Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4274

Appeal PA20-00069

Ministry of Children, Community and Social Services

July 5, 2022

Summary: The Ministry of Children, Community and Social Services (the ministry) received a request from a journalist under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the ministry in connection to a third party. One of the responsive records was an email chain. The ministry withheld portions of that email chain, but decided that the remaining portions of the email chain should be disclosed in response to the request. The ministry's redactions are not at issue in this appeal. A third party appealed the ministry's decision that the remaining portions of the email chain should be disclosed in response to the request under the *Act*. The appellant raised non-responsiveness, the mandatory exemptions at sections 21(1) (personal privacy) and 17(1) (third party information), and the discretionary exemptions at sections 15 (relations with other governments) and 19 (solicitor-client privilege) of the *Act*. In this order, the adjudicator finds that the remaining information at issue is responsive to the request, and that neither of the mandatory exemptions claimed apply. She also finds that the appellant is not permitted to claim discretionary exemptions that the ministry itself did not claim. As a result, she upholds the ministry's decision, and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* , R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 17(1), 24, and 53.

Orders Considered: Orders P-257, PO-2225, and PO-3617.

OVERVIEW:

[1] This order resolves an appeal brought by a third party regarding the decision of the Ministry of Children, Community and Social Services (the ministry) to disclose

portions of an email chain, under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*, or the *Act*). The ministry identified the email chain as responsive to a request made under the *Act* by a journalist, as follows:

> Copies of all emails and work provided to the ministry in connection to contracts awarded to [name of consulting firm] or its affiliates, including [names of three individuals], from [specified date] to present.

[2] In response, the ministry located records that are responsive to the request and granted the requester partial access to them. The ministry denied access to some parts of the records under the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*.

[3] The requester did not appeal the ministry's decision to deny him access to parts of the records.

[4] However, the third party (the appellant) filed an appeal with the Information and Privacy Commissioner of Ontario (IPC). The appellant objects to the ministry's decision to partly disclose the emails of a specified date[1] to the requester. It claims that these emails are not responsive to the request and are also exempt from disclosure under various provisions in the *Act*.

[5] The IPC assigned a mediator to explore resolution. During mediation, the appellant reiterated that the emails are not responsive to the request, and also took the position that they are exempt from disclosure under the mandatory exemptions in sections 17(1) and 21(1) and the discretionary exemptions in sections 15 (relations with other governments) and 19 (solicitor-client privilege) of the *Act*. The requester raised the public interest override in section 23 of the *Act* and claimed that there is a compelling public interest in disclosing these emails.

[6] The appeal was not resolved during mediation and moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[7] The adjudicator initially assigned to the appeal began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the appellant. The adjudicator sought and received written representations from the appellant in response. In addition, the adjudicator wrote to the ministry advising that, while it was not required to provide representations at this time, it might be helpful if the ministry provided the adjudicator with brief representations that outline why the ministry decided to partially disclose the record at issue, however the ministry did not do so.

[8] The appeal was then transferred to me in order to continue the inquiry.

[9] Upon resolving issues relating to sharing the appellant's representations, I invited

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[1] On page 11 of the records.

the ministry, the requester, and an affected party to provide written representations in response to a Notice of Inquiry. In order to assist them with preparing representations, I enclosed a copy of the non-confidential portions of the appellant's representations.[2] The requester provided written representations in response. I then invited the appellant to provide reply representations, and the appellant did so.

[10] For the reasons that follow, I uphold the ministry's decision to disclose the remaining information at issue, and dismiss the appeal. I find that there is no *personal information* at issue, as that term is defined in section 2(1) of the *Act*, so the personal privacy exemption cannot apply. I also find that the record does not meet part one of the three-part test for section 17(1), so the information is not exempt under that provision. Finally, I also find that the appellant has not established that it should be permitted to claim the discretionary exemptions at sections 15 and 19 of the *Act* when the ministry has not done so. As a result, since no claimed exemptions apply, it is not necessary to consider the public interest override at section 23 of the *Act*, and the ministry's decision is upheld and I order it to disclose the remaining information at issue.

RECORD:

[11] The record is a one-page email chain of a specified date. The portions of the record that were severed by the ministry are not at issue because the requester did not appeal those severances.

ISSUES:

Preliminary issue: What is the scope of the requests for records? Is the record responsive to the request(s)?

