Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4076

Appeal PA17-235

University of Western Ontario

October 26, 2020

Summary: The appellant made a request to the University of Western Ontario (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the most current version of agreements between the university and five named companies regarding the university's Institute for Chemicals and Fuels from Alternative Resources, including records such as notes containing terms of partnership. The university identified responsive records, and disclosed some of the records in full. It also took the position that some records were excluded from the scope of the *Act* under section 65(8.1)(a) (records respecting or associated with research), and that portions of two records were exempt from disclosure under the mandatory exemption at section 17(1) (third party information). The appellant appealed the university's decision. In this order, the adjudicator upholds the university's decision and dismisses the appeal.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 17(1)(b), 65(8.1), 65(9), and 65(10).

Orders Considered: Orders PO-2557, PO-3932, MO-2004

OVERVIEW:

[1] The appellant made a request to the University of Western Ontario (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> … any agreements between [the university] and [five named companies] regarding the Institute for Chemicals and Fuels from Alternative

> Resources.[1] This would include, but is not limited to, contracts, memorandums of understanding, or notes spelling out terms of partnership.

[2] The appellant specified that he is not seeking access to personal information that may be contained in the records, and that he seeks only the most current versions of any agreements.

[3] The university identified several records, including agreements as responsive to the request. Before making a decision on access, the university notified a number of companies who are parties to the agreements in accordance with section 28 of the *Act*. After hearing from these parties, the university decided to grant the appellant partial access to the records. The university claimed some records or portions are excluded from the scope of the *Act* by virtue of the exclusion at section 65(8.1)(a) for research records. It also withheld other portions of records on the basis of the mandatory exemption for third-party information at section 17(1) of the *Act*. In all, the university withheld all or portions of seven agreements, and fully disclosed the remaining records to the requester.

[4] The requester, now the appellant, appealed the university's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] During mediation, the university disclosed to the appellant the subject matter and the amount of funding associated with five agreements. This disclosure is required by section 65(9) of the *Act*.

[6] As mediation did not resolve the remaining issues, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[7] The adjudicator initially assigned to conduct this appeal began her inquiry by seeking the representations of the university and one affected party with an interest in one record pertaining to it (Record 4). The university provided representations, a copy of which was shared with the appellant, except for portions withheld under this office's confidentiality criteria.[2] The affected party did not provide representations. The appellant did not provide representations, but asked that the adjudicator to rely on a letter he had sent to the IPC earlier.[3] The appeal was then transferred to me.

[8] For the reasons that follow, I uphold the university's decision, and dismiss the appeal.

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[1] This is a research institute of the university at its Faculty of Engineering.
[2] The IPC's *Practice Direction Number 7: Sharing of representations.*
[3] The appellant sent this letter during the Intake process.

RECORDS:

[9] At issue in this appeal are seven records which the university withheld in full or in part. The university describes records 1, 2, 3, 5, and 6 as collaborative or collaboration research agreements, and Records 4 and 7 as technical service agreements.

ISSUES:

A. Does section 65(8.1) exclude the records 1, 2, 3, 5, and 6 from the *Act*?

B. Does the mandatory exemption at section 17(1) of the *Act* apply to Records 4 and 7?

DISCUSSION:

Issue A: Does section 65(8.1) exclude the records from the *Act*?

[10] The university's position is that records 1, 2, 3, and 5 are excluded from the operation of the *Act* in their entirety by virtue of section 65(8.1)(a), and I uphold that decision for the reasons set out below. I also find that Record 6 is excluded under from the scope of the *Act* under section 65(8.1)(a). Since some of Record 6 was already disclosed to the appellant, that portion of the record is not at issue. However, in deciding if the research exclusion applies to the record, I must consider the record as a whole and not just the withheld portions. It should be noted that this office takes a whole-record approach to determining whether a record is excluded from the operation of the *Act* under section 65(8.1), and does not look at whether a portion of a record is excluded to make that determination.[4] Nevertheless, an institution is still free to disclose information that would otherwise be excluded by the *Act* outside of the *Act*, and that is what occurred here with Record 6.

