Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-4188

Appeal PA16-471

Ministry of Finance

September 22, 2021

**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 the Deposit Insurance Company of Ontario (DICO) contained in four reports. Both DICO and the ministry claimed that information in the records was excluded from the *Act* pursuant to section 65(6) (employment or labour relations), or alternatively, qualified for exemption under various exemptions including sections 17(1) (third party information) and/or 18(1)(d) (economic and other interests). At adjudication the information at issue was narrowed, the claimed applicable exemptions were reduced and the ministry issued a revised decision letter. In this order, the adjudicator upholds the ministry's decision not to disclose the information that qualifies for exemption under section 17(1)(c). The adjudicator orders disclosure of the remaining withheld information at issue as he finds that it is not exempt under section 17(1) or excluded under section 65(6)3.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, sections 10(2), 17(1)(a), (b) and (c) and 65(6)3; *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c 11 former sections 252(1), 260(1), 260(2) and sections 298(19) and 298(20).

**Orders Considered:** Orders P-1637, PO-2294 and PO-3642.

## 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 the Deposit Insurance Corporation of Ontario (DICO)[1], contained in four reports, three of which are at issue in this appeal. Two of the records (Records 1 and 3) are reports of DICO's Chief Executive Officer to DICO's Board of Directors. These two records contain information pertaining to DICO's operations, including information about executive compensation. Record 4 is a Report to DICO's Board from the Chair of the Risk Oversight Committee and Resolutions. Record 4 contains information relating to a proposed Request for Proposal (RFP).

[2] After notifying DICO, the ministry issued its initial access decision. It relied on sections 17(1) (third party information) and 18(1) (economic and other interests) of the *Act* to deny access to the four reports, in full.

[3] The requester, now the appellant, appealed the ministry's access decision.

[4] 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*.

[5] I commenced my inquiry by seeking representations from the ministry and DICO on the facts and issues set out in a Notice of Inquiry. Both the ministry and DICO provided confidential and non-confidential versions of their representations requesting that only the non-confidential versions be shared with the appellant. In its representations, DICO raised for the first time the possible application of the exemptions at sections 12(1) (cabinet records) and 15(b) (relations with other governments) as well as the exclusion at section 65(6) (employment and labour relations) to certain portions of the reports. Accordingly, the late raising of the discretionary section 15(b) exemption was added as an issue in the appeal. As section 65(6)3 goes to whether the records are excluded entirely from the *Act*, and section 12(1) is a mandatory exemption, I also added the possible application of the exclusion and the section 12(1) exemption as issues in the appeal.

[6] I then sent a Notice of Inquiry to the appellant along with a copy of the ministry's and DICO's non-confidential representations. The confidential versions of the representations were 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. These included DICO's position regarding the application of the section 65(6)3 exclusion. The ministry's representations and DICO's non-confidential representations[2] were then shared with the appellant who provided sur-

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[1] As set out in section 2(1) of the *Financial Services Regulatory Authority of Ontario Act, 2016*, S.O. 2016, c.37 DICO and the Financial Services Regulatory Authority of Ontario were amalgamated and continued as one corporation under the name Financial Services Regulatory Authority of Ontario (the authority). Under section 33(1) of that legislation, proceedings and other activities to which DICO is a party are deemed to be those in which the authority is a party. Based on the date of the request and the date the appeal was filed, this amalgamation does not change my analysis.

[2] Again 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*.

reply representations.

[7] At adjudication the information at issue was narrowed, the claimed applicable exemptions were reduced, and the ministry issued a revised decision letter. As a result, and as discussed in more detail below, only information in three of the four records remains at issue in this appeal.

[8] In this order, I uphold the decisions of the ministry not to disclose to the appellant the information that I find to qualify for exemption under section 17(1)(c). I find that neither the exclusion at section 65(6)3 nor the exemption at section 17(1) applies to the remaining withheld information at issue and order that it be disclosed to the appellant.

