Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4047

Appeal PA16-99

Ministry of Finance

June 16, 2020

Summary: The Ministry of Finance (the ministry or MOF) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information pertaining to succession planning by the Deposit Insurance Company of Ontario (DICO). Both DICO and the ministry claimed that the records at issue were excluded from the *Act* pursuant to section 65(6) (employment or labour relations), or alternatively, qualified for exemption under sections 17(1) (third party information), in conjunction with section 49(a) (discretion to refuse requester's own information), or 49(b) (personal privacy). In this order, the adjudicator finds that the section 65(6)3 exclusion does not apply but upholds the decision of the ministry not to disclose to the appellant the information remaining at issue on the basis of the claimed exemptions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 1, 2(1) (definition of "personal information"), 2(3), 2(4), 10(2), 17(1)(c), 21(1)(a), 21(2)(d), 21(2)(h), 21(3)(d), 21(3)(g), 49(a), 49(b) and 65(6)3; *Broader Public Sector Executive Compensation Act, 2014*, SO 2014, c 13, Sch 1, section 5; *Credit Unions and Caisses Populaires Act*, 1994, S.O. 1994, c 11, former sections 252(1), 260(1), 260(2) and Regulation 304/16, now repealed .

Orders Considered: Orders P-1369, P-1637 and PO-3709.

Cases Considered: *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507; *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123; 178 O.A.C. 171; 126 A.C.W.S. (3d) 185 (C.A.); *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (Ont. Div. Ct.).

OVERVIEW:

[1] The Ministry of Finance (the ministry or MOF) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information pertaining to succession planning by the Deposit Insurance Company of Ontario (DICO). In particular, the requester sought access to:

> The DICO board and Human Resources committee meeting materials provided to the MOF Observer from January 1, 2010 through June 30, 2015 relating to the topic of Succession Planning of any of DICO staff (Succession Planning) and any notes taken by the MOF Observer at these meetings.
>
> For greater certainty, these records include: the Agenda for the [relevant] committee or board meeting, submissions by DICO management including any third party enclosures or attachments relating to Succession Planning and the subsequently approved Minutes of the … meetings.

[2] The ministry issued a fee estimate and advised that it was extending the time for processing the request under section 27 of the *Act*. In its decision, the ministry also stated that a preliminary review of the records indicated that some of the records may be exempt from disclosure pursuant to a number of sections of the *Act*.

[3] The requester (now the appellant) appealed the amount of the fee estimate and the time extension and the ministry then issued a revised fee estimate set out in a decision letter. The letter indicated that some of the records might also be exempt from disclosure under section 17 (third party information) of the *Act* and that the ministry was notifying DICO of the request, pursuant to section 28 of the *Act*. As a result of the ministry's revised fee estimate decision, the appellant indicated that he no longer wished to pursue his appeal of the fee estimate.

[4] After DICO provided its position on disclosure, the ministry issued its access decision, accompanied by an Index of Records. The ministry granted partial access to the responsive records, relying on section 21(1) (personal privacy) of the *Act* to deny access to the portion it withheld. It also issued a final fee. Finally, the ministry also indicated that, in its view, certain portions of the records were not responsive to the request.

[5] The appellant appealed the ministry's decision, asserting that the ministry should not have applied the time extension provision at section 27(1) and further erred in notifying DICO of the request under section 28. The appellant's appeal was assigned appeal file number PA15-475. This was one of three appeals commenced by the appellant that became the subject of Order PO-3709, issued by former Senior Adjudicator Frank DeVries.

[6] In Order PO-3709, the former senior adjudicator found that the ministry

inappropriately applied the time extension in section 27(1) but did not err in notifying DICO pursuant to section 28 of the *Act*. He also granted other relief as detailed in that order. As a result of the issuance of Order PO-3709, Appeal file PA15-475 was closed. This appeal file (PA16-99) was opened to address the outstanding issue of the appellant's access to some of the withheld information in records that the ministry had identified as responsive to the request at issue before me.

[7] At the mediation of the appeal before me, the appellant clarified that he was only pursuing access to part of Record 5 on the ministry's Index of Records (which was ultimately renumbered as Record 1 in this appeal) and one additional record which may have been responsive to the request at issue in this appeal but which had been the subject of another access request. In response, the ministry agreed to add the additional record to this appeal and issued a revised access decision with respect to the two records. As set out in the revised access decision, the ministry relied on sections 17(1) (third party information) and 21(1) of the *Act* to deny access to the portion of the two records it withheld.

[8] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[9] I commenced my inquiry by seeking representations from the ministry and DICO on the facts and issues set out in a Notice of Inquiry. The ministry provided representations and advised that they could be shared with the appellant. The ministry indicated that it was adopting DICO's representations as well. DICO provided confidential and non-confidential versions of its representations, requesting that only the non- confidential version be shared with the appellant. In its representations DICO advised that it was prepared to disclose additional information to the appellant. Finally, in its representations DICO raised for the first time the possible application of the exclusion at section 65(6)3 (employment or labour relations) of the *Act*. As this exclusion goes to whether the records are subject to the *Act*, I added the possible application of section 65(6)3 as an issue in the appeal.

[10] I then sent a Notice of Inquiry to the appellant along with a copy of the ministry's representations as well as DICO's non-confidential representations. The confidential version of DICO's representations was not shared, in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The appellant provided responding representations which were shared with the ministry and DICO for reply. DICO provided reply representations which the ministry adopted. The ministry and DICO's representations were then shared with the appellant who provided sur-reply representations.

[11] After the exchange of representations, the ministry disclosed the additional information that DICO consented to share. Accordingly, that information is no longer at issue in the appeal.

[12] In this order, I find that the section 65(6)3 exclusion does not apply but uphold

the decision of the ministry not to disclose to the appellant the information remaining at issue under the claimed exemptions.

RECORDS:

[13] Remaining at issue in this appeal are the withheld portions of the following two records:

> Record 1 - described by DICO as being an excerpt from a Memorandum from [DICO's Chief Executive Officer] to the Governance & Human Resources Committee dated March 2, 2012 re: Annual Performance Reviews of Executive Leadership Team and Succession Planning Update (originally identified by the ministry as pp. 9-11 of Record 5); and
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> Record 2 - described by DICO as being a Report to the DICO Board of Directors by [DICO's Chief Executive Officer] re: Organizational Realignment dated March 4, 2014, which attaches a Memorandum regarding Organizational Realignment and Human Resources Strategies.

[14] In his initial representations the appellant stated that he did not object to:

> … the redaction of all credit union related information in the recognition that [section 17(1)(b)] harm may occur if confidential credit union information were disclosed under *FIPPA*.

[15] However, the appellant did not agree with DICO's subsequent characterization of what constitutes "credit union related information". Accordingly, I am considering that all the remaining withheld information in the two records remains at issue in the appeal.

ISSUES:

A. Does section 65(6)3 exclude the records from the *Act*?

B. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

C. Does the discretionary exemption at section 49(b) apply to the information at issue?

D. Does section 17, in conjunction with the discretionary exemption at section 49(a), apply to the remaining information at issue in Record 2?

E. Did the ministry exercise its discretion under sections 49(b) and 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does section 65(6)3 exclude the records from the *Act*?

[16] Section 65(6) states, in part:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[17] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) apply, the records are excluded from the scope of the *Act*.