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

B. Does the mandatory exemption at section 17(1) apply to the records?

C. Is the appellant permitted to raise the application of the discretionary exemptions in sections 15 and 19 of the *Act*?

[2] Portions of the appellant's representations have been withheld due to confidentiality concerns, in accordance with the *Practice Direction 7* on the sharing of representations in the IPC's *Code of Procedure*. Although I will only directly refer to the appellant's non-confidential representations in this order, I have considered all of the appellant's representations in coming to my decision.

DISCUSSION:

Background information

[12] By way of background, the ministry email chain at issue was identified as a responsive record to the request. The ministry redacted some information in the emails found in the email chain under the mandatory personal privacy exemption at section 21(1) of the *Act*. What is at issue is all of the information that the ministry decided should be disclosed.

[13] Under section 53 of the *Act*, if an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. However, if a third party appeals an institution's decision to disclose a record or a part of a record, the burden of proving that such information should be withheld from disclosure falls on the third party.[3] That is the case in the appeal resolved by this order.

Preliminary issue: What is the scope of the requests for records? Is the record responsive to the request(s)?

[14] As mentioned, during mediation, the appellant objected to disclosure on the basis that the email chain is not responsive to the request.

[15] To be considered responsive to a request, records must "reasonably relate" to the request.[4] Institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. Generally, if a request is unclear, the institution should interpret it broadly rather than restrictively.[5]

[16] As discussed, the request is worded as follows:

> Copies of all emails and work provided to the ministry in connection to contracts awarded to [name of consulting firm] or its affiliates, including [names of three individuals], from [specified date] to present.

[17] While the adjudicator previously assigned to this appeal did not specifically seek representations on whether the remaining information at issue in the email chain is responsive to the request under section 24 of the *Act*, the adjudicator's letter with the Notice of Inquiry included the following invitation: "If you believe that there are additional factors which are relevant to this appeal, please refer to them." The appellant did not argue that the emails in question are not responsive in its representations.

[18] Based on my review of the wording of the request, the appellant's

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[3] Order P-42.
[4] Orders P-880 and PO-2661.
[5] Orders P-134 and P-880.

representations which do not again raise responsiveness, and the content of the information at issue, I find no reasonable basis for questioning the responsiveness of the information at issue in this appeal. I find that the information at issue in the email chain is responsive to the request.

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[19] For the reasons that follow, I find that the information at issue in the record is not "personal information" as that term is defined in section 2(1) of the *Act*. Therefore, the section 21(1) personal privacy exemption, relied on by the appellant, cannot apply.

[20] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates.

What is "personal information"?

[21] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

Recorded information

[22] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[6]

About

[23] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[7] See also sections 2(3) and 2(4), which state:

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

[24] In some situations, even if information relates to an individual in a professional,

[6] See the definition of "record" in section 2(1).
[7] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[8]

Identifiable individual

[25] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[9]

What are some examples of "personal information"?

[26] Section 2(1) of the *Act* gives a list of examples of personal information:

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

[8] Orders P-1409, R-980015, PO-2225 and MO-2344.
[9] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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

[27] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[10]

Whose personal information is in the record?

[28] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.[11] Here, there is no suggestion that the record contains the requester's personal information. However, I must determine if the record contains the personal information of other individuals, such that the section 21(1) personal privacy exemption might apply.

Representations

The appellant's representations

[29] In its representations, the appellant describes itself as a "political affairs consultancy." An individual in that consultancy is repeatedly referenced in the appellant's representations (and the requester's), and for ease of reference in this order, I will treat this individual and the consultancy company as one entity.

[30] The appellant's brief non-confidential representations in response to the issue of whether the record contains *personal information* and, if so, to whom it belongs, are set out below.

> It is [the appellant's] view that multiple personal information exemptions should be considered in the review of the records. These primarily relate to identifying information about an individual who is not employed by [the appellant] or the Ministry. The records in question contain information which both identifies a specific individual as well as their personal views on a politically sensitive issue.
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> The emails with subject line [specified] describe instructions to [redacted] and the mayor's decision to [redacted]. The records discuss [Mr. A's] insight into the decision-making process of a political office which is independent of both [the appellant] and the Ministry. Information

[10] Order 11.

