**Information and Privacy Commissioner,
Ontario, Canada**

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

ORDER PO-4141

Appeal PA20-00089

Ministry of Labour, Training and Skills Development

April 26, 2021

Summary: A requester sought records under the *Freedom of Information and Protection of Privacy Act* relating to the response by an individual (the affected person), on behalf of his business, to an employment standards claim made by the requester to the Ministry of Labour, Training and Skills Development (the ministry).

The ministry issued an access decision denying access to portions of the records on the basis that the discretionary personal privacy exemption in section 49(b) applied. The requester did not appeal the ministry's decision, but the affected person did. The affected person claimed that the mandatory third party information exemption in section 17(1) applied to two records.

In this order, the adjudicator reviews the affected person's appeal and finds that section 17(1) does not apply. She orders the two records at issue disclosed to the requester, except the information withheld under section 49(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O., c. F. 31, as amended, sections 17(1) and 49(b).

OVERVIEW:

[1] The records at issue in this appeal concern an individual business owner's (the affected person's) response to an employment standards claim made by the requester to the Ministry of Labour, Training and Skills Development (the ministry).

[2] The requester's access request, made under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), sought:

- all evidence submitted to the ministry by the [affected person], including emails, telephone conversations and a response to a questionnaire.
- all correspondence between the [affected person] and a named Employment Standards Officer (ESO), and
- all internal correspondence between the named ESO and other ministry staff.

[3] The ministry responded to the requester, advising her that the potential disclosure of the records responsive to the access request may affect the personal privacy interests of the affected person. The ministry advised the requester that it would be notifying the affected person of the request and seeking his representations regarding the potential disclosure.

[4] The ministry notified the affected person of the request, indicating that:

> The requester is [name], the individual who filed the employment standards claim.
>
> The requested records (attached) include two documents you had provided to the ministry's Employment Standards Officer, which contains information about you. Under [the mandatory personal privacy exemption] section 21(1) of the *FIPPA*, this is considered to be your personal information, which cannot be released without your consent.
>
> Please review the attached records, and advise whether you have any objection to releasing any of this information to the requester.

[5] The affected person responded, objecting to disclosure of the two records at issue on the basis that the mandatory third party information exemption in section 17(1) of the *Act* applies to them. The ministry then advised the affected person that the records in question would be disclosed in part to the requester, with portions redacted pursuant to the personal privacy exemption in section 49(b) of the *Act.*

[6] The ministry issued a decision granting the requester partial access to the records, while denying access to portions of them pursuant to the discretionary personal privacy exemption in section 49(b) of the *Act*.

[7] The requester and the affected person were advised that they could appeal the ministry’s decision to the Information and Privacy Commissioner of Ontario (the IPC).

[8] The requester did not appeal the ministry’s decision; however, the affected person (now the appellant) appealed the ministry’s decision to the IPC. The ministry then disclosed the records to the requester, except for the two records that it referred to in its notification letter to the appellant and the information it had decided to withhold from them under section 49(b). A mediator was appointed by the IPC to explore the possibility of resolution.

[9] During the course of mediation, the appellant reiterated that he believes that the two records at issue qualify for exemption under section 17(1) of the *Act*. As no further mediation was possible, this appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry.

[10] I decided to conduct an inquiry and provided the appellant with a Notice of Inquiry to seek his representations on the section 17(1) exemption. I also sought the appellant's representations on whether the discretionary personal privacy exemption in section 49(b) applies to any of the information the ministry planned to disclose to the requester.

[11] The appellant did not provide representations in response to the Notice of Inquiry, despite numerous attempts by the IPC to seek representations from him.

[12] As section 17(1) is a mandatory exemption, which the appellant has raised in this appeal, I have adjudicated upon this exemption to the two records at issue even in the absence of representations from the appellant.