## RECORDS AT ISSUE:

[9] The scope of the information at issue was narrowed during the inquiry and the following three records remain at issue:

> Record 1: the DICO's Chief Executive Officer's Report to the Board of Directors, dated December 8, 2015.
>
> Record 3: the DICO's Chief Executive Officer's Report to the Board of Directors, dated September 22, 2015.
>
> Record 4: the Report to the Board of Directors from the Chair of DICO's Risk Oversight Committee and Resolutions, dated December 2015.

[10] In particular, as a result of the narrowing of the scope of the appeal, the only information at issue in these three records is the following:

| **Record** | **Portion at issue** | **Exemption(s)/exclusion claimed** |
|---|---|---|
| Record 1 | page 2, paragraph 5 (middle)<br>page 3, paragraph 5 (beginning)<br>page 4, paragraphs 3 and 4<br>page 4, paragraph 5 (last bullet)<br>page 5, table (row 4)<br>page 7, paragraph 1 (last bullet) | 17(1)/18(1)(d)<br>17(1)<br>17(1)/65(6)3<br>17(1)<br>17(1)/65(6)3 |
| Record 3 | page 2, paragraphs 6 and 7 | 17(1)/18(1)(d)<br>17(1)/65(6)3<br>17(1) |

| | | |
|---|---|---|
| | page 2, paragraph 8 (last bullet)<br>page 3, table (row 4)<br>page 4, table "Financial Results"<br>page 5, paragraph 1 (last bullet) | 17(1)<br>17(1)/65(6)3 |
| Record 4 | page 1, paragraph on "Information Systems RFP" | 17(1) |

## ISSUES:

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

B. Do sections 17(1) or 18(1)(d) apply to the withheld information at issue in the records for which it is claimed?

## DISCUSSION:

### Issue A: Does section 65(6) exclude records 1 and 3 from the *Act*?

[11] The ministry ultimately took the position that portions of records 1 and 3 are excluded from the *Act* pursuant to section 65(6). These portions contain information relating to DICO's executive compensation.

[12] 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.

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

[14] 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.[3]

[15] 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.[4]

[16] 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 and employees that do not arise out of a collective bargaining relationship.[5]

[17] 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.[6]

[18] The type 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.[7]

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

***Introduction***

[19] 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 usage was in relation to meetings, consultations, discussions or communications; and

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[3] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[4] *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.
[5] Order PO-2157.
[6] *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.
[7] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289; 2008 CanLII 2603 (Div. Ct.).

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

[20] 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.[8]

[21] 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 employees' actions.[9]

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

[22] 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**

[23] DICO submits that the "institution" for the purposes of the section 65(6) analysis is the ministry but that DICO's consultations and communications regarding the compensation of its executives are "employment-related matters" in which the ministry had a direct interest.

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

> … In addition, the [ministry] "has an interest" in the record by virtue of the presence of the [ministry] observer at the board meetings, the reporting

[8] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[9] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

> relationship of DICO to the Minister that is detailed in the MOU between the Minister and DICO and the monitoring role that [the ministry] has, as detailed in the MOU.

[25] In support of its position, DICO provided an affidavit of its Vice-President, 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*[10] ("*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 popularies […], 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.
>
> 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, the Memorandum of Understanding between the Ministry and DICO […] 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*[11], 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.[12] …
>
> …
>
> 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

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

> states that the Deputy Minister is responsible for "[a]ssigning a Ministry of Finance staff person to sit on the Board as an observer". Pursuant to this assignment, the [ministry] 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 Board and committee 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 *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 Director's meetings.

[26] 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.

[27] 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), providing Annual Reports and Other Reports. In addition to the reports set out in appendix 1 of the MOU, section 9.3(b) provides that "[a]t the request of the Minister or Deputy Minister, supplying specific data and other information that may be required from time-to-time for the purpose of ministry administration".

**The appellant's representations**

[28] The appellant submits that section 65(6) does not apply to records at issue. He submits that DICO is not an institution under the *Act* and that the records were only provided to the MOF Observer "as a courtesy".