[11] Under sections 47(1) and 49 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

> concerning an independent entity's deliberations should not be subject to disclosure so as to protect their privacy.
>
> Additionally, the record contained identifying information about the individual, despite their status as a third-party. Thus far, [the appellant] has not been assured that the subject has been informed of their relation to their records or that consent has been provided. The release of the records may lead to innuendo regarding this individual despite their lack of engagement in the issue.

No representations from the ministry or the affected party

[31] The ministry did not provide representations in this inquiry when invited to do so. However, in this appeal, it has no burden of proof because its access decision was to disclose the information that remains in dispute.

[32] I invited a party whose interests may be affected by disclosure (an affected party) to provide representations, but this individual did not do so.

The requester's representations

[33] The requester states that the appellant's representations tell a reader that:

- while consulting for the ministry, the appellant raised a point regarding a municipality or mayor's office;
- that work led to instructions; and
- the mayor made a decision, in part because of the appellant's work.

[34] Based on what the appellant's representations say, the requester submits that the information at issue reflects a business arrangement and a mayor's decision, so it is associated with a person in their business and/or official government capacity, and is not *personal information* as defined in the *Act* and IPC jurisprudence (including Order PO- 2225). The requester submits that despite not seeing the record, one can infer from the appellant's representations that there is nothing about the particular information at issue that, if disclosed, would reveal something of a personal nature about an individual. In the requester's view, the appellant chose to share advice and/or insights with the ministry, knowing that those emails could later be captured by a freedom of information request under the *Act*. The requester submits that if the appellant believed the email chain contains *personal information*, the appellant's representations would have included a description or explanation of why this information was of a personal nature, but the representations do not do so because the information at issue is not personal in nature. Therefore, the requester submits that the appellant's representations fail to establish that the information at issue is *personal information* under section 2(1) of the *Act* in light of the context of the record and the

nature of the information itself.

The appellant's reply representations

[35] On reply, the appellant submits the following:

> Information found within the record should be subject to exemption based on the FIPPA's personal information exemption. The records at issue, titled [redacted] contain email addresses and identifying information which are not related to a government organization or ministry. Respecting the rights of those individuals, we implore you to exempt all personal information from any record release.[12]

Analysis/findings

[36] As mentioned, the requester does not seek information withheld by the ministry. Therefore, the personal email address(es) and other information already withheld by the ministry are not at issue. The remaining portions of the email exchange between the appellant and the ministry are at issue; the appellant describes this as a confidential conversation.[13]

[37] Based on my review of the information at issue in the record and the representations before me, I find that information at issue does not constitute *personal information* as that term is defined in the *Act*.

[38] From my review of the record, I find that the record contains information that may reasonably identify one or more individuals, either from the record itself, or from the record with other information available to a reader. However, the question is whether that information identifies an individual in a personal capacity, and if not, whether it may nevertheless qualify as *personal information*, as that term is defined in section 2(1) of the *Act*.

[39] Order PO-2225 established a two-step analysis for determining whether information should be characterized as "personal" or "business, professional or official."[14] This two-step analysis, which the IPC has consistently adopted and applied,[15] is:

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[12] Following these representations, which were under the heading "Personal Information Exemption," the appellant provides representations under the heading "Personal Privacy Exemption." However, there is no "personal information exemption" in the *Act*. Rather, there are two personal privacy exemptions (one mandatory at section 21(1), and one discretionary at section 49(a) of the *Act*), neither of which can apply if there is no *personal information,* as that term is defined in section 2(1) of the *Act*, in the records.

[13] This includes content that another individual associated with the appellant and another ministry recipient were simply copied on.

[14] As noted by the adjudicator in Order MO-3420, the quote from Order PO-2225 refers to "official" as "official government," but the word "government" is not contained in the definition in the *Act*.

[15] See, for example, Orders PO-3617, PO-3960-R, and MO-3449-I. See also *Ontario Medical Association v.* (*Ontario*) *Information and Privacy Commissioner*, 2018 ONCA 673.

1. In what context do the names of the individuals appear? Is it in a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

2. Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[40] The IPC's Notice of Inquiry, which was sent to all of the parties in the appeal, contains questions inviting parties to provide representations in this vein.

[41] In Order PO-3617, the appropriateness of this two-step approach, and the distinction it draws between "business" and "personal information" was thoroughly considered by the adjudicator, and found to be consistent with the modern principle of statutory interpretation. In Order PO-3617, the adjudicator observes that the two-step analysis in Order PO-2225 is intended to assist in understanding how the term "about an individual" in the preamble of the definition of *personal information*, as well as the wording of items (b) and (h) of the definition (reproduced above), would apply to information in the business, professional or official sphere.