[18] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[1]

[19] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[2]

[20] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer

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[1] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

[2] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

and employees that do not arise out of a collective bargaining relationship.[3]

[21] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[4]

[22] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.[5]

[23] The types of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[6]

Section 65(6)3: matters in which the institution has an interest

Introduction

[24] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[25] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[7]

[26] The records collected, prepared, maintained or used by the institution are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to

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[3] Order PO-2157.
[4] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[5] Orders P-1560 and PO-2106.
[6] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289; 2008 CanLII 2603 (Div. Ct.).
[7] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

employees' actions.[8]

Section 65(7): exceptions to section 65(6)

[27] If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. Section 65(7) states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

DICO's representations

[28] DICO submits that the "institution" for the purposes of the section 65(6) analysis is the ministry but that records prepared for meetings and discussions regarding the performance and succession planning of DICO's executive leadership team are "employment-related matters" in which the ministry had a direct interest.

[29] DICO references a Memorandum of Understanding (MOU) governing its relation with the ministry and submits:

> … In particular, the ministry has an interest in DICO's executive leadership team, who are responsible for the operations and management of the organization and succession within the organization. The ministry has an interest in the records by virtue of the presence of the MOF observer at the board meetings, as well as DICO's reporting relationship to the Minister and the monitoring role that the MOF has (as detailed in the MOU).

[30] In support of its position, DICO provided an affidavit of its Vice-President,

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[8] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

Corporate Affairs and Chief Risk Officer who explains that:

> DICO is an Ontario provincial agency established under the *Credit Unions and Caisses Populaires Act, 1994*[9] ("*CUCPA*"). DICO is responsible for administering and ensuring compliance with the rules set by the Ontario government relating to the solvency of credit unions and caisses populaires […], promoting standards of sound business and financial practices, providing insurance against loss of deposits, and promoting and contributing to the stability of the Ontario credit union sector with due regard to its need to compete.
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> DICO is a "Board-Governed" agency of the Province of Ontario established in 1977 and operates under the *CUCPA*. The *CUCPA* sets out DICO's objects, powers and duties, as well as general terms for deposit insurance and other governing parameters. DICO functions within the legal framework established by the *CUCPA*, the Agency and Appointments Directive […], issued by Management Board of Cabinet, and other applicable directives and laws. DICO is accountable to the Minister of Finance for the conduct of its affairs.
>
> …
>
> Provincial agencies act as a part of government but are not organizationally part of a ministry. They are led by government appointees and are expected to provide a high level of service to the public. Provincial agencies are accountable to the government through the responsible minister. The *Agencies and Appointments Directive* (February 2015) (the *Directive*), issued under the *Management Board of Cabinet Act*[10], sets out the rules for all provincial agencies, including DICO. The Directive provides an accountability framework for provincial agencies and includes a requirement for a Memorandum of Understanding between each provincial agency and the ministry that oversees them.[11] …
>
> …
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> As part of the accountability framework under the *CUCPA*, the *Directive*, the MOU and related directives and guidance, paragraph 8.4(o) of the MOU states that the Deputy Minister is responsible for "[a]ssigning a Ministry of Finance staff person to sit on the Board as an observer."

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[9] S.O. 1994, c 11.
[10] RSO 1990, c M.1.
[11] DICO provided a copy of the Agencies and Appointments Directive (February 2015) in its representations.

> Pursuant to this assignment, the MOF regularly sends an "observer" (the "MOF Observer") to attend meetings of the DICO Board of Directors. The Deputy Minister is responsible for assigning an MOF Observer to sit in on DICO Board meetings and the MOF Observer keeps the MOF informed of issues or events that may concern the MOF. The MOF Observer is invited to attend all DICO meetings and is usually present at the meetings. Apart from the MOF Observer, and any special invitees, DICO's Board meetings are not open to the public and are private and confidential meetings.
>
> When the MOF Observer is attending a meeting of the DICO Board of Directors, the MOF Observer is provided with copies of all the materials circulated at the meeting, including materials or documents containing confidential information. The MOF Observer is present even during "in camera" sessions of the DICO Board of Directors when highly confidential matters are being discussed. All documents, materials and information provided to the MOF Observer are provided pursuant to DICO's legal obligation under the *CUCPA*, the Directive and the MOU for the purposes of complying with the MOF's oversight role. DICO expects that the MOF will treat as confidential any documents, materials and information provided to the MOF Observer during the DICO Board of Directors meetings.

[31] As explained above, section 8.4 of the MOU sets out the responsibilities of the Deputy Minister of Finance and section 8.4(o) provides that one of the Deputy Minister's responsibilities is assigning a ministry staff person to sit on the board as an observer.

[32] Section 9 sets out DICO's reporting requirements within the framework of the MOU. This includes providing the ministry with a Business Plan (including a system of performance measures and reporting on the achievement of the objectives set out in the Business Plan), and providing Annual Reports and Other Reports. In addition to the reports set out in appendix 1 of the MOU, section 9.3(b) requires DICO "[a]t the request of the Minister or Deputy Minister, [to supply] specific data and other information that may be required from time-to-time for the purpose of ministry administration".

The appellant's representations

[33] Relying on Order P-1369, the appellant submits that section 65(6) does not apply to the records at issue because Record 2 qualifies as an organizational or operational review, thereby falling outside the scope of the exclusion. Furthermore, the appellant takes the position that the words "in which the institution has an interest" mean an

institution's own workforce.[12]

[34] With respect to his latter point, the appellant submits that:

> The MOF does not have an interest in these records. The MOF is the institution that received the *FIPPA* request. It is not the party that collected, maintained, or used these records. That party is DICO. These records were prepared by DICO staff for the information of DICO's board which has the legal duty and authority to supervise or manage DICO.[13] These records were only copied to the MOF's observer by DICO as a courtesy. ….

[35] The appellant submits that contrary to the positions taken by the ministry and DICO, neither the Minister, the MOU nor any government directive give the ministry any right to, or interest in, any of these records. He submits that there is no legal authority that authorizes the ministry to conduct the level of oversight alleged.

[36] In that regard, the appellant takes the position that former section 260[14] of the *CUCPA* sets out the type of information DICO was legally required and authorized to provide to the Minister of Finance. Sections 260(1) and (2) read as follows at the time of the request:

1. The Corporation [DICO] shall provide the Minister with such information relating to its activities, operations and financial affairs as the Minister may request.

2. At least once each year, the Corporation shall advise the Minister about the credit union sector and the adequacy of the Deposit Insurance Reserve Fund and about any matters that concern or can reasonably be expected to concern the Minister in the exercise of his or her responsibilities.

[37] The appellant submits that:

> Neither the MOF nor DICO have provided any evidence of the Minister having "requested" this level of operational information from DICO. At best, the MOU evidences the Minister's request for information about the

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[12] The appellant relies on *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507 at paragraph 35 in support of this submission.

[13] The appellant relies on former section 252(1) of the *Credit Unions and Caisses Populaires Act, 1994,* S.O. 1994, c 11, in support of this submission, which is now repealed but read as follows at the time of his request: The board of directors of the Corporation shall manage or supervise the management of the affairs of the Corporation and shall perform such additional duties as may be imposed under this Act, prescribed by the regulations or imposed by the by-laws.

[14] Now repealed.

> effectiveness of DICO's board in performing its responsibilities set out in the MOU and Agencies & Appointments Directive through the appointment of a board observer[15]. If the Minister wanted operational information about DICO, he could have appointed a ministry official, such as a deputy minister, to sit as an ex-officio director on DICO's board. This is the practice of the federal government in dealing with the Canada Deposit Insurance Corporation, DICO's federal equivalent.
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> DICO's records, which are the subject of this *FIPPA* request, are not addressed in the Agencies and Appointment Directive or the Reporting Requirements of paragraph 9 of the MOU.

