Bala Falls Project.

Sections 18(1)(c), (d) and (g)

[76] The appellant submits that while it is clear that section 18(1) is designed to protect institutional interests (i.e. the ministry's interests), in this case the "unusual circumstances" threshold has been met because the ministry, by failing to apply section 18(1) to the record "puts in jeopardy the very goals that the Province of Ontario seeks to achieve through the FIT program."[26] The Feed-in Tariff (FIT) program was initiated in order to encourage and promote the greater use of renewable energy sources, including waterpower for electricity generating projects. Another third party made an application for, and was accepted, into the FIT program. The appellant was retained by the other third party to assist in the creation of the Bala Falls project.

[77] The appellant argues that the fact that the FIT program is now closed has no

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[26] The FIT program refers to the Feed-In Tariff program, which has since been closed.

impact on existing projects that form part of the program, and that the province continues to maintain an interest in ensuring that the existing projects for which significant resources have already been expended, both on the part of the proponents and the province, are carried through and realized.

[78] With respect to section 18(1)(c), the appellant submits that the disclosure of the record could reasonably be expected to prejudice the economic interests and/or the competitive position of the ministry for the following reasons:

- the disclosure of sensitive information would generate a negative response throughout the marketplace, where ministry partners would be less inclined to provide complete and frank information to the ministry;
- the disclosure of the record could jeopardize or delay the building of the project, resulting in a waste of provincial and municipal resources which have already been used and/or the use of additional resources needed to complete the project; and
- this result could severely inhibit the fulfillment of the ministry's mandate of promoting economic opportunities in the resources sector.

[79] Turning to section 18(1)(d), the appellant submits that the disclosure of the record could reasonably be expected to be injurious to the ministry or the province, or the ability of same to manage the economy of Ontario. In particular, the disclosure of the record could reasonably be expected to discourage other private sector companies from entering into partnerships at all with the province, as well as cause a ripple effect that may discourage energy companies from investing in renewable energy as a whole, thereby directly affecting the province's financial interests.

[80] With respect to section 18(1)(g), the appellant submits that the disclosure of the record could reasonably be expected to result in premature disclosure of a pending policy decision by the ministry regarding the Bala Falls project. In addition, the record contains plans, policies or projects of the ministry, where the disclosure could reasonably be expected to result in undue financial benefit or loss to the appellant.

[81] Lastly, the appellant argues that the expansion of public-private partnerships necessitates a change in the application of the provisions of the *Act*, particularly where there is a disparity between the broad protections afforded to institutional interests and the very few protections available for third parties who work with institutions. The appellant goes on to state:

> In partnerships such as the FIT Program in this case, it must be acknowledged and recognized that [a third party] and [the appellant] are working in partnership with the Province in part to help further the Province's mandate and objectives. The Province has an economic interest

> in these relationships and the resulting savings for taxpayers. It is therefore submitted that the protection of private information is inexplicably [sic] tied to the protection of institutional information, and as such, it would be inequitable to prohibit [the appellant] from raising the possible application of discretionary exemptions to the records at issue.

[82] As previously stated, the ministry submits that in its review of the records in this appeal, it considered all of the claimed discretionary exemptions, and found no basis to conclude that there is potential for the specific types of harm which the respective exemptions are intended to prevent, or that the circumstances are such that they warrant a third party claim for these discretionary exemptions.

[83] The requester submits that the Bala Falls project is being built purely for private profit, with high-level political encouragement.

Analysis and findings

[84] The *Act* expressly contemplates that the head of an institution (in this case, the ministry) is given the discretion to claim, or not claim discretionary exemptions. Generally speaking, third party appellants are not permitted to claim discretionary exemptions not relied upon by the institution. This office has previously addressed whether a third party may raise discretionary exemptions. In Order P-777, former Assistant Commissioner Irwin Glasberg stated:

> As a general rule, the responsibility rests with a Ministry to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by a Ministry during the course of an appeal. This result would occur, for example, where the release of a record would seriously jeopardize the rights of a third party.

[85] In Order P-257, former Assistant Commissioner Tom Mitchinson, in considering the question of when a third party, or a person other than the institution that received the access request, may be entitled to rely on one of the discretionary exemptions in the *Act*, stated:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. . . .
>
> In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, *there may be rare occasions*

> *when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.
>
> [Emphasis added]

[86] In Order P-1137, former Adjudicator Anita Fineberg made the following comments:

> The *Act* includes a number of discretionary exemptions within sections 13 to 22 [of *FIPPA*, the equivalent of sections 6 to 16 of the *Act*] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
>
> The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17(1) of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
>
> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has

> not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[87] I agree with and adopt the reasoning in the above orders. The issue, therefore, is whether this is one of those "rare occasions" where a third party should be permitted to raise a discretionary exemption not claimed by an institution.