[42] I agree with the analysis and approach in these orders, and I adopt it here.

Step one: In what context do the names of the individuals appear? Is it in a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

[43] Based on my review of the information at issue in the record, I find that:

- some individuals are identifiable by their names and business email addresses;

- some individuals may be identifiable, if at all, by information available to a reader that is particularly familiar with the subject matter of the information remaining at issue in the record, but not by names; and

- one individual (the mayor referenced) is not identifiable by name from the information at issue, but may be identifiable by other information available to a reader knowledgeable about the subject matter of the record.

[44] Having considered the parties' representations and the information at issue itself, I find that the information at issue in the record appears in a business, professional or official government context.

Step two: Although the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[45] From my review of the appellant's representations and the record itself, I am not persuaded that the particular information at issue, if disclosed, would reveal something of a personal nature about any of the individuals named, referenced, and/or otherwise identifiable in the record.

[46] Rather, I find that the record is inherently related to the business, professional and/or official government in nature, as it pertains to each of the individuals named, referenced, and/or otherwise identifiable in the information at issue. This is consistent with the appellant's own submission that the record includes a discussion of its "insight into the decision-making process of a political office" that is not connected to the ministry. The fact that the "political office" is independent of the ministry does not transform the information into *personal information*, as that term is defined in section 2(1) of the *Act*, of any individual in that political office.

[47] In the circumstances of this appeal, I find that the information relating to the parties named, referenced, or otherwise identifiable in the record appears the context of government (or "political") matters. Therefore, I find that information revealing the government or political views, actions, decisions, or business contact information of these individuals is information appearing in a business, professional, or official capacity, due to the very nature of their government-related and/or political work. In the circumstances, I find that disclosure of the information at issue would not reveal something that is inherently personal in nature about any of the individuals named, referenced, and/or otherwise identifiable from the information at issue in the record.

[48] For these reasons, I find that, if disclosed, the information at issue would not reveal something of a personal nature about any of the individuals named, referenced, and/or otherwise identifiable by the information at issue in the record. As a result, I find that the record does not contain information that qualifies as *personal information*, as that term is defined in section 2(1) of the *Act*. Accordingly, the mandatory personal privacy exemption at section 21(1) of the *Act* cannot apply to it, and I will not consider the parties' arguments about this exemption.

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

[49] The appellant submits that the mandatory exemption at section 17(1) of the *Act* applies to the record, but for the reasons that follow, I find that it does not.

[50] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[16] where specific

[16] *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.*).

harms can reasonably be expected to result from its disclosure.[17]

[51] Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if 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.

[52] For section 17(1) to apply, the party arguing against disclosure 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;
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.

[53] In this appeal, the appellant, as the party arguing against disclosure, has the onus of proving that each part of this three-part test is met.

Part 1 of the section 17(1) test: type of information

[54] If the type of information at issue does not reveal a trade secret, or scientific, technical, commercial, financial or labour relations information, it cannot be withheld under section 17(1) of the *Act*.

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[17] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[55] As mentioned, the information at issue consists of the portions of an email chain that the ministry did *not* redact.

[56] The IPC has described the types of information protected under section 17(1), and referenced directly or indirectly in the parties' representations, as follows:

> ***Trade secret*** includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
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> (a) is, or may be used in a trade or business;
>
> (b) is not generally known in that trade or business;
>
> (c) has economic value from not being generally known; and
>
> (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[18]
>
> ***Commercial information*** is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[19] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[20]

The appellant's representations

[57] The appellant's representations focus on parts two and three of the test for section 17(1), but there are some references to the type of the information at issue in the representations, so I have considered them under part one of the test.

[58] The appellant describes the information at issue as confidential emails between itself and its client, containing proprietary advice that is of a political and unique nature.[21] The appellant also describes the information at issue as a confidential conversation. In addition, the appellant appears to suggest that the political advice found in the record is akin to a *trade secret,* as follows:

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[18] Order PO-2010.
[19] Order PO-2010.
[20] Order P-1621.
[21] In addition, the appellant initially argued that the information at issue directly relates to an individual who is not employed by the appellant and is not a member of the ministry, and that the ministry had not provided assurances that this individual has consented to disclosure. However, when I later invited the appellant to provide reply representations in response to the requester's representations, I also advised the appellant that the affected party did not provide representations to the IPC, though I had invited this individual to do so. As this aspect of the appellant's initial representations was not further addressed in its reply representations, I do not further address it in this order.