[38] The appellant asserts that the only reference to a ministry observer is found in paragraph 8.4.o of the MOU which states that the duties of the Deputy Minister include assigning an MOF staff person to sit on DICO's board as an observer. The appellant adds:

> … It should also be noted that paragraph 1b. of the MOU states that "This MOU does not affect, modify or limit the powers of the corporation as set out in the act or interfere with any of the responsibilities of any of its parties as established by law." …

[39] The appellant also alleges that the MOU is not even binding on DICO as it was signed by an individual as DICO's chair, "rather than being signed by DICO, per [the individual], then Chair of the Board". The appellant submits that:

> This mode of execution is both appropriate and intended given that the MOU is between the Minister of Finance and the Chair of DICO rather than the Minister of Finance and DICO.

The reply representations

[40] DICO provided reply representations which were adopted and relied upon by the ministry.

[41] DICO submits that the information that DICO seeks to withhold does not qualify as an organizational review, rather it consists of information regarding employment candidates, hiring strategies, expected retirement of certain employees and information pertaining to the experience level, skills and learning curve of certain employees.

[42] DICO submits that:

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[15] The appellant references paragraph 8.4.o of the MOU in this regard.

> … Unlike the situation described in Order P-1369, the information that DICO seeks to redact is not "a broadly-based organizational review, which touches occasionally, and in an extremely general way on staffing and salary issues"[…]. Instead, DICO seeks to redact specific sensitive and confidential information about certain employee positions, candidates, hiring strategy and the employees that were performing those named roles at the time.

[43] Also relying on *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*[16], DICO takes the position that the phrase "in which the institution has an interest" actually does not refer exclusively to an institution's own workforce. DICO submits that in that case the Court of Appeal upheld the decision of the Ministry of the Solicitor General and Correctional Services to apply section 65(6)3 to records involving the workforce of the Ontario Provincial Police and did not adopt an interpretation that would have restricted the application of section 65(6)3 to the Ministry of the Solicitor General and Correctional Services' own workforce. DICO submits that in doing so, the Court of Appeal did not intend to restrict the application of section 65(6)3 to the institution's own workforce. DICO submits that if it had, the result would have been different.

[44] DICO submits that this approach is consistent with a purposive reading of the legislation that ensures the confidentiality of labour relations and employment-related information that is in the custody or control of an institution subject to *FIPPA*.

[45] DICO adds that:

> … While an institution's "interest" in a record can be demonstrated in particular cases by reference to a requirement to report or provide information to the institution, as here, section 65(6) simply does not require a formal order or directive to establish that the institution has a valid interest in a record. Having said that, the ministry's "interest" in the records in this case is supported by the legal framework that has been established to facilitate meaningful reporting by and oversight of DICO. The ministry collected, maintained and used the records in order to facilitate such meaningful reporting by and oversight of DICO.
>
> As explained in DICO's Original Representations and the [Affidavit provided] DICO is required under the Memorandum of Understanding with the Ministry to allow an MOF Observer to sit in on meetings of the DICO Board and its committees. As part of this role, the MOF observer is

[16] Cited above.

> entitled to all materials distributed at the meeting of the DICO board and its committees.

[46] DICO states that the records were not produced by DICO to the ministry "as a courtesy" and that under former section 260(1) of the *CUCPA*[17], DICO was to provide the Minister with "such information relating to its activities, operations and financial affairs as the Minister may request." DICO submits that the MOU sets out the terms and conditions by which the Minister "requests" information from DICO as part of its oversight role and adds that the MOU does not affect, modify or limit the powers of DICO, but it is a method by which the ministry requests the information to which it is entitled under the *CUCPA*. DICO submits that it has a legal obligation to abide by former section 260(1) of the *CUCPA* and the terms of the MOU.

[47] DICO further submits that:

> Although the specific documents contained in the Records are not directly referenced in the Agencies & Appointments Directive or the Reporting Requirements of Paragraph 9 of the MOU, the Directive and the MOU provide the overall framework for the ministry's oversight of DICO and DICO's reporting to the ministry. DICO disputes the appellant's suggestion that there must be an explicit requirement in the MOU or the Directive in order to require DICO to provide documents to the ministry. As explained in the [Affidavit provided], DICO provides all copies of all materials circulated at meetings of the DICO Board of Directors and its committees to the MOF Observer pursuant to section 8.4(o) of the MOU.

[48] Finally, DICO asserts that the appellant's suggestion that the MOU is not binding on DICO because it was signed by [a named individual] as DICO's chair rather than signed by DICO per [the named individual], or that the MOU is no longer in effect due to the passage of time, is "absurd and unreasonable". DICO submits that the MOU is binding on both the ministry and DICO and has been and is consistently treated by both parties as binding.

The appellant's sur-reply representations

[49] In sur-reply, the appellant makes further arguments on why, in his view, the MOU is not binding. He also submits that both the court and this office have found that the information must be about the institution's own workforce for section 65(6) to apply. He submits that:

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[17] Now repealed, but the version of the section of the legislation in force at the time the request was made.

> In their reply representations, DICO incorrectly attempts to broaden the court's application of the "institution's own workplace" restriction based on an incorrect interpretation of the [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*] case.

[50] He submits that DICO is a separate legal entity and its employees are not part of the workforce of the government of Ontario or the ministry and that as a result, section 65(6)3 does not apply.

Analysis and finding

[51] I begin my analysis by agreeing with DICO that the information that DICO seeks to withhold does not qualify as an organizational review of the kind described in Order P- 1369, rather it consists of information regarding employment candidates, hiring strategies, expected retirement of certain employees and information pertaining to the experience level, skills and learning curve of certain employees. This is unlike the situation in Order P-1369 which was a broadly-based organizational review, that touched occasionally, and in an extremely general way on staffing and salary issues. That said, however, I find that the exclusion in section 65(6)3 does not apply in any event.

[52] I note that previous decisions issued by this office have held that section 65(6) requires a record-specific and fact-specific analysis.[18]

[53] In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*[19], the Ontario Court of Appeal stated at paragraph 35 of the decision that section 65(6)3:

> . . . deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted [footnote omitted], and the wording of the subsection as a whole, the words, "in which the institution has an interest" in subclause 3 *operate simply to restrict the categories of excluded records to those relating to the institution's own workforce* where the focus has shifted from "employment of a person" to "employment-related matters". . . . [Emphasis added.]

[54] In a subsequent decision in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*[20] ("*Minister of Health*"), the

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[18] See Orders P-1242 and MO-3163.
[19] Cited above.
[20] [2003] O.J. No. 4123; 178 O.A.C. 171; 126 A.C.W.S. (3d) 185 (C.A.).

Court of Appeal considered whether the work of the Physician Services Committee, in the context of its role in negotiating the remuneration of physicians by the Ontario government, would fall within the meaning of the term, "labour relations." In concluding that it did, the Court discussed the meaning of the phrase, "labour relations," stating at paragraph 1 of the decision that:

> . . . its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee relationships; to do so would render the phrase "employment-related matters" redundant.
>
> The relationship between the government and physicians, and the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, fall within the phrase, "labour relations", and the meetings, consultations and communications that take place in the discharge of that mandate fell within that phrase as it appears in s. 65(6)3. …

[55] In a later decision, *Ontario (Correctional Services) v. Goodis*[21] (*Goodis*), Swinton J., on behalf of the Divisional Court, canvassed the state of the law as it existed at that time. I include a lengthy quote from that decision as it succinctly summarizes the case law on this issue.