[29] The appellant submits that contrary to the positions taken by the ministry and DICO, there is no legal obligation for DICO to prepare these records for, or on behalf of, the ministry.

[30] In that regard, the appellant takes the position that former section 260 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.

[31] The appellant submits that:

> Neither [the ministry] nor DICO have provided any evidence of the Minister having "requested" this information [from] DICO. Furthermore, DICO's records, which are the subject of this *FIPPA* request, are not addressed in the Agencies & Appointment Directive […] or the reporting requirements of paragraph 9 of the MOU. ...

[32] 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." …

**The reply representations**

[33] DICO submits that there is no basis for the appellant's assertion that only the legislation he cited could constitute a requirement for DICO to produce employment-related information to the ministry.

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

[35] DICO adds that the records were not produced by DICO to the ministry "as a courtesy" and that under former section 260(1) of the *CUCPA*, DICO must 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.

[36] 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.

**The appellant's sur-reply representations**

[37] In sur-reply, the appellant submits that because DICO is a separate legal entity, its employees are not part of the workforce of the government of Ontario or the ministry and that as result, section 65(6)3 does not apply.

**Analysis and finding**

[38] I begin by noting that section 65(6)3 was claimed to apply to only portions of the records, rather than the entire record. Previous decisions issued by this office have held that section 65(6) requires a record-specific and fact-specific analysis.[13] In that regard, this office has emphasized that in addressing the possible application of the 65(6) exclusion, the whole record is considered.

[39] As adjudicator Jenny Ryu wrote at paragraphs 18 to 22 in Order PO-3642:

> This office has consistently taken the position that the exclusions at section 65(6) of the *Act* (and the equivalent section in the *Act*'s municipal counterpart) are record-specific and fact-specific. [Footnote omitted] This

[13] Orders P-1242 and MO-3163.

means that in order to qualify for an exclusion, a record is examined as a whole. This whole-record method of analysis has also been described as the "record-by-record" approach when applied by this office in considering the application of exemptions to records. [Footnote omitted]

This approach to the consideration of exclusions is illustrated in previous orders of this office that have addressed whether an exclusion applies to a record based on the inclusion within the record of an excluded portion[14]. In these orders, this office has applied the record-specific and fact-specific analysis to consider whether the record, as a whole, qualifies for the claimed exclusion.

In Order MO-3163, for example, the adjudicator considered an internal police training video containing, as examples of inappropriate officer behaviour, two discrete clips for which the police claimed certain exclusions.

The adjudicator examined the record—the training video—as a whole, and concluded that it did not qualify for any of the claimed exclusions, irrespective of whether portions of the record (the individual clips) might themselves qualify for exclusion in another context (which question was not before the adjudicator). Similarly, in Order PO-2613, this office held that evidence of an institution's regular use of some portions of a database of job positions, job descriptions, classification standards and evaluations for labour relations or employment-related proceedings and negotiations did not support the exclusion of the database, as a whole, under section 65(6)1 or 65(6)2 of the *Act*. [Footnote omitted] I applied this same whole-record-based approach most recently in Order PO-3572, in which an institution sought to exclude under section 65(6)2 budget records of approximately 10,000 line items each, based on its claim that it maintained or used certain line items in each of the records for labour relations negotiations. In that order, I found that the actual use of some information in the records for an excluded purpose was not sufficient to bring the records, as a whole, within the scope of the claimed exclusion.

In each of these cases, the question is whether the collection, preparation, maintenance or use of the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the *Act*. This approach to the exclusions is consonant with the language of the exclusions, which applies to records that meet the relevant criteria. […]

In this case, the ministry does not claim that the record, as a whole, is excluded under section 65(6)3. In any event, on my review of the record's contents (the majority of which have been disclosed to the appellant), and

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[14] It is clear from her conclusion in the order that the exclusion cannot apply to parts of a record that she was referring here to a portion that related to employment matters.