[11] Section 65(8.1)(a) says:

> This Act does not apply ... to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution[.]

[12] The effect of an exclusion is different from the effect of an exemption. If a record is found to be excluded under the *Act*, that means that the *Act* does not apply to the record. However, as just mentioned, the institution can still disclose outside of the

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[4] For discussion of the "whole record" approach to reviewing the exclusion, see Orders PO-3572 and PO-3926.

Act if the exclusion is found to apply.

[13] The purpose of section 65(8.1) is to protect academic freedom and competitiveness.[5]

[14] Research is defined as "… a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." The research must be referable to specific, identifiable research projects conducted or proposed by a specific faculty member, employee or associate of an educational institution.[6]

[15] I will address each component of the legal test for section 65(8.1)(a) below.

Respecting or associated with research

The university's position

The university states that records 1, 2, 3, 5, and 6 each set out the respective terms and conditions of the research agreement between the university and the other party or parties to the agreement, including terms related to funding, intellectual property rights, and confidentiality. For each of records 1, 2, 3, 5, and 6, the university provided a description of the record and the parties involved, the objective of the record, and the subject matter of the specific research project(s) carried out respecting or associated with that record question. The appellant was provided with this information during the inquiry. Based on my review of the university's representations and the records themselves, I accept the university's submissions on the first part of the test for 65(8.1)(a) and find that records 1, 2, 3, 5, and 6 are each "respecting or associated with research."

The appellant's position

[16] The appellant submits that the intent of his request is not to obtain "proprietary research" or "research results" but to obtain "the terms and conditions governing [the research]," and goes on to discuss the "intent" behind his request.

[17] In my view, however, the intent behind a request is not relevant to the question of whether the exclusion at section 65(8.1)(a) applies.

[18] All that is required for the exclusion at section 65(8.1)(a) to apply is that there be "some connection" between the record and the specific, identifiable "research conducted or proposed by an employee of an educational institution or by a person

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[5] See, for example, Orders PO-2942 and PO-3713.
[6] Order PO-2693.

associated with an educational institution."[7]

[19] While the appellant disagrees that the exclusion applies, this does not mean that he challenges the fact that the record at issue is "respecting or associated with research." To interpret his position that way would be to ignore a plain reading of his representations. Specifically, he argues that:

- the intent of his request is not to obtain research results, but rather the terms and conditions governing research; and
- he is trying to "access research agreements at a public institution in the hopes of evaluating any provisions that may affect academic integrity at the institution," and that much money has been invested in research at the university and the public should know how or if "that research meets the standards of academic integrity."

[20] In my view, the appellant's representations, on their face, acknowledge that the records he is seeking have "some connection" to research.

Conclusion re: respecting or associated with research

[21] Based on the wording of the request, the parties' representations, and my review of the records themselves, I find that there is "some connection" between one or more specific field(s) of research and each record. Accordingly, records 1, 2, 3, 5, and 6 each qualify as being "respecting or associated with research" under section 65(8.1)(a).

[22] As a result, I will move on to the next part of the test of whether section 65(8.1)(a) has been met.

Conducted or proposed by an employee of an educational institution or by a person associated with an educational institution

[23] In its representations, the university provided details linking the research conducted or proposed in each of records 1, 2, 3, 5, and 6 with a specified employee (or employees) of the university. Therefore, the university submits that the research described in records 1, 2, 3, 5, and 6 satisfies the requirement in section 65(8.1)(a) that the research in question is conducted or proposed by an employee of or person associated with an educational institution.

[24] The appellant did not address this aspect of the test under section 65(8.1)(a).

[25] Having reviewed the records, I find that each of the records relates to specific, identifiable research conducted or proposed by an employee of an educational

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[7] Order PO-2942; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.).

institution or by a person associated with an educational institution.