> In a broader sense, by undermining confidence in the government's ability to protect trade secrets, the province risks deterring private-sector engagement and advice – weakening the policy development process. Firms should not be expected to release trade secrets and elements of their competitive advantage when providing services to the government. While the principles of transparency and fairness must be upheld, vendors should not lose their right to the protection of their commercially sensitive information.

The requester's representations

[59] The requester states that the appellant appears to be arguing that "the emails containing information about [the appellant's] work constitute a trade secret." The requester also submits that the appellant has not established that the information at issue consists of one of the types of information listed in section 17(1) of the *Act*, and therefore, the first part of the three-part test for section 17(1) is not met.

The appellant's reply representations

[60] The appellant submits that the *Act* protects third party information, including *trade secrets*, and that the information at issue "classify as trade secrets based on generally accepted principles and criteria." More specifically, the appellant states that the Canadian Intellectual Property Office defines *trade secrets* as "any business information that has commercial value derived from its secrecy."[22] The appellant submits that its "actions are consistent with the [Canadian Intellectual Property] Office's hurdles to confirm a trade secret," which include the information having commercial value, and having been subject to reasonable measures to ensure secrecy.

[61] In addition, the appellant states that its advice was not intended to be public facing.

Analysis/findings

[62] Having reviewed the information at issue in the record and the parties' representations, I find that the information at issue does not reveal a *trade secret* or *commercial information*, as those terms have been defined by the IPC for the purpose of interpreting section 17(1) of the *Act*.

[63] It is undisputed that the information at issue in the record consists of the portions of an email exchange which the ministry did not redact under any exemption

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[22] The appellant cites the following: *What is a trade secret?* Canadian Intellectual Property Office, March 2021. I retrieved this document online at: https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/home. The Canadian Intellectual Property Office is "a special operating agency of" the federal government's department of Innovation, Science and Economic Development Canada, as noted on the department's website: https://www.ic.gc.ca/eic/siTe/cipointernet-internetopic.nsf/eng/home.

of the *Act*.

[64] I find that there is also no dispute that this email exchange includes advice. In my view, based on my review of the record and the appellant's description of itself as part of the political affairs consulting industry, and other references to the political nature of the advice provided to its clients, I find that the advice contained in part of the email chain is political advice.

[65] As I will explain below, I am not persuaded by the appellant's representations, or the record itself, that the portions of the email exchange that are at issue can qualify as a *trade secret* or *commercial information*, as those terms have been defined by the IPC.

Trade secret

[66] In the appellant's initial representations, it made only passing references to a type of information listed in section 17(1), by using the term *trade secrets*, without providing substantiating evidence of this claim as it pertains to the specific information at issue in the record before me. The appellant's representations also do not specify how the information at issue meets the definition of *trade secret* found in the Notice of Inquiry. For ease of reference, I will set out the appellant's initial representations, citing a type of information listed in section 17(1) again here:

> In a *broader sense*, by undermining confidence in the government's ability to protect *trade secrets*, the province risks deterring *private-sector engagement and advice* – weakening the policy development process. Firms should not be expected to release *trade secrets* and elements of their competitive advantage when providing services to the government. While the principles of transparency and fairness must be upheld, vendors should not lose their right to the protection of their commercially sensitive information. [Emphasis mine.]

[67] I find that these submissions insufficiently relate to the specific email exchange at issue in the record before me, and do not establish that this information is a *trade secret*.

[68] In addition, I find that the appellant's reply representations also fall short of establishing that the information at issue in this appeal is a *trade secret* within the meaning of section 17(1) of the *Act*. The appellant relies on the definition of *trade secret* used by the Canadian Intellectual Property Office, a federal government agency, and submits that the appellant's "actions are consistent with the [Canadian Intellectual Property Office's] hurdles to confirm a trade secret." I find that this vague assertion does not establish that the information at issue in this appeal meets the definition of *trade secret* under the *Freedom of Information and Protection of Privacy Act*.