> in consideration of the record's purpose—to document a meeting whose stated objective is to enhance preparedness and coordination between government, nuclear facilities and other agencies in responding to nuclear and radiological emergencies—I am satisfied that the record would not itself qualify for the section 65(6)3 exclusion. As the application of an exclusion must be considered in the context of the whole record, I conclude that the withheld portion of the record cannot qualify for exclusion, whether or not I were to accept the ministry's claim that this discrete portion is about "workforce labour relations."

[40] I agree with the reasoning in Order PO-3642, which has been consistently applied by the IPC. The question before me, therefore, is whether each or either of records 1 or 3, as a whole, relate to employment-related matters in which the ministry has an interest.

[41] I have examined Records 1 and 3, and in my view, they address many matters involving DICO's operations, with employment-related matters being only a small part. Accordingly, I find that Records 1 and 3, as a whole, do not relate to employment-related matters in which the ministry has an interest. As a result, I find that the section 65(6)3 exclusion does not apply. As the records are subject to the *Act*, I will now consider whether sections 17(1) and/or 18(1)(d) of the *Act* apply to all the records at issue.

**Issue B: Do sections 17(1) or 18(1)(d) apply to the remaining information at issue in the records for which they are claimed?**

[42] DICO claims that the section 17(1) exemption for third party information applies to a portion of the information remaining at issue. In addition, the ministry claims that the section 18(1)(d) exemption (harm to Ontario's financial interest or economy) also applies to some of the information for which section 17(1) has been claimed. I will first address the possible application of section 17(1) of the *Act*. In light of the conclusions I reach on section 17(1), it is not necessary that I also consider section 18(1)(d).

[43] The ministry and DICO rely on sections 17(1)(a),(b) and (c) of the *Act*, which provide that:

> 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

[44] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[15] 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.[16]

[45] 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 section 17(1) will occur.

### ***Part 1: type of information***

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

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[17] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[18]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[19]

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[15] *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.).
[16] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[17] Order PO-2010.
[18] Order P-1621.
[19] Order PO-2010.

### *Part 2: supplied in confidence*

[47] 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.[20]

[48] 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.[21]

[49] 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.[22]

[50] 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.[23]

### *Part 3: harms*

[51] 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.[24]

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

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[20] Order MO-1706.
[21] Orders PO-2020 and PO-2043.
[22] Order PO-2020.
[23] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).
[24] *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.

consequences.[25] 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.*[26]

**The ministry's representations**

[52] The ministry submits that portions of the records contain sensitive commercial or financial information about DICO and other third parties (credit unions, industry groups and other regulatory agencies) that if disclosed would harm DICO and its relationship with other third parties. In the confidential portion of its submissions, it provides examples of what it alleges is the type of commercial or financial information that is contained in the records.

[53] It submits that DICO supplied this information to the Minister in confidence pursuant to DICO's legal obligations under the *CUCPA*, the *Agencies and Appointments Directive* and the MOU.

[54] The ministry submits that:

> DICO's board meetings are closed to the public and the information presented and discussed within the meetings is generally considered to be confidential (and highly confidential during "in camera" meetings).
>
> …
>
> The records were produced solely for the use of the DICO board and not for any future disclosure. DICO has indicated a concern for confidentiality for the records by not making the information available from sources to which the public has access. This further supports the ministry's position that DICO reasonably expected these records to be kept in confidence.

[55] The ministry adopts DICO's representations regarding DICO's expectation of harm from disclosure.

**DICO's representations**

***Type of information***

[56] DICO submits that the withheld information is confidential commercial and/or financial information about third party credit unions or industry groups comprised of credit unions, such as the Alliance of Large Ontario Credit Unions (ALOCU). DICO submits that:

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

> … The records involved in this appeal provide detailed commercial and financial information about individual named credit unions, credit union industry groups as well as commercial and financial information about the credit union industry as a whole.

[57] DICO submits that although some of the information was not provided to DICO directly by the credit unions it is still sensitive commercial or financial information about the credit unions that is in its possession.

[58] DICO submits in particular that some of the information it seeks to withhold relates to the commercial viability of a credit union's business and that disclosing information relating to the viability of a credit union's business would affect its reputation in the marketplace if revealed, "thereby potentially exacerbating its struggles".