[88] For ease of reference, I have duplicated a portion of the appellant's representations, in which it refers to Order PO-3601 to support its position that it should be able to raise discretionary exemptions. In that order, former Adjudicator John Higgins stated:

> As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. **This result would occur, for example, where release of a record would seriously jeopardize the rights of a third party.**
>
> [emphasis added]

[89] I have considered the situation before me in the context of the purposes of the *Act* in order to decide whether this appeal might constitute the "most unusual of circumstances" and I find that this is not one of those "rare occasions" where a third party should be permitted to raise discretionary exemptions.

[90] Based on the representations of the ministry, in which it argues that in its review of the records in this appeal, it considered all of the available discretionary exemptions, and found no basis to conclude that there is potential for the specific types of harm which the respective exemptions are intended to prevent, or that the circumstances were such that they warrant a third party claim for these discretionary exemptions, I am satisfied that this appeal does not constitute the most unusual of circumstances. In my view, the ministry has exercised its discretion against claiming the exemptions in sections 16, 18(1) and 20.

[91] Having reviewed the appellant's representations and the records at issue, I am not satisfied that this qualifies as one of those unusual of cases where an appellant could raise the application of an exemption which has not been claimed by the head of an institution. Discretionary exemptions all indicate that the head "may refuse to disclose…." In other words, the Legislature expressly contemplated that the head of the

institution is given the discretion to claim, or not claim, these exemptions.

[92] In my view, the appellant's concerns regarding disclosure of the remaining information at issue were addressed in the consideration of the application of section 17(1) of the *Act*. The appellant has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary measure of permitting it to claim the discretionary exemptions in sections 16, 18(1) and 20 when the head has elected not to do so.

[93] With respect to section 18(1), the appellant makes the argument that because the way the province operates and conducts business since the *Act* was first enacted, the application of the *Act* needs to reflect the evolving relationship between institutions and third parties. The appellant also submits that the protection of private information is tied to the protection of institutional information. As a result, it would be inequitable to prohibit the appellant from raising the application of discretionary exemptions, such as section 18(1). I disagree. The appellant's assertion that the protection of private information is inextricably linked to the protection of institutional information because of the nature of public-private partnerships is not supported by any evidence. Simply because a third party might be in a partnership with a public institution does not mean that they have the same interests. This argument is inconsistent with the Legislature's intention of having two separate exemptions, namely sections 17(1) and 18(1) of the *Act*.

[94] The mandatory exemption in section 17(1) is available to third parties to claim, and it is specifically designed to provide for the exemption of third party information, provided that the three-part test in section 17(1) is met. Section 18(1) is designed to protect an institution's economic interests and, barring an exceptional circumstance, which the appellant has not established in this case, is to be claimed solely by the institution.

[95] Even if I were to allow the appellant to raise the discretionary exemptions in sections 16, 18(1) and 20, I find that they do not apply to the remaining information at issue.

Sections 16 and 20

[96] Section 16 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

[97] It is evident from the context of this exemption that it is intended to protect vital

public security interests. Section 16 must be approached in a sensitive manner, given the difficulty of predicting future events affecting the defence of Canada and other countries.[27]

[98] In order for section 16 to apply, the party raising it must provide detailed 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.[28]

[99] This office has applied section 16 to exempt records containing detailed technical information about the operations of a nuclear facility.[29] I have already found the detailed technical information in the records to be exempt under section 17(1). I find that the remaining information at issue, is either too general to trigger a reasonable expectation of harm in section 16, or is publicly available. In my view, the remaining information at issue could not reasonably be expected to prejudice the defence of Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism.

[100] Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[101] For this exemption to apply, the party raising it must again provide detailed 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.[30]

[102] An individual's subjective fear, while relevant, may not be enough to justify the exemption.[31] The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[32]

[103] Turning to section 20, I find that the appellant has not established a reasonable

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[27] See Order PO-2500.
[28] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[29] Order PO-2500.
[30] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[31] Order PO-2003.
[32] Order PO-1817-R.

basis for believing that an individual, or a group of individuals' safety will be endangered by disclosing the remaining information at issue. In Order PO-1939, former Adjudicator Laurel Cropley noted that it is necessary to demonstrate that there is clear and direct evidence that the behaviour in question (in this case sabotage or terrorism) is tied to the record(s) at issue.[33] In this case, given that I have already found that the detailed technical information is exempt under section 17(1), I fail to see how the remaining information at issue, if disclosed, could be used to facilitate an act of sabotage or terrorism that would harm an individual or a group of individuals. Consequently, I find that the exemption in section 20 does not apply in this instance.

