

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4331

Appeals PA20-00002 and PA20-00025

Ministry of Natural Resources and Forestry

December 22, 2022

Summary: The requester sought access to records related to a specific Niagara Escarpment Commission permit approval process. The Ministry of Natural Resources and Forestry granted partial access to the responsive records. Two third parties appealed the ministry's decision, arguing that the responsive records were exempt under the mandatory third-party information exemption in section 17(1) of the *Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator upholds the ministry's decision that section 17(1) does not apply, and orders the records be disclosed to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1).

OVERVIEW:

[1] The Ministry of Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a specific Niagara Escarpment Commission permit approval process.

[2] The ministry identified email correspondence, reports, letters, charts, maps, diagrams and meeting notes and itineraries that were responsive to the request. It notified various third parties under section 28(1) of the *Act* and sought their views regarding disclosure of the records. The ministry then issued a decision to the requester granting partial access to the responsive records.

[3] Two third parties, now the appellants, appealed the ministry's decision to disclose the responsive records to this office, resulting in Appeals PA20-00002 and PA20-00025. The requester did not file its own appeal of the ministry's access decision, therefore the information withheld by the ministry is not at issue in this appeal.¹ The information at issue is comprised of records that the ministry decided to disclose, but the third parties object to the ministry disclosing.

[4] During mediation, the mediator had discussions with the parties about the records and the issues. The ministry identified additional records and notified the third-party appellants pursuant to section 28(1) of the *Act* during the course of mediation. The third-party appellants objected to the release of the additional records. The requester advised the mediator that they believe there is a public interest in disclosure of the records. As a result, the public interest override at section 23 of the *Act* was added as an issue to these appeals.

[5] The parties were unable to resolve any of the issues through the mediation process and the matters were transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry pursuant to the *Act*. An adjudicator commenced the inquiries by seeking representations from the third-party appellants and the original requester in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The third-party appellants submitted joint representations for appeals PA20-00002 and PA20-00025. The requester provided representations in response. The adjudicator did not seek representations from the ministry.

[6] The appellants consented to the disclosure of additional records in their joint representations. This information was relayed to the ministry. The ministry released those records to the requester and the adjudicator removed those records from the scope of the appeals.²

[7] The appellants also stated in their representations that the discretionary exemption at section 22 (information available to the public) of the *Act* applies. The adjudicator added section 22 of the *Act* as an issue, as well as the issue of whether a party other than the institution may raise a discretionary exemption in the *Act*.

[8] After reviewing the appellants' representations, the adjudicator also added the issue of whether the requester's access request met the criteria of frivolous or vexatious pursuant to section 10(1)(b) of the *Act*. The appellants were provided the opportunity to make additional representations on this issue.

¹ The ministry withheld record 13 (TIFF A0343726, pages 566-576) pursuant to section 21.1 and records 92 (TIFF A0344694, pages 3408-3410) and 93 (TIFF A0344695, pages 3411-3415) pursuant to section 19. These records were listed in the Notice of Inquiry provided to the parties but they are not at issue as the requester did not appeal the ministry's decision to withhold them.

² The records already disclosed to the requester and removed from the scope of this inquiry are listed at Appendix A.

[9] The appeals were then transferred to me to continue the inquiry. After reviewing the file material, including the records, I determined that it was necessary to notify and seek representations from additional third parties prior to making my decision. One of those parties provided representations in response to the Notice of Inquiry I sent and I considered those representations prior to making this decision.

[10] In this joint order, I dismiss the third party appeals and order the ministry to disclose all of the remaining information at issue to the requester.

RECORDS:

[11] The records at issue are listed in Appendix B. They are comprised of email correspondence, reports, letters, charts, maps, diagrams and meeting notes and itineraries.

ISSUES:

- A. Is the request for access frivolous or vexatious?
- B. Can the appellants raise the application of the discretionary exemption in section 22 of the *Act*?
- C. Does the mandatory exemption at section 17(1) apply to the records?

DISCUSSION:

Background information and the parties' representations

[12] The requester and the appellants both provided detailed background information about the circumstances leading to the appeals in their representations. Based on my review of their submissions, I understand that the appellant is seeking to develop a specific area of land and requires various approvals. According to the appellants, an application was originally submitted 30 years ago by a previous owner. The appellants say that the requester objected to the previous owner's application and continues to object to the appellants' current applications.

[13] The appellants say that multiple applications have been filed with a specific town and that an appeal is pending with the Local Planning Area Tribunal. The appellant also says it is also awaiting a decision from the Niagara Escarpment Commission about the proposed development.

[14] The requester says that the appellants have submitted a number of unsuccessful applications to the town and the Niagara Escarpment Commission. The requester says

that it has sought and received many documents related to the appellants' applications. However, the requester submits that there were "gaps in the documents received, ambiguous responses and many occurrences of [the phrase] 'to be determined at a later point in time' making the comments inconclusive." The requester submits that the information requested from the ministry would allow it to address its concerns regarding the appellants' development application.

Preliminary Matter

[15] In their initial representations the appellants assert that many of the records that are not publicly available are not directly connected to the request. They submit that email exchanges or correspondence with the various towns or regions "do not necessarily fall within the four corners of what was requested simply because the [the ministry] received a copy."

[16] As set out in previous IPC decisions, in order to be considered responsive to a request, records must "reasonably relate" to the request.³ Previous orders have stated that institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. In general, if a request is unclear, the guidance from