[13] In this order, I find that section 17(1) does not apply to the records at issue. Therefore, I order these records disclosed, except the information withheld by the ministry in these two records under section 49(b), which was not before me.[1]

RECORDS:

[14] At issue are two emails from the appellant to the ministry dated June 28, 2019 and July 22, 2019. The ministry claimed only section 49(b) regarding portions of these emails. The appellant has claimed that these emails are subject to the mandatory third party information exemption in section 17(1).

DISCUSSION:

Does the mandatory third party information exemption at section 17(1) apply to the records?

[15] Section 17(1) states:

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[1] As the requester did not appeal the ministry's decision to withhold certain information in the records under section 49(b) (and the appellant did not provide representations on the withholding of personal information), the ministry's access decision was not at issue, and I did not need to determine the application of section 49(b).

> 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.

[16] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3]

[17] 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.

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[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[18] The type of information discussed in past IPC orders that is relevant in this appeal is Labour Relations information, which has been defined as:

> *Labour relations* means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships. Labour relations information has been found to include:
>
> - discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute[4]
> - information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,[5]
>
> but not to include:
>
> - names, duties and qualifications of individual employees[6]
> - an analysis of the performance of two employees on a project[7]
> - an account of an alleged incident at a child care centre[8]
> - the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation.[9]

Analysis/Findings re part 1

[19] Based on my review of the records, I find that they contain labour relations information as they include information about employee/employer relationships between the appellant and the requester, as well as information related to the requester's conditions of work. I find that the records do not contain the other types of information set out in section 17(1).

[20] Therefore, I find that part 1 of the test under section 17(1) has been met.

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[4] Order P-1540.
[5] Order P-653.
[6] Order MO-2164.
[7] Order MO-1215.
[8] Order P-121.
[9] Order P-373, upheld in *Ontario* (*Workers' Compensation Board*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 (C.A.).

Part 2: supplied in confidence

Supplied

[21] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[10]

[22] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[11]

In confidence

[23] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[12]

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

- 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.[13]

Analysis/Findings re part 2

[25] I find that the two emails at issue, both of which were sent by the appellant to the ministry, were not supplied by the appellant to the ministry with a reasonable expectation of confidentiality.

[26] I find that the information in the emails has not been treated consistently by the

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[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.
[12] Order PO-2020.
[13] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

appellant in a manner that indicates a concern for confidentiality.

[27] In particular, both emails refer to the information in those emails being supplied by the appellant to individuals outside the ministry. As well, the July 22, 2019 email was copied to three individuals outside the ministry.

[28] Therefore, I find that part 2 of the test under section 17(1) has not been met and the records are not exempt under section 17(1). For the sake of completeness, I will consider whether part 3 of the test under section 17(1) has been met.

Part 3: harms

[29] 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.[14]

[30] 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.[15] 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.*[16]

Analysis/Findings re part 3

[31] The records are two emails sent by the appellant to the ministry. These records are concerned primarily with the appellant's opinion as to the procedure the ministry should follow in responding to the employment standards complaint by the requester.

[32] As indicated above, the appellant did not provide representations and, therefore, I do not have the requisite detailed evidence from him to demonstrate or explain the risk of harm from disclosure of the records under section 17(1). As well, based on my review of the records, I find that harm cannot be inferred from the records themselves and/or the surrounding circumstances.

[33] Therefore, I find that part 3 of the test under section 17(1) has not been met and that the exemption does not apply.

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[14] *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.

[15] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), cited above.

[16] Order PO-2435.

[34] Accordingly, the records are not exempt under section 17(1) and I will order them disclosed, except for the information withheld by the ministry under section 49(b).

ORDER:

1. I uphold the ministry's decision and order it to disclose the two records at issue, except for the information withheld by the ministry under section 49(b), to the requester by **May 31, 2021** and not before **May 26, 2021**.

2. The timeline noted in order provision 1 may be extended if the ministry is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any requests for extension.

Original Signed by: April 26, 2021
Diane Smith
Adjudicator