[56] At paragraphs 24 through 31 of the *Goodis* decision, Swinton J. wrote:

> [24] The scope of s. 65(6) is made clearer when one looks at the relationship between it and s. 65(7), as well as the legislative history of the provision. Subsection 65(6) is subject to s. 65(7), which states:
>
> > 65(7) This Act applies to the following records:
> >
> > 1. An agreement between an institution and a trade union.
> >
> > 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
> >
> > 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

[21] 2008 CanLII 2603 (ON SCDC).

> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The fact that the Act applies to the documents in subclauses 1 through 3 of s. 65(7) suggests that the type of records excluded from the Act by s. 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

[25] This conclusion is reinforced by the legislative history of these provisions. Subsection 65(6) was added to the Act by the Labour Relations and Employment Statute Law Amendment Act, S.O. 1995, c. 1, s. 82. In introducing the bill, the Hon. Elizabeth Witmer, then Minister of Labour, described it as a "package of labour law reforms designed to revitalize Ontario's economy, to create jobs and to restore a much-needed balance to labour-management relations" (Ontario, Legislative Assembly, Official Report of Debates (Hansard) (4 October 1995)). The Hon. David Johnson, Chair of the Management Board of Cabinet, stated that the amendments to provincial and municipal freedom of information legislation were "to ensure the confidentiality of labour relations information" (ibid.).

[26] Moreover, s. 65(6) should be interpreted in light of the purpose of the Act, which is found in s. 1. It states:

> 1. The purposes of this Act are:
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and [page466]
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The interpretation suggested by the Ministry in this case would seriously curtail access to government records and thus undermine the public's right to information about government. If the interpretation were accepted, it would potentially apply whenever the government is alleged

to be vicariously liable because of the actions of its employees. Since government institutions necessarily act through their employees, this would potentially exclude a large number of records and undermine the public accountability purpose of the Act (Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner), 2005 CanLII 34228 (ON CA), [2005] O.J. No. 4047, 202 O.A.C. 379 (C.A.), at para. 28).

[27] Two decisions of the Court of Appeal dealing with the interpretation of s. 65(6) reinforce the conclusion that the provision protects the confidentiality of records pertaining to terms of employment or conditions of work in an employer-employee or collective bargaining relationship or a quasi-collective bargaining relationship. In Ontario (Solicitor General), supra, the court stated (at para. 35):

> Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Subclause 1 deals with records relating to "proceedings or anticipated proceedings . . . relating to labour relations or to the employment of a person by the institution" (emphasis added). Subclause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution . . ." (emphasis added). Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, [footnote omitted] and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the subclause when it does not appear, introduces a concept there is no indication the legislature intended. The endnote reference in that passage is to the bill which introduced s. 65(6) and includes the quotation from the Hon. David Johnson found at para. 25 of these reasons.

[28] The Ministry submitted that the Court of Appeal approved a broad interpretation of the exclusion, as it quashed [page 467] the decisions of the IPC and restored the decisions of the heads of the respective Ministries involved in the case (at para. 42). One of the records at issue in the case was a copy of a public complaint file of the Police Complaints

Commission. The Ministry of the Solicitor General and Correctional Services had taken the position that the file was excluded under s. 65(6). The IPC agreed that the investigation of a complaint of police misconduct was an employment- related matter. However, it had ordered the file disclosed because there were no existing or anticipated proceedings before a court, tribunal or other entity (Ministry of the Solicitor General and Correctional Services, Order PO- 1618, at pp. 4 and 6).

[29] Thus, there was no dispute in that case that the file documenting the investigation of the complaint was employment - related -- not surprisingly because of the potential for disciplinary action against a police officer. However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the Act, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document.

[30] The Court of Appeal also dealt with s. 65(6) in Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner), 2003 CanLII 16894 (ON CA), [2003] O.J. No. 4123, 178 O.A.C. 171 (C.A.), where it held that the provision excluded records pertaining to negotiations between the government and physicians concerning the remuneration of physicians. The court held that "labour relations" in s. 65(6)3 extended to relations and conditions of work beyond those arising in collective bargaining and employer-employee relationships. It held that the term "labour relations" included the relationship between the government and physicians and the work of the Physician Services Committee. In my view, this case further supports the interpretation that s. 65(6) excludes records related to collective bargaining, broadly interpreted, and employment-related matters.

[31] In Reynolds v. Ontario (Information and Privacy Commissioner), [2006] O.J. No. 4356, 217 O.A.C. 146 (C.A.), this court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the Act, as Mr. Osborne was carrying out a kind of performance review, which was [page 468] an employment- related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated:

> It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of

> access to certain records relating to their relations with their own workforce.

[57] As can be seen from Swinton J.'s summary, the courts have repeatedly stated that the reference to "employment-related matters" in section 65(6)3 is designed to exclude from the *Act* records relating to an institutions relation with its own workforce.

[58] It is trite to say that the ministry and DICO are separate entities. DICO itself states that as a Provincial agency it acts as a part of government but is not organizationally part of a ministry. Only the ministry is defined as an institution under the *Act*.

[59] I have considered both the non-confidential and confidential submissions DICO filed (and adopted by the ministry) regarding whether there is an employment relationship that falls within the scope of section 65(6) between the ministry and DICO's employees. There is not. The ministry does not bear the hallmarks of being an employer, or hold itself out as being responsible for the terms and conditions of employment at DICO, in a manner that is sufficient to bring it within an equivalent relationship with respect to the application of the exclusion. Furthermore, in my view, the subject matter of the records does not result in it being an employment-related matter in which the ministry has an interest within the meaning of section 65(6)3. DICO has an interest in the subject-matter of the records regarding succession planning, however, I find that this does not thereby establish an employment-related interest of the ministry that falls within the scope of section 65(6)3.

[60] Although not specifically raised by DICO or the ministry, in light of the broad wording of the *Minister of Health* decision, I have also considered whether there is a labour relations (as opposed to employment) relationship between the ministry and DICO employees as reflected in the record at issue. I have not been advised that there is any collective bargaining relationship between the ministry and DICO or between the ministry and DICO's employees. I am not satisfied that the subject matter of the records otherwise created a labour relations relationship between DICO employees and the ministry. Accordingly, I find that there is no labour relations relationship that falls within the scope of section 65(6)3.

[61] Finally, with respect to the submissions of the parties on the interpretation of the *Ministry of the Solicitor General* decision, as explained by the Divisional Court, there was no dispute in that case that the file documenting the investigation of the complaint was "employment-related" because of the potential for disciplinary action against a police officer. Further, because the Ontario Provincial Police is a division of the Ministry of the Solicitor General, there was a direct linkage between the institution and the file documenting the investigation of the complaint. The connection in that case was not as remote as that suggested in DICO's representations. Here DICO is not a division of the ministry and the ministry's oversight role is not sufficient to bridge the "employment-related" gap.

[62] Furthermore, in my view, and in keeping with the purpose of the *Act* as set out in section 1, the interpretation suggested by DICO and adopted by the ministry in reply would seriously curtail access to government records and thus undermine the public's right to information about government.

[63] Accordingly, I find that the section 65(6)3 exclusion does not apply to either of the records at issue in this appeal.

[64] As the records are subject to the *Act*, I will now consider whether the records contain the appellant's personal information and which claimed exemptions might apply.