[69] I accept that the appropriate definition of *trade secret* to consider in assessing the appellant's claim of section 17(1) of *FIPPA* is the one used in the Ontario provincial

freedom of information context, interpreting *FIPPA*. This is the definition that was put to all parties in the Notice of Inquiry. For ease of reference, I will set this definition out again here:

> *Trade secret* includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
>
> (a) is, or may be used in a trade or business;
>
> (b) is not generally known in that trade or business;
>
> (c) has economic value from not being generally known; and
>
> (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[23]

[70] The appellant describes the information at issue as a confidential conversation, but I am not satisfied that a confidential conversation, even if it includes confidential advice, is necessariliy a *trade secret* as the IPC defines that term. I note that in support of its position that the information at issue is a *trade secret*, the appellant also refers to (unspecified) "generally accepted principles and criteria," but this does not sufficiently establish how the portions of the email conversation at issue can reasonably be considered be a *trade secret* within the meaning of section 17(1) of the *Act*.

[71] Based on my review of the information at issue itself, I find that, on its face, it is not a *trade secret*, as the IPC defines that term.

[72] It is not apparent from the appellant's representations or the record itself that the information at issue is a formula, pattern, compilation, programme, method, technique, or process. Nor is it information contained or embodied in a product, device or mechanism.

[73] I accept that the appellant uses political insight and/or experience to provide political advice to clients at a price, even advice that may be exclusive or secret. However, I find that the evidence before me does not sufficiently establish that the specific email communications before me is a *trade secret*.

[74] For these reasons, I find that the information at issue is not a *trade secret* within the meaning of section 17(1) of the *Act*.

Commercial information

[75] The appellant does not explicitly claim that *commercial information* is at issue.

[23] Order PO-2010.

However, given the fact that the appellant's business is to provide advice to clients and some of the information at issue is advice, I will consider whether there is *commercial information* at issue. The IPC defines this type of information, as follows:

> ***Commercial information*** is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[24] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[25]

[76] I find that the evidence before me does not establish that the portions of the email exchange at issue in the record, including the advice provided, qualifies as *commercial information*. That is, I find no basis for concluding that the information that the ministry did not redact in the email exchange is "information that relates only to the buying, selling or exchange of merchandise or services."

Other types of information listed in section 17(1)

[77] Having reviewed the record, I am also satisfied, and I find, that it does not contain *scientific*,[26] *technical*,[27] *financial*,[28] or *labour relations information*,[29] as those terms have been interpreted by the IPC.

Conclusion regarding section 17(1)

[78] For these reasons, I find that the information at issue in the record does not qualify as any of the types of information that are listed in section 17(1) of the *Act*, and therefore, does not meet part one of the test for section 17(1). Since all three parts of the test must be met for section 17(1) to apply, I do not need to decide whether parts two or three are met. The record is not exempt from disclosure under section 17(1).

Issue C: Is the appellant permitted to raise the application of the discretionary exemptions in sections 15 and 19 of the *Act*?

[79] The appellant claims that the discretionary exemptions in sections 15 (relations with other governments) and 19 (solicitor-client privilege) of the *Act* apply to the information at issue, despite the fact that the ministry has not claimed these discretionary exemptions. For the reasons that follow, I find that the appellant is not permitted to raise these exemptions and I will not consider whether they apply.

[80] The IPC has previously considered the question of whether a third party is

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[24] Order PO-2010.
[25] Order P-1621.
[26] Order PO-2010.
[27] Order PO-2010.
[28] Order PO-2010.
[29] Orders P-653 and P-1540.

permitted to claim a discretionary exemption when the institution has not done so.[30]

[81] It is important to distinguish between the two types of exemptions in the *Act*: mandatory and discretionary exemptions. If a record qualifies for mandatory exemption, the head of an institution must withhold it from disclosure ("A head shall refuse to disclose. . ."). In contrast, exemptions such as the section 15 and 19 exemptions are discretionary (the institution 'may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. By choosing the word "may" in the wording of discretionary exemptions, "the Legislature expressly contemplated that the head of the institution retains the discretion to claim such an exemption to support its decision to deny access to a record."[31]

[82] In general, discretionary exemptions in the *Act* are designed to protect various interests of the *institution* to which the freedom of information request was made. Given this purpose, the IPC has long held that "it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution."[32] The interests of an affected party "would *usually only* be considered" in appeals involving claims that information is exempt under the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*.[33]