[59] DICO submits that some of the information it seeks to withhold relates to DICO's role as liquidator in managing litigation on behalf of credit unions in liquidation. Relying on Order PO-2294, it submits that financial details about the handling and settlement of claims qualifies as financial information. Finally, DICO submits that this type of information also qualifies as commercial information because it relates to litigation done on behalf of a commercial entity as well as financial information to the extent that it deals with litigation settlements.

[60] In the confidential portion of its submissions, it provides examples of what it says is the type of commercial or financial information that is contained in the records.

### ***Supplied in confidence***

[61] DICO submits that it directly supplied the information at issue to the ministry. It submits that:

> … The MOF Observer was provided with a copy of the records when attending meetings of the DICO Board of Directors. 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.[27] 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*

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

> *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 have subsequently been disclosed on DICO's website, in DICO's Annual Reports 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)(a): prejudice significantly competitive position or interfere with negotiations*

[62] DICO submits that stakeholders provide confidential information to DICO with an expectation that DICO will keep this information confidential. DICO adds:

> … Certain information provided to DICO, such as information regarding failed business initiatives or mergers under discussion could be highly prejudicial if disclosed to the public. This highly sensitive commercial and financial information about credit unions could be exploited either by competitor credit unions in Ontario or other competitor financial institutions, such as banks. […]
>
> …
>
> … Information regarding the settlement of litigation would significantly prejudice DICO's ability to conduct settlement negotiations in the event that DICO seeks to apply similar strategies in future negotiations and may even affect DICO's position and ability to progress other ongoing litigation files (particularly those that are similar to the settled files described in the

> records). Confidentiality is a key legal presumption in settlement negotiations, and settlement privilege applies to the fact or substance of settlement negotiations (whether or not the matter actually settles). This settlement privilege belongs to all the parties to the settlement discussions, and it is not open to any one party to waive that privilege without the consent of the other parties. Disclosure would constitute a breach of settlement privilege that could cause damage and be actionable by another party to the settlement negotiations. The IPC has previously found the details of settlement discussions could significantly interfere with an affected party's settlement negotiations with current or future litigants.[28]

[63] Finally, DICO submits that disclosure of information in Record 4 would prejudice DICO in its commercial relations with future third parties in any Request for Proposal (RFP) process.

*Section 17(1)(b): information no longer supplied*

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

> […] If this type of information 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): undue loss or gain*

[65] 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*.

[66] 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 international regulatory authorities, individual credit unions and the credit union industry as a whole. DICO's ability to successfully carry out its mandate requires

[28] DICO relies on Order P-1597 in support of this submission.

> 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. DICO regularly negotiates with the credit unions to establish standards and guidelines to help credit unions manage risk. DICO is also involved in the administration, dissolution and/or liquidation process for credit unions. In order to successfully carry out this function, DICO must continue to receive confidential information from credit unions considering or in the process of liquidation. […]
>
> 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, for institutions under regular monitoring, DICO collects general financial information on a monthly basis. For institutions on DICO's watch list or under liquidation, additional specific information is collected as required. In addition, DICO's financial information regarding, for example [confidential] or commercial information regarding, for example, [confidential] reports could cause significant harm 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. […]
>
> DICO also has strong working relationships with other regulatory authorities that provide a framework for coordination and communication. These relationships encourage effective risk management and assist in promoting adoption of best practices while recognizing the unique and cooperative structure of credit unions. DICO's ability to coordinate and communicate successfully with other regulatory authorities would be significantly prejudiced if DICO disclosed other regulatory authorities' confidential information. […]

**The appellant's representations**

[67] The appellant disagrees that DICO supplied the information remaining at issue, 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*

[68] 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 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.