Sections 18(1)(c), (d) and (g)

[104] Section 18(1) states, in part:

> A head may refuse to disclose a record that contains,
>
> > c. information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > d. information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
> >
> > g. information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[105] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[34]

[106] Once again, for sections 18(1)(c), (d) or (g) to apply, the party raising it must provide detailed 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

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[33] See also, for example, Order PO-3972.

[34] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (The Williams Commission Report), Toronto: Queen's Printer, 1980.

needed will depend on the type of issue and seriousness of the consequences.[35]

[107] The failure to provide detailed 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 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[36]

[108] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[37]

[109] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[38]

[110] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.[39]

[111] In order for section 18(1)(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

    i. premature disclosure of a pending policy decision, or

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[35] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[36] Order MO-2363.
[37] Orders P-1190 and MO-2233.
[38] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[39] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

ii. undue financial benefit or loss to a person.[40]

[112] The term "pending policy decision" refers to a situation where a policy decision has been reached, but has not yet been announced.[41]

[113] I find that the appellant has not established any of the harms contemplated in either of sections 18(1)(c), (d) or (g), and that the exemptions do not apply to the remaining information at issue. In particular, with respect to section 18(1)(c), I find the appellant's argument that, should the information at issue be disclosed, future private partners would not provide complete and frank information to the ministry, to be entirely speculative. In my view, having to provide the ministry with information would not deter a company from seeking to secure a lucrative contract with the ministry, or province, as the case may be. The appellant also argues that the disclosure of the record could jeopardize or delay the building of the Bala Falls project. I have already made my finding on this issue, above, that there is insufficient evidence to support that position.

[114] Regarding section 18(1)(d), the appellant's position is that the disclosure of the record could reasonably be expected to discourage other private sector companies from entering into partnerships with the province, as well as cause a ripple effect that may discourage energy companies from investing in renewable energy as a whole, thereby directly affecting the province's financial interests. As is the case with section 18(1)(c), I find this argument to be speculative and counterintuitive. The notion that a company would refuse to do business with the province, let alone abandon its investment in renewable energy as a whole, due to the disclosure of the remaining information at issue, is purely speculative.

[115] Turning to section 18(1)(g), in order for it to apply, the record must contain information including proposed plans, policies or projects of an institution, and disclosure of the record could reasonably be expected to result in premature disclosure of a pending policy decision, or undue financial benefit or loss to a person.[42] The appellant has not provided any evidence, nor is it obvious on my review of the record, that the information at issue contains a pending policy decision. Further, the issue of whether the disclosure of the record would result in an undue financial loss to the appellant was more properly considered in my analysis of the application of the mandatory exemption in section 17(1).

[116] In sum, I find that some of the information at issue is exempt from disclosure

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[40] Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[41] Order P-726.
[42] Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).

under the mandatory exemption in section 17(1). The information that is not exempt from disclosure is to be disclosed to the requester. Further, I do not permit the appellant to raise the application of the discretionary exemptions in sections 16, 18(1) or 20.

ORDER:

1. I order the ministry to disclose the following records to the requester, in whole by **October 3, 2019**, but not before **September 30, 2019**:

   - A0302581 - pages 139, 140 and 141;
   - A0302839 – pages 226, 227, 228 and 229;
   - A0304184 – pages 2564-2565, 2568-2569, 2573-2576, 2578-2579, 2584, 2600-2605, 2613-2614 and 2618;
   - A0304196 – pages 2644 and 2645;
   - A0304281 – pages 3071, 3072 and 3073; and
   - A0304429 – pages 3319 and 3320.

2. I order the ministry to disclose pages 2566, 2567, 2570, 2571, 2572, 2577 and 2617 of record A0304184, in part, to the requester by **October 3, 2019** but not before **September 30, 2019**. I have included a copy of these pages for the ministry and have highlighted the portions that are to be disclosed to the requester.

3. I reserve the right to require the ministry to provide this office with copies of the records it discloses to the requester.

Original signed by | August 28, 2019

Cathy Hamilton
Adjudicator