[26] I find, therefore, that the elements of the section 65(8.1)(a) exclusion have been established for records 1, 2, 3, 5, and 6. I will now turn to the exceptions to the exclusion.

Exceptions do not apply

[27] Sections 65(9) and (10) create exceptions to the section 65(8.1)(a) exclusion. These sections say:

> (9) Despite subsection (8.1), the head of the educational institution or hospital shall disclose the subject-matter and amount of funding being received with respect to the research referred to in that subsection.
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> (10) Despite subsection (8.1), this Act does apply to evaluative or opinion material compiled in respect of teaching materials or research only to the extent that is necessary for the purpose of subclause 49(c.1)(i).

[28] As mentioned in the overview, the university disclosed to the appellant the subject matter and the amount of funding relating to the research, as required by section 65(9) of the *Act*. The appellant has not disputed this, and I have reviewed a copy of the information provided. Therefore, I find that the university met its obligation under section 65(9).

[29] Furthermore, I accept that the exception at section 65(10) does not apply. That exception relates to evaluative or opinion material compiled in respect of teaching materials or research under certain circumstances. However, the records at issue in this appeal are not evaluative or opinion materials. Accordingly, the exception at section 65(10) has no relevance in this case.

Conclusion regarding the research exclusion

[30] The university has demonstrated that the records are respecting or associated with research conducted by an employee of the university. Therefore, the records are excluded from the application of the *Act* under s. 65(8.1)(a). Since the exclusion applies, each record as a whole is removed from the scope of the *Act*.

No public interest override

[31] The appellant argues that even if the exclusion applies, the public interest override at section 23 of the *Act* would apply to allow for disclosure of the records. However, the public interest override can only apply to a record that is covered by the *Act*. As the records at issue are excluded from the *Act*, the public interest override at section 23 cannot apply to them.

Issue B: Does the mandatory exemption at section 17(1) of the *Act* apply to records 4 and 7?

[32] In addition to the research agreements discussed above, the university also located what it describes as two technical services agreements (records 4 and 7) and identified them as responsive to the appellant's request for any agreements between the university and five named companies regarding the university's Institute for Chemicals and Fuels from Alternative Resources (ICFAR). The university disclosed most of records 4 and 7 but withheld only schedule A to each of the agreements, relying on the mandatory exemption at sections 17(1) of the *Act* to do so. For the reasons that follow, I uphold that decision.

[33] The university describes records 4 and 7 as technical service agreements entered into between the university and two named companies (affected parties). These records are further described as agreements relating to scientific testing to be performed by the university on behalf of each of these named companies in exchange for financial compensation to the university. Under the agreements, the university was also to deliver a report when it had completed the testing.

[34] Since the records are agreements with third party companies, the university notified each affected party of the request, and asked for each affected party's position on disclosure and the possible application of the third party exemption at section 17(1).[8] One affected party responded, objecting to disclosure under section 17(1)(a) and 17(1)(c). The other affected party did not respond; it is the university's understanding that that affected party was dissolved and its assets were sold. Without knowing who, if anyone, now owned the agreement between the university and the affected party, and in light of the other affected party's position on a similar record, the university withheld only schedule A to each agreement under sections 17(1)(a) and 17(1)(b). It did so on the basis that these schedules contained very detailed information about the testing that the university would conduct for each company.

[35] Sections 17(1)(a), (b), and (c) say:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
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> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[8] As required to by section 28(1)(a) of the *Act*.

> (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[.]

[36] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[9] 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.[10]

[37] For section 17(1)(a) and/or (b) 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) and/or (b) of section 17(1) will occur.

[38] Before proceeding to consider whether the three-part test is met, I note that the appellant's representations do not address whether section 17(1) of the *Act* applies to the portions of records 4 and 7 that are at issue.

Part 1: type of information

[39] The university takes the position that the withheld portions of records 4 and 7 contain technical and commercial information.