Issue B: Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?

[65] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

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

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

[66] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[22]

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

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[68] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[23] 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.[24] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[25]

The ministry's representations

[69] The ministry submits that the withheld information in the records falls within the scope of the definition of personal information. It submits that certain withheld information relates to the employment history of individuals, succession planning, retirement plans and also the opinions or views of individuals.

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

DICO's representations

[70] DICO submits that the records contain information about the age, employment history, retirement plans and performance reviews of identified DICO executives. It submits that this information is confidential and highly sensitive to the named individuals.

[71] It submits that:

> The age, employment history, retirement plans and performance reviews of the named DICO executives is information about these individuals in their personal capacity. Although the information was obtained from these individuals by their employer (DICO), it still qualifies as personal information. Employment-related information, whether of an evaluative nature or in relation to other human resources matters, has generally been found to qualify as "personal information."[26] Since all the individuals involved are named or identifiable, it is reasonable to expect that these individuals may be identified.

The appellant's representations

[72] The appellant acknowledges that the records at issue contain information relating to various DICO staff but submits that the information appears in a business and/or professional capacity rather than a personal capacity, and pertains to the board's statutory management or supervision of DICO. The appellant takes the position that:

> … comments concerning the performance of these staff members is likely private personal information but relies on the IPC to determine how the various categories of information about DICO senior staff is properly categorized.

Analysis and finding

[73] I find that both records contain the personal information of the appellant as well as other identifiable individuals that falls within the scope of the definition of personal information at section 2(1) of the *Act*. This is because, although it appears in a business context, disclosing the information would reveal something of a personal nature about the appellant as well as other identifiable individuals.[27] I elaborate on the type of personal information at issue under Issue C, below.

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[26] DICO refers to Order P-1409 in support of this submission.
[27] See in this regard, Orders P-1409, R-980015, PO-2225 and MO-2344.

Issue C: Does the discretionary exemption at section 49(b) apply to the information at issue?

[74] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[75] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[28]

[76] Sections 21(2) and (3) provide guidance in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[77] If any of paragraphs (a) to (e) of section 21(1) apply the section 49(b) exemption does not apply.

[78] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[79] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[29] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[30]

[80] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[31]

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[28] For a more detailed discussion of the institution's discretion under sections 49(a) and 49(b), see the discussion in Issue E, below.
[29] Order P-239.
[30] Order P-99.
[31] Order MO-2954.

Absurd result

[81] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd.[32] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[33]

The sections raised

[82] The ministry submits that the presumption at section 21(3)(d) applies to information in both records. DICO takes the position that the presumptions at sections 21(3)(d) and (g) of the *Act* apply and adds that the information was supplied in confidence, thereby raising the potential application of the factor at section 21(2)(h). The appellant raises the possible application of the consent provision at section 21(1)(a), that another Act expressly authorizes disclosure as provided for in section 21(1)(d) and relies on the factor favouring public scrutiny at section 21(2)(a).

[83] In addition, the appellant's representations appear to raise two unlisted factors: that Regulation 304/16[34] to the *Broader Public Sector Executive Compensation Act, 2014*[35] (*the BPSECA*) would support the disclosure of information that falls within the scope of that legislation and that information relating to retirement dates is already in the public domain.

[84] Sections 21(1)(a), 21(1)(d), 21(2)(a), 21(2)(h), 21(3)(d) and 21(3)(g) read:

> 21(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
> >
> > (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
>
> 21(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,

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[32] Orders M-444 and MO-1323.
[33] Orders M-757, MO-1323 and MO-1378.
[34] Now repealed.
[35] SO 2014, c 13, Sch 1.

> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and […]
>
> 21(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; […]

The ministry's representations

[85] The ministry submits that the information at issue falls within the scope of the section 21(3)(d) presumption, which applies to information relating to employment or educational history. The ministry further submits that there are no factors or other circumstances favouring disclosure.

DICO's representations

[86] DICO submits that the presumptions at sections 21(3)(d) and 21(3)(g) apply to the withheld information.

[87] DICO submits:

> … The presumption relating to employment or educational history includes: dates upon which individuals are eligible for early retirement, start and end dates of employment, number of years of service, last day worked, dates upon which a notice period begins and ends, and date of earliest retirement.[36] Therefore disclosure of the DICO executives' years of service, notice period, retirement information and all other employment history included in Record 1 and 2 is presumed to constitute an unjustified invasion of personal privacy.
>
> In addition, […] disclosure of the performance reviews or skills assessments of DICO executives included in Record 1 and 2 is presumed to constitute an unjustified invasion of personal privacy.

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[36] DICO references Order PO-2711 in support of this submission.

[88] DICO also submits that withheld information was supplied in confidence, thereby raising the potential application of the factor favouring non-disclosure at section 21(2)(h) of the *Act*:

> In addition, the personal information, such as the age of the DICO executives, was supplied by those individuals to DICO in confidence (and, in turn, was supplied by DICO to the MOF in confidence). The IPC has previously held that it is reasonable to conclude that employees who provide their employer with personal information would expect that information to be treated confidentially and used only for reasons consistent with the limited purpose for which it was provided.[37] Similarly, the performance reviews of the DICO executives were supplied in confidence with a reasonable expectation that they would not be disclosed.

[89] DICO submits that section 21(4) does not apply because the withheld information does not relate to the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution.

The appellant's representations

[90] The appellant submits that he is entitled to all information relating to him that may appear in the records.

[91] He also submits that section 21(1)(d) would apply to any information relating to salaries over $100,000 by virtue of the provisions of the *Public Sector Salary Disclosure Act, 1996*[38] (*PSSDA*).

[92] He further submits that the factor favouring disclosure at section 21(2)(a) applies if any of the remuneration information relates to the types of remuneration that the government had prohibited under the now repealed Regulation 304/16 to the *BPSECA*. The appellant explains that the provisions of that regulation prohibit a number of the forms of remuneration provided to DICO's executive employees referenced in the harm section of the DICO's submissions.

[93] Regulation 304/16 to the *BPSECA* addressed, in part, limits to executive compensation for designated employers and designated executives, while the regulation was in force. Section 2 of Regulation 304/16 set out some terms of the compensation framework. Section 2(3) of Regulation 304/16 provided that:

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[37] DICO references Order P-1018 in support of this submission.
[38] SO 1996, c 1, Sch A.

> A designated employer shall not provide the following elements of compensation to a designated executive, subject to any entitlement to the element under the *Employment Standards Act, 2000*:
>
> i. Payments or other benefits provided in lieu of perquisites.
>
> ii. Signing bonuses.
>
> iii. Retention bonuses.
>
> iv. Cash housing allowances.
>
> v. Insured benefits that are not generally provided to non- executive managers.
>
> vi. Termination payments, including payments in lieu of notice of termination, and severance payments that in total equal more than 24 times the average monthly salary of the designated executive.
>
> vii. Termination or severance payments that are payable in the event of termination for cause.
>
> viii. Paid administrative leave, unless provided to the head of a college or university or another designated executive who is part of or will return to the faculty at a college or university.
>
> ix. Paid administrative leave that accrues at a rate in excess of 10.4 paid weeks per year.
>
> x. Payments in lieu of administrative leave.

[94] In his submissions on section 17(1) of the *Act*, and which are relevant here, the appellant submits that DICO's position regarding confidentiality and the nature of the information is also contradicted by sections 5(1), 5(2) and 5(4) of the *BPSECA*.