[69] The appellant takes the position that disclosing the information relating to credit unions in liquidation could not reasonably be expected to cause the harms alleged. He submits:

> Credit unions in liquidation are no longer viable organizations. They have ceased normal business operations and hence do not have a competitive position to be significantly prejudiced. Other than litigation settlements (which are addressed below), these credit unions are not involved in any contractual or other negotiations which could be significantly prejudiced through release of any records under *FIPPA*[29].
>
> There is no issue about similar information not being provided in the future as the credit union in liquidation is going out of business and hence will not continue to produce this information in any event. DICO is the liquidator of virtually all liquidating credit unions in Ontario.[30] DICO has control over what information it chooses to produce to itself.

[70] With respect to DICO's position regarding settlement privilege, the appellant submits:

> Because these were settlements by both DICO and credit unions in liquidation where DICO was the liquidator, all settlement agreements included a provision to keep the agreement confidential except for a few specified exceptions, one of which was disclosure was permitted to fulfil any reporting or legal requirements. Accordingly, all parties to the settlement agreements agreed to this type of disclosure.

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[29] The appellant references section 298(9) of the *CUCPA* in support of this submission.
[30] The appellant references section 298(4) of the *CUCPA* in support of this submission.

> These settlements were what is referred to as Pierringer Settlements because they do not include all parties to the litigation. This disclosure provision was included for DICO's benefit. DICO did not want the defendant they settled with to share the terms of the settlement with other unsettled defendants in the same action.
>
> …
>
> No action for damages can be taken against DICO for release of settlement information to MOF in good faith under what it honestly believed was a reporting requirement both because of the exception in the agreement and also because of DICO's statutory immunity.
>
> This information is now in the possession of the MOF and it is in the public interest to know how effectively DICO, both in its capacity and that as liquidator of failed credit unions, managed these litigations.
>
> This accountability, at least with respect to DICO's activities as a liquidator, in clearly set out in sections 298(19) and 20 of the *CUCPA*.
>
> The only legal actions mentioned in the [affidavit] are [two identified credit unions]. These actions date back to 2011 and 2012. It is highly unlikely that any further settlements are achievable at this late date if, in fact, any portion of these actions is still outstanding.
>
> In the absence of other identified ongoing litigation, DICO's concern about the impact release of this information would have on unspecified litigation files is at best vague and speculative [Footnote omitted]. It does not satisfy the test for harm at section 17(1) of the *Act*.

[71] With respect to the alleged impact of disclosure on future Requests for Proposal, the appellant submits:

> … As noted in Appendix 2 to the MOU, DICO is subject to the government's Procurement Directive - July 2009. The Directive sets out the procurement steps DICO is required to take for all Requests for Proposal. As long as DICO follows these requirements it cannot be harmed by release of the information its staff included in any report to DICO's board.

**The reply representations**

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

[73] 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.

[74] With respect to the appellant's position regarding credit unions in liquidation, DICO submits:

> … The fact that the credit unions in liquidation are no longer viable organizations does not affect the fact that disclosure of this information could prejudice DICO's ability to negotiate on behalf of these credit unions as a liquidator. DICO also has a legitimate and pressing concern that credit unions will be reluctant to provide confidential commercial and financial information to DICO if they are concerned that this information may be disclosed by DICO.

[75] DICO also submits that because it shares a common interest with the ministry it did not waive any settlement privilege or violate any settlement agreements by disclosing settlement information to the ministry.

[76] With respect to the appellant's arguments that it is in the public interest to know how effectively DICO, both in its own capacity and as liquidator of failed credit unions, managed litigation, DICO submits:

> … that there is no compelling public interest within the meaning of *FIPPA*, and certainly none that outweighs the public interest in DICO entering into successful confidential settlement negotiations and agreements. Even if particular actions may no longer be outstanding, or future settlements may not be achievable in these cases, disclosure of this information would significantly prejudice DICO's ability to conduct further future settlement negotiations in any matters if other parties believed this information could be disclosed in the future. Furthermore, disclosure without the parties' consent would undermine the common law privilege that attaches to settlement discussions for the purposes of encouraging settlement. It has long been a policy of the courts and regulatory bodies to promote voluntary settlement and jealously protect bona fide settlement discussions from disclosure.