[40] This office has defined "technical information" and "commercial information" in past orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical

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[9] *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.*).
[10] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[11]
>
> *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.[12] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[13]

[41] In addition to relying on the definition of technical information above, the university notes that the IPC has held that monitoring and testing procedure[14] and records of testing methods and measurements constitute technical information.[15]

[42] Regarding schedule A in record 4, the university states that it contains technical information in the form of a detailed description of the testing to be conducted by researchers at the university's research Institute Chemicals and Fuels from Alternative Resources at the university's Faculty of Engineering. The university states that schedule A sets out the specific responsibilities of the university and the named company in performing the testing, and includes details about the expected technical contents for the report that the university would have to provide the company. Based on these submissions and my own review of schedule A of record 4, I find that it contains information that qualifies as technical information.

[43] Similarly, the university submits, and I find, that schedule A of record 7 also contains technical information. The university states that schedule A contains a detailed description of the experiments to be conducted by the university's engineering researchers, including information about the specific testing to be performed on samples to be supplied by the named company and the areas of evaluation.

[44] In my view, record 4 also contains commercial information, as it sets out the service that the university was providing for the affected party.

[45] Accordingly, the information withheld in records 4 and 7 meets part one of the test.

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[11] Order PO-2010.
[12] Order PO-2010.
[13] Order P-1621.
[14] Order MO-2004.
[15] Order PO-2557.

Part 2: supplied in confidence

Supplied

[46] 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.[16]

[47] 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.[17]

[48] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[18]

[49] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions.

[50] The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[19] The university submits that it is this exception that applies to schedule A in each of records 4 and 7. It states that the information in the schedules was supplied by the third parties or was derivative information based on the information supplied by the third parties to the university.

[51] By way of background, the university explains that the third parties contacted the university to ask that it perform specific tests on specific materials and to deliver the test results to the third parties. The university states that it and the third parties then concluded an agreement based on such supplied information and negotiated the agreements' other terms, including the cost of performing the services.

[52] In these circumstances, the university submits that the items being tested, the type of testing and its respective purposes are non-negotiated aspects of the agreement, being specific requirements or information supplied by the affected parties.

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[16] Order MO-1706.
[17] Orders PO-2020 and PO-2043.
[18] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[19] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

Regarding record 4 (for which the university was able to consider the affected party's position on disclosure), the university submits that disclosure of schedule A would disclose the fact that the company involved was looking at a specific subject matter as part of its business strategy, and submits that is underlying confidential information belonging to that company.

[53] Given the nature of the withheld information and the surrounding context, I find that records 4 and 7 are schedules to the contract that was negotiated between the university and the affected parties. Normally, the information in records 4 and 7 would be found to be negotiated, however, in this case, I find that the inferred disclosure exception applies as disclosing this information would permit accurate inferences to be made with respect to the underlying non-negotiated confidential information supplied by the third parties to the institution. As mentioned, each schedule A contains details about testing that was requested of the university by an affected party (a third party company). Accordingly, I find it reasonable to accept that the university had no way of (or reason for) having the information that it has withheld, apart from each affected party supplying that information to the university through each respective commercial relationship.

In confidence

[54] 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.[20]

[55] 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.[21]

[56] The university submits that the companies with which they entered into these

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[20] Order PO-2020.
[21] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

agreements had a reasonable expectation of confidentiality when supplying the types of information to the university found in schedule A to each of the agreements.

[57] In my view, the background information about this commercial relationship is helpful in accepting the university's position that there was an implicit expectation of confidence on the part of each company involved. The university explains that communication with each third party originated in a confidence that the details would not be disclosed. The purpose of each company contacting the university was to test materials and provide results related to the third parties' continuous program of research, development and commercialization of materials previously thought to be waste by-products. The university states that these were the strategic ideas, concepts and plans belonging to the third parties, not the university, and that it held such information in the strictest of confidence. The university submits that the supply of the information at issue in each schedule A was implicitly in confidence since the unpermitted disclosure of such information could undermine these parties' competitive position in the marketplace.