[95] Section 5 of the *BPSECA* reads as follows:

> 5. (1) The Management Board of Cabinet may issue directives to designated employers requiring the employer to provide information that the Board considers appropriate relating to compensation and any other payments that designated executives and other employees and office holders of the employer may be entitled to.
>
> (2) Without restricting the generality of subsection (1), a directive may include requirements to provide information with respect to,

(a) salaries, salary ranges, benefits, perquisites, discretionary and non-discretionary payments, payments payable on or in connection with termination, performance plans, incentive plans, bonus plans, allowances and any other form of remuneration;

(b) agreements between an employer and one or more employees or office holders relating to anything mentioned in clause (a);

(c) compensation policies, plans, guidelines and programs; and

(d) compensation studies.

(3) Any disclosure of personal information made by a designated employer in compliance with a directive shall be deemed to be in compliance with clause 42 (1) (e) of the *Freedom of Information and Protection of Privacy Act* and clause 32 (e) of the *Municipal Freedom of Information and Protection of Privacy Act*.

(4) Where an organization that has provided information described in subsection (1) meets both of the conditions set out in paragraphs 1 and 2, the Minister and any other person or entity in receipt of the information shall maintain the information in confidence, and shall not disclose this information except in accordance with a directive of the Management Board of Cabinet:

1. The organization is not an institution within the meaning of the Freedom of Information and Protection of Privacy Act or the Municipal Freedom of Information and Protection of Privacy Act.

2. The organization,

i. is an organization that undertakes its activities for the purpose of profit to its shareholders, or

ii. is a publicly funded organization that received public funds, within the meaning of the Broader Public Sector Accountability Act, 2010, of less than $10,000,000 in the previous fiscal year of the Government of Ontario.

(5) The Management Board of Cabinet may issue directives authorizing the disclosure of information described in subsection (1) to,

(a) a minister of the Crown;

(b) a person employed in the office of a minister;

> (c) a person employed under Part III of the *Public Service of Ontario Act, 2006*; or
>
> (d) a consultant or advisor retained to provide advice or services in relation to compensation matters.
>
> (6) Subsections (4) and (5) prevail over the Freedom of Information and Protection of Privacy Act.

[96] The appellant states that DICO is subject to this statute and all forms of designated executive remuneration are controlled by this legislation. Referencing the confidentiality provisions in section 5(4) of the *BPSECA*, the appellant submits:

> DICO does not meet the above test for confidentiality. The information referenced in DICO's representations predates the *BPSECA*. Because executive compensation is now controlled by the *BPSECA* and is not confidential pursuant to section 5(4) of that act, past remuneration practices disclosed in the records under appeal are irrelevant and can have no effect on DICO's future employment negotiations.

[97] Finally, he submits that the proposed retirement dates of individuals who have since retired would be public knowledge and there would be accordingly be no unjustified invasion of personal privacy if that information is disclosed.

DICO's reply representations

[98] In reply, DICO disagrees that the *BPSECA* operates to make public all the information that DICO seeks to withhold and therefore DICO could not be prejudiced in its future employment negotiations. It submits that the information that it seeks to withhold is not and has never been public information. DICO adds that, contrary to the appellant's assertions, details regarding retirement arrangements, notice periods and consultant offers would not be made public under the *BPSECA*. DICO submits that:

> … The *BPSECA* is intended to include payments, compensation, remuneration, salary and benefits, whereas the information that DICO seeks to redact is confidential information relating to DICO's negotiation with its executives regarding the terms of their retirement. This level of detail would not be disclosed pursuant to the *BPSECA* and therefore would affect DICO's future employment negotiations.

Analysis and finding

[99] For section 21(1)(a) to apply, the consenting party must provide a written

consent to the disclosure of his or her personal information in the context of an access request.[39]

[100] There has already been a substantial amount of information disclosed to the appellant including information relating to him. The withheld information does not relate to him and no other identifiable individual provided their consent to disclosure. Accordingly, section 21(1)(a) does not apply.

[101] In order for section 21(1)(d) to apply, there must either be specific authorization in the statute for the disclosure of the type of personal information at issue, or there must be a general reference to the possibility of such disclosure in the statute together with a specific reference to the type of personal information to be disclosed in a regulation.[40]

[102] For example, the *PSSDA*, cited by the appellant, expressly authorizes the disclosure of salary and benefit amounts and this authorization meets the requirements of section 21(1)(d).[41]

[103] However, in my view, the information remaining at issue is not the type of information that would fall within the scope of the *PSSDA*.

[104] Regarding the appellant's assertion that the information would be disclosable under the *BPSECA* and there is no harm from its disclosure, regardless of the date the *BPSECA* was enacted, I accept DICO's evidence that the information at issue regarding retirement arrangements, notice periods and consultant offers would not be made public under the *BPSECA*. Furthermore, I am not satisfied that, as it is reflected in the records, that it would be subject to any prohibition under former Regulation 304/16. With respect to the appellant's position that retirement dates would be in the public domain, I accept that the date an individual left their employment might be something that could be known publicly, however, in this case no such specific dates are at issue. Finally, I do not accept that the appellant would be privy to the specific type of information relating to other identifiable individuals by virtue of the position he held. The records were generated in the context of an in-camera board meeting that the appellant did not attend.

[105] I find, therefore, that sections 21(1)(a) and/or (d) do not apply and that there are no section 21(2) factors, listed or unlisted, weighing in favour of disclosure.

[106] Previous orders have established that information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of

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[39] See Order PO-1723.
[40] Orders M-292, MO-2030, MA-2344 and PO-2641.
[41] Orders PO-2641 and MO-2344.

employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used, and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption.[42] Information contained in resumes[43] and work histories[44] falls within the scope of section 21(3)(d). A person's name and professional title, without more, does not constitute "employment history".[45]

[107] The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards.[46] The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, etc., by that individual.[47]

[108] Certain withheld information in both records sets out an identifiable individual's number of years of service with DICO or references the anticipated retirement date of the individual. I find that the records also contain information that qualifies as personal evaluations. This information describes views about an identifiable individual, their performance and their ability to fulfill certain positions in the organization. I Therefore find that all this information qualifies as "employment history" as described in section 21(3)(d) and/or falls within the scope of the section 21(3)(g) presumption, and weighs in favour of a finding that its disclosure would be an unjustified invasion of an identifiable individual's personal information.

[109] Accordingly, considering and weighing the application of the presumptions at sections 21(3)(d) and/or 21(3)(g)[48] and finding that no unlisted factors favouring disclosure apply, and balancing the interests of the parties, I am satisfied that the disclosure of the personal information in the records would be an unjustified invasion of personal privacy. As a result, subject to the discussion of the absurd result principle below, I find that the information qualifies for exemption under section 49(b) of the *Act*.

The absurd result principle

[110] In my view, the appellant has not provided sufficient evidence to establish that

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[42] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders MO-2174 and MO-2344 and PO-2598.
[43] Orders M-7, M-319 and M-1084.
[44] Orders M-1084 and MO-1257.
[45] Order P-216.
[46] Orders PO-1756 and PO-2176.
[47] Order P-171.
[48] As I have found that the presumptions in sections 21(3)(d) and 21(3)(g) apply, and that there are no unlisted factors favouring disclosure, it is not necessary for me to address whether section 21(2)(h) might also apply.

he is aware of the withheld information. In any event, I am satisfied that in the circumstances of this appeal, withholding the information would not be absurd or inconsistent with the purpose of the section 49(b) exemption. For this reason, I find that the absurd result principle does not apply.