[83] Despite the general rule that an institution has the responsibility of determining which discretionary exemptions, if any, should apply to a record, the IPC has recognized that there may be "rare occasions" when an affected party can claim a discretionary exemption not originally claimed by an institution.[34] Order P-257 provides examples of such "rare occasions":

> This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is *only in this limited context* that an affected person can raise

[30] See, for example, Orders P-257, M-430, P-1137, PO-3917 and PO-3979.
[31] Order PO-4084.
[32] Order P-1137.
[33] Order P-1137.
[34] Order P-257. Orders P-257 and M-430, and others, recognize that there may also be "rare occasions" when the IPC, in discharging its mandate, decides that it is consider to consider discretionary exemptions that were not claimed by an institution, but in this appeal, it is the appellant that believes it is necessary to do so.

> the application of an exemption which has not been claimed by the head; *the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it*. [Emphasis added.]

[84] I provided the appellant with the above passage during the inquiry,[35] and shared my preliminary view that it may be useful for the appellant to consider that there is a high threshold necessary for a third party claiming a discretionary exemption where the institution has not done so. The appellant continued to rely on the exemptions at section 15 and 19 of the *Act*.

Representations

[85] The appellant's representations about whether it should be permitted to claim discretionary exemptions are brief, so I will set them out in full, below:

> The records at issue should receive due consideration due to the relevance of intergovernmental relations and solicitor-client privilege exemptions to the emails. It is [the appellant's] belief that Sections 15 and 19 of FIPPA were not given due consideration by the institution's head, resulting in the incomplete redactions. Despite language in the records offering indications of both Section 15 and 19 concerns, the records did not receive redactions, nor can we be assured that the exemptions were considered.
>
> Due to the politically contentious nature of the records at issue, [the appellant] believes that there is a distinct possibility that third-party consultations were not completed in a fair manner, unduly prejudicing our right to receive appropriate privacy protections. We ask that the IPC consider our following submission with respect to intergovernmental relations and the applicability of solicitor-client privilege with respect to the emails.

[86] The appellant then goes on to provide arguments regarding the application of sections 15 and 19 to the information at issue in the record.

[87] In response to the appellant, the requester submits that the appellant has not established that it should be permitted to raise sections 15 and 19 of the *Act*.

Analysis

[88] Having considered the parties' representations, I am not satisfied that the appeal before me involves "the most unusual of cases," or "rare occasion," such that the appellant should be allowed to claim discretionary exemptions that the ministry has not

[35] In the context of communications about the sharing of representations, including representations regarding the application of the discretionary exemptions claimed by the appellant.

claimed.

[89] The appellant expresses doubts that the ministry duly considered the discretionary exemptions at section 15 and 19, if at all. In the appellant's view, the emails in the record "offer indications of both section 15 and 19 concerns," but no redactions were made, and the appellant "can[not] . . . be assured that the exemptions were considered."

[90] I find that these submissions relate to the issue of whether the ministry exercised its discretion to disclose information in the record, even if that information could have qualified as exempt under sections 15 and 19.

[91] However, this is a separate question from what I must first decide in this appeal: whether this appeal involves any extraordinary, unusual or rare circumstances, such as the rights of a third party, such that the appellant should be allowed to claim discretionary exemptions that the ministry has not claimed to protect its own interests. Based on my review of the record, the appellant's representations (which are brief and vague), the nature of the section 15 and 19 exemptions, and the surrounding circumstances, I am not satsifed that I should permit the appellant to raise these additional discretionary exemptions.

[92] Without sufficient evidence of any extraordinary, unusual or rare circumstances, I find that the discretion to claim sections 15 and 19 must be left to the ministry and the appellant is not permitted to raise these exemptions. Accordingly, as established by Order P-257, I am under no obligation to consider whether the discretionary exemptions at sections 15 and 19 apply, and I will not.

[93] Given my findings that the exemptions at sections 21(1) and 17(1) do not apply, and that the appellant is not permitted to claim sections 15 and 19, it is not necessary for me to consider whether the public interest override at section 23 applies to the record. Since no other exemptions have been claimed, and in light of my findings, I uphold the ministry's decision to disclose the information at issue and dismiss the appeal.

ORDER:

1. I uphold the ministry's decision, and dismiss the appeals.

2. I order the ministry to disclose the record to the requester in accordance with the ministry's access decision by **August 9, 2022** but not before **August 4, 2022**.

3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the original requester upon request.

Original signed by: July 5, 2022

Marian Sami
Adjudicator