[58] In relation to record 7 specifically, the university points to a confidentiality clause within it to submit that there was also an explicit expectation of confidentiality in relation to that record.

[59] Having considered the nature of the information withheld and the circumstances surrounding the creation of the records, I accept the university's submissions that there was an implicit expectation of confidentiality regarding the information found in schedule A of records 4 and 7.

[60] Therefore, the information at issue in records 4 and 7 was supplied in confidence to the university and meets part two of the test under section 17(1).

Part 3: harms

[61] In this appeal, the harms under sections 17(1)(a) and (b) have been raised by the university. At the notification stage, one affected party raised sections 17(1)(a) and 17(1)(c), and the other could not be reached. As I will explain below, I accept the university's position that the harms contemplated by section 17(1)(b) would be reasonable to expect if disclosure was made.

[62] Under section 17(1(b), I am to consider whether disclosure of the records could result in similar information no longer being supplied to the institution. I may also consider whether it is in the public interest that similar information continue to be supplied to the institution, and what harm would result if similar information were no longer supplied to the institution.

[63] 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.[22]

[64] 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.[23] 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.*[24]

[65] In this case, I acknowledge that one affected party did not provide its position about disclosure, and the other declined the invitation to do so during this inquiry. However, in light of the university's representations relating to section 17(1)(b), and the records themselves, there is sufficient evidence to accept that if schedule A of records 4 and 7 were ordered disclosed, this could result in similar information no longer being supplied to the university, and that in itself would not be in the public interest.

[66] I found that the background information provided by the university was helpful in explaining how the third part of the test is met.

[67] The university explained that on behalf of the research institute named in the request (the Institute for Chemicals and Fuels from Alternative Resources, or ICFAR), it has entered into several research relationships with third parties, including the for-profit companies to which records 4 and 7 relate. These relationships have led to funding for ICFAR initiatives or collaborative research projects such as those identified as responsive to this request. At other times, ICFAR has been asked to perform a confidential technical service for a third party in relation to performing a specific test at the third party's request in exchange for compensation, which is the context for records 4 and 7.

[68] The university submits, and I accept, that information about the purpose and subject matter of what a for-profit company is studying is a valuable form of intellectual property.

[69] The university states that the pillar of the relationship between a testing facility such as the ICFAR and the third parties which ask the university for its technical

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[22] *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.
[23] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.
[24] Order PO-2435.

services is the promise that the university would only use the information supplied by the third party to provide the services to the third party. In addition, the university submits that if a testing facility, whether public or private, is found to be disclosing confidential and proprietary information about what a customer is a studying and the purpose of the study, the customer would no longer supply similar information to the facility. In my view, it is reasonable to accept that the pillar of this type of relationship, where the university is asked to conduct testing using proprietary and/or other confidential information belonging to a third party, is trust.

[70] The university submits, and I accept, that if a third party were to no longer supply similar information to it through such commercial relationships, this would result in a loss of revenue to the university, which would deplete the resources available for the university to perform other research. The university submits, and I accept, that the loss of such work would reasonably be expected to also result in the loss of opportunity to perform tests, to improve testing procedures, and to gain valuable insights into subject matter being tested. In addition, the university submits, and I accept, that it is in the public interest that similar information continue to be supplied to the university.

[71] Taking all of these factors into consideration, the university submits, and I find, that the harms contemplated by section 17(1)(b) of the *Act* would reasonably be expected if the portions of records 4 and 7 that have been withheld were disclosed. As a result, part three of the test has been met.

[72] Since all three parts of the test have been met, the portions of records 4 and 7 that are at issue are exempt from disclosure under section 17 of the *Act*. The appellant did not submit representations on the compelling public interest in the disclosure of the information at issue in records 4 and 7, and therefore, I am not considering its application to the information that I have found exempt under section 17.

ORDER:

I uphold the university's decision, and dismiss the appeal.

Original Signed by: October 26, 2020

Marian Sami
Adjudicator