Conclusion

[111] I found above that certain personal information in both records qualifies for exemption under section 49(b). In light of this conclusion, it is not necessary for me to address whether this information also qualifies for exemption under section 17(1). There is, however, information in Record 2 that remains to be addressed.

Issue D: Does section 17, in conjunction with the discretionary exemption at section 49(a), apply to the remaining information at issue in Record 2?

[112] I found above that Record 2 contains the personal information of the appellant. As noted above, section 47 of the *Act* gives individuals a general right of access to their own personal information held by an institution, and section 49 sets out some exemptions from this right.

[113] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[114] DICO claims the section 17 exemption applies to the information remaining at issue. Accordingly, I will consider whether the remaining withheld information in that record, which relates to DICO's internal operations and its mandate, including its future strategic orientation, rather than individual employees, is subject to exemption under section 49(a) in conjunction with section 17(1). I addressed any withheld personal information in that record in my discussion on the application of the section 49(b) exemption, above, and found it to be exempt under section 49(b), so I will not consider it again here.

Section 17(1) - third party commercial information

[115] Section 17(1) states:

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

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[116] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[49] 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.[50]

[117] 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

[118] The types of information listed in section 17(1) have been discussed in prior orders. Of relevance here is commercial information. That type of information has been defined in previous orders as follows:

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[49] *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.*).
[50] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> *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.[51] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[52]

Part 2: supplied in confidence

[119] 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.[53]

[120] 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.[54]

[121] 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.[55]

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[56]

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[51] Order PO-2010.
[52] Order P-1621.
[53] Order MO-1706.
[54] Orders PO-2020 and PO-2043.
[55] Order PO-2020.
[56] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

Part 3: harms

[123] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[57]

[124] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[58] 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 records themselves and/or 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.*[59]

The ministry's representations

[125] The ministry submits that the withheld information in Record 2 is confidential and commercially sensitive information. It submits that DICO supplied this information to the Minister pursuant to DICO's legal obligations under the *CUCPA*. The ministry submits that at no time was it involved in gathering or drafting this information. The ministry adds that the Minister has an obligation to keep this information confidential and agrees with DICO's representations that the disclosure of this information could reasonable be expected to result in the harms alleged by DICO.

DICO's representations

[126] DICO submits that Record 2 contains confidential and commercially sensitive information about third party credit unions that are not parties to this appeal, that meets the definition of "commercial information" in section 17(1). It submits that information relating to the business or proposed business activities, plans and strategies of a commercial entity is properly characterized as "commercial information."[60] In the confidential portion of its submissions, it provides examples of what it alleges is the type of commercial information that is contained in the records.

Supplied in confidence

[127] DICO submits that it directly supplied Record 2 to the ministry. It submits that:

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[57] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[58] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.
[59] Order PO-2435.
[60] DICO references Order P-1629 in support of this submission.

> The MOF Observer was provided with a copy of the records when attending meetings of the DICO Board of Directors or its Committees. Information provided by a third party to an institution in accordance with statutory reporting requirements or further to requests for information is considered to have been "supplied" to the institution by the third party.[61] The ministry was not involved in any way in negotiating, gathering information for or drafting the records. […]
>
> All documents, materials and information provided to the MOF Observer are provided pursuant to DICO's legal obligations under the *Credit Unions and Caisses Populaires Act, 1994* ("*CUCPA*"), the Agencies and Appointments Directive (February 2015) (the "Directive") and the MOU for the purposes of carrying out the MOF's oversight role. […]
>
> DICO had a reasonable expectation of confidentiality at the time the information was provided to the ministry. DICO's Board meetings are not open to the public and material discussed in meetings is generally considered to be confidential (and highly confidential in the case of "in camera" meetings). Although the MOF Observer is permitted to attend meetings of the DICO Board (and of its committees) pursuant to section 8.4(o) of the MOU in order to carry out part of the ministry's oversight function, DICO reasonably expects that the MOF Observer and the MOF would maintain the confidentiality of any documents, materials and information provided during the DICO Board meetings. [...]
>
> The records were confidential reports prepared solely for the use of the DICO Board and not for any future disclosure. Although some portions of the records are not confidential or otherwise made publicly available, the items that DICO seeks to redact are still treated as confidential and have not been publicly disclosed. DICO has consistently treated the [withheld information] … in a confidential manner that indicates a concern for confidentiality and the information has not been disclosed or available from sources to which the public has access. […]

The harms alleged

Section 17(1)(b)

[128] DICO submits that disclosure of the withheld information could reasonably be expected to result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied,

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[61] DICO references Order PO-1983 in support of this submission.

thereby falling within the scope of the harms set out at section 17(1)(b) of the *Act*. DICO submits that:

> …The IPC has found that the harm in this provision could reasonably be expected to occur where there is evidence that the institution relies heavily on voluntary cooperation to receive information.[62] Even in cases where the institution is entitled to certain information by statute, the IPC has previously found that this exemption applied where the quality of information provided was much higher than what was required by statute, and it was in the public interest that the institution continue to receive as much detailed information as possible.[63]
>
> Under the *CUCPA*, the Directive and the MOU, DICO is required to cooperate with the MOF and assist the MOF with its oversight of DICO. However, disclosure of confidential information that may prejudice DICO, and in particular confidential information that could cause harm or prejudice to the credit unions that DICO oversees, would result in DICO no longer voluntarily providing the same amount and quality of information to the ministry – particularly insofar as any DICO employees or member credit unions may no longer supply the same amount and quality of information to DICO in the first place. […]
>
> […] If the type of information in issue were to be disclosed under *FIPPA*, DICO would have no alternative but to be more cautious and hesitant about sharing confidential information with the MOF Observer, which would inevitably lead to tension and potentially decrease the effectiveness of the MOF Observer and the extent of meaningful oversight by the ministry, to the detriment of all involved.

Section 17(1)(c)

[129] DICO submits that disclosure of the withheld information could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency, thereby falling within the scope of the harms set out at section 17(1)(c) of the *Act*.

[130] DICO submits that:

> … , as a provincial agency tasked with the oversight of the credit union sector in Ontario, DICO has various stakeholders including the Government of Ontario, the Ministry of Finance, other Canadian and

[62] DICO references Order P-1061 in support of this submission.
[63] DICO references Order PO-1702 in support of this submission.

> international regulatory authorities, individual credit unions and the credit union industry as a whole. DICO's ability to carry out its mandate successfully requires strong relationships with its various stakeholders and a high degree of trust and cooperation. In particular, DICO's successful operation requires stakeholders to share certain confidential information with DICO without the need to compel it. […]
>
> Stakeholders provide confidential information to DICO with an expectation that DICO will keep their information confidential. DICO's ability to protect depositors successfully and efficiently, and contribute to the stability of the credit union sector, depends on DICO building and maintaining strong relationships with the credit unions. Any disclosure of confidential credit union information could harm DICO's ability to continue to negotiate and work with its member credit unions, could undermine trust and could deter cooperation. […]
>
> In addition, as an organization tasked with overseeing the credit union sector and insuring deposits, DICO also receives detailed commercial and financial information regarding the stability of the sector as a whole. This highly-sensitive information could cause significant prejudice and harm to the credit union sector if disclosed to the public. For example, DICO collects information regarding the concentration of the sector's assets, the possibility and likelihood a credit union is moving towards federal regulation, and the ratio of insured deposits to total deposits. Information regarding orphan credit unions that will need to be wound-up, for example, could also cause significant harm to those credit unions and to the credit union sector if disclosed. If any third parties were harmed by disclosure of this information, which could reasonably be expected, they would hold DICO to account for the harmful disclosure. […]

The appellant's representations

[131] The appellant accepts that the information concerning credit unions qualifies as commercial information but disagrees that DICO supplied the information, that DICO was under a legal obligation to supply it or that the Minister had an obligation to keep the supplied information in confidence. He submits that by virtue of his position he is aware that MOF's policy branch warned that anything sent to them may be subject to *FIPPA* and that board report binders were sent out to all board members and the MOF policy branch a specified number of days before the scheduled date of the board meeting. He submits that these binders were available to the policy staff of the MOF in addition to the MOF observer whether or not the MOF observer actually attended the board meeting.