[77] Finally, DICO submits that the fact that it is subject to the Ontario Government's Procurement Directive does not change the fact that disclosing confidential information discussed at a DICO Board meeting about a pending Request for Proposal would prejudice DICO in its commercial relations with future third parties in any Request for Proposal process.

### The appellant's sur-reply representations

[78] In sur-reply, the appellant 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.

[79] With respect to DICO's position regarding records relating to credit unions in liquidation, the appellant submits that "the likelihood that DICO will suffer the type of harm set out in section 17(1) is extremely remote" and that as set out in an attached exhibit, DICO has been out of the business of liquidating credit unions since 2013. The appellant takes the position that accordingly, "release of this information cannot be harmful to activities DICO is no longer performing".

[80] The appellant further asserts that DICO has failed to identify a suitably specific common interest between DICO and the ministry.

[81] Regarding DICO's claim of harm concerning releasing RFP related information the appellant takes the position that the RFP processes addressed in these records "has either been completed or abandoned". Relying on Order P-1637, the appellant submits that the internally generated information relating to an RFP could not reasonably be expected to result in the section 17(1) harms alleged.

## Analysis and findings

### *Part 1: type of information*

In my view, the withheld information remaining at issue in 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.

### *Part 2: supplied in confidence*

[82] 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.

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

### *Part 3: harms*

[84] Based on my consideration of the representations of the parties, as well as a careful review of the records, with certain exceptions that I discuss below, I am satisfied that DICO has provided sufficient evidence to establish that disclosing the withheld information at issue in Record 1 at page 2, paragraph 5 (middle), page 3, paragraph 5

(beginning), page 4, paragraphs 3 and 4 and page 5, table (row 4); Record 3 at page 2, paragraphs 6 and 7, page 3, table (row 4) and page 4, table "Financial Results" as well as Record 4 page 1, paragraph on "Information Systems RFP" could reasonably be expected to result in the undue loss or gain within the meaning of section 17(1)(c). 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, including its litigation strategy, 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 that regard I am not satisfied that DICO withdrew from its role as liquidator, as this remained one of its statutory mandates. 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. Furthermore, as the information at issue in Record 1 at page 2, paragraph 5 (middle) and Record 3 at page 2, paragraphs 6 and 7 was also claimed by the ministry to qualify for exemption under section 18(1)(d), it is not necessary for me to consider whether section 18(1)(d) might also apply to this information.

[85] I do not make the same finding with respect to the information that was originally claimed to qualify for the exclusion under section 65(6) and in the alternative the exemption under section 17(1), being Record 1 at page 4, paragraph 5 (last bullet) and page 7, paragraph 1 (last bullet) as well as Record 3 at page 2, paragraph 8 (last bullet) and page 5, paragraph 1 (last bullet). In my view, insufficient evidence has been led to establish that the disclosure of this information could reasonably be expected to result in any of the harms set out in section 17(1). The information is for the most part of a very general nature on a topic of historical interest and in my view, does not meet the threshold for a finding that disclosing this information could reasonably be expected to cause any of the harms contemplated by section 17(1). I have highlighted this information on a copy of the records that I have provided to the ministry along with a copy of this order.

## Severance under section 10(2) of the *Act*

[86] I have also considered whether the information that I have found to be subject to section 17(1)(c) 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, the record cannot be further severed without disclosing information that I have found to be exempt. Furthermore, as held 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.[31]

## ORDER:

1. The section 65(6)3 exclusion does not apply to records 1 or 3 and the records are subject to the *Act*.

2. I uphold the decisions of the ministry not to disclose to the appellant the information that I find to qualify for exemption under section 17(1)(c).

3. I order the ministry to disclose to the appellant the highlighted portions of a copy of the records that I have enclosed with a copy of this order by sending it to him by **October 28, 2021** but not before **October 22, 2021**.

4. I reserve the right to require the ministry to send me a copy of the records as disclosed to the appellant under order provision 3, above.

Original Signed by: September 22, 2021

Steven Faughnan
Adjudicator

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