The harms alleged

[132] The appellant denies that disclosing the information could reasonably be

expected to cause the harms alleged. He submits that DICO is a provincial government agency with a statutory monopoly to regulate credit unions and caisses populaires and provide deposit insurance to members/depositors of those institutions. As such he says that there is no competitive position to be prejudiced. Pointing to the content of the information that DICO has said is at issue, he takes issue with DICO's submissions that disclosing the information could reasonably be expected to cause the section 17(1)(c) harms alleged.

[133] With respect to the section 17(1)(b) harms in particular, the appellant submits that:

> If as DICO and MOF claim, DICO has a legal duty to provide this information to MOF, then this harm cannot happen. If, as the appellant contends, provision of this information to MOF was as a courtesy and continuation of this practice is now in jeopardy, there is nothing to stop the Minister from specifically requesting whatever information he desires. Under the *CUCPA*, DICO is required to provide the Minister with "such information relating to its activities, operations and financial affairs as the Minister may request"[64]. …

The reply representations

[134] DICO provided reply representations which were adopted and relied upon by the ministry.

[135] DICO submits that it did not waive confidentiality over the records when they were provided to the MOF Observer. DICO repeats that it is required to provide the ministry with all materials circulated at the board and board committee meetings. DICO adds that a mention that the records "may be subject to *FIPPA*" does not amount to a waiver of confidentiality.

[136] Regarding section 17(1)(b), DICO repeats that, even in cases where the institution is entitled to certain information by statute, the IPC has previously found that this exemption applied where the quality of information provided was much higher than what was required by statute, and it was in the public interest that the institution continue to receive as much detailed information as possible.

The appellant's sur-reply representations

[137] In sur-reply, the appellant submits that DICO cannot rely on the Management Board of Cabinet's Agencies and Appointments Directive dated February 2015 as authority for the MOU because the MOU predates the directive. The appellant further

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[64] The appellant references section 260(1) of the *CUCPA* in support of this submission.

states that, in any event, DICO has not provided any evidence of compliance with paragraph 16 of the MOU with respect to either confirmation or extension of the MOU after its expiry date.

[138] He submits:

> Simply put, the Minister does not have the authority to appoint an observer to DICO's board and DICO does not have the authority to enter into an MOU with the Minister. Only the Lieutenant Governor in Council (cabinet) has the ability to appoint a person to DICO's board in which case that appointment must be a director (not an observer).

[139] He also takes issue with DICO's confidentiality claim, submitting that:

> If DICO had properly treated the records as confidential, DICO would have taken the steps necessary to ensure that the records were for the "observer's eyes only". DICO failed to protect the confidentiality of these records. By sending the records to MOF, rather than ensuring that they were handed or sent directly to the Observer, DICO broke confidentiality by allowing the records to be seen by any number of other staff members of MOF.

Analysis and findings

Part 1: type of information

[140] In my view, the withheld information remaining at issue in Record 2 which for the most part relates to DICO's internal operations and its mandate, including its future strategic orientation, falls within the scope of the definition of commercial information, thereby satisfying Part 1 of the section 17(1) test.[65]

Part 2: supplied in confidence

[141] I am satisfied that DICO supplied the information to ministry staff and/or the MOF Observer whether before or during the DICO Board meetings. Although challenged by the appellant, I accept that based on the relationship between the parties and the nature of the information that it was also supplied in confidence. In that regard, I agree that a statement that *FIPPA* may apply is not the same as waiving confidentiality.

[142] Accordingly, I am satisfied that Part 2 of the section 17(1) test has also been met.

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[65] In light of this conclusion it is not necessary to also determine whether the remaining withheld information also qualifies as labour relations information as alleged by DICO.

Part 3: harms

[143] Based on my consideration of the representations of the parties, as well as a careful review of the record, I am satisfied that DICO has provided sufficient evidence to establish that disclosing the withheld information at issue could reasonably be expected to cause the 17(1)(c) harm alleged. Regarding this commercial information, like Adjudicator Laurel Cropley in Order P-1637, I am satisfied that the disclosure of information pertaining to DICO's strategies, planning and operations could reasonably be expected to significantly interfere with its activities in performing its unique role in the examination, inspection and monitoring and assisting credit unions. In my view, this amounts to "undue loss" within the meaning of section 17(1)(c). Therefore, I find that disclosure of this information could reasonably be expected to result in the harms in section 17(1)(c). As I have found the information to fall within the scope of section 17(1)(c) it is not necessary for me to consider whether other section 17(1) harms could reasonably be expected to occur by disclosure.

Conclusion

[144] I found above, that the commercial information remaining at issue in Record 2 meets all three parts of the section 17(1) test and I find that this information qualifies for exemption under section 49(a), in conjunction with section 17(1)(c).

Issue E: Did the ministry exercise its discretion under sections 49(b) and 49(a)? If so, should this office uphold the exercise of discretion?

[145] The sections 49(a) and 49(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[146] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[147] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[66] This office may not, however,

[66] Order MO-1573.

substitute its own discretion for that of the institution.[67]

The ministry's representations

[148] The ministry submits that it properly applied sections 49(a) and 49(b) to the records at issue and adds that a careful balancing of the relevant factors, considerations, and the purpose of the *Act* was undertaken when considering the application of those sections. It submits that it did not exercise its discretion in bad faith.

The appellant's representations

[149] The appellant states that he is satisfied that the ministry exercised its discretion in good faith with respect to the severances to Record 1, but is not similarly satisfied regarding the ministry's prior withholding of the information in Record 2.

Analysis and finding

[150] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[68] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[69]

[151] I am satisfied overall that the ministry properly exercised its discretion under sections 49(a) and 49(b).

[152] I am satisfied that the ministry was aware of the reasons for the request and why the appellant wished to obtain the information. I am satisfied that in proceeding as it did, and based on all the circumstances, the ministry considered why the appellant sought access to the information, the nature of the information and whether the appellant was an individual or an organization. In all the circumstances and for the reasons set out above, I uphold the ministry's exercise of discretion.

Severance under section 10(2) of the Act

[153] I have also considered whether the information that I have found to be subject to section 49(a) (in conjunction with section 17(1)(c)) or 49(b) can be severed and portions of the withheld information be provided to the appellant. In my view, in light of the appellant's familiarity with underlying matters in the information remaining at issue,

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[67] Section 54(2).
[68] Order MO-1287-I.
[69] Order P-58.

the record cannot be severed without disclosing information that I have found to be exempt. Furthermore, as identified in previous orders, an institution is not required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless" or "meaningless" information, which any other severance would result in here.[70]

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original signed by
Steven Faughnan
Adjudicator

June 16, 2020

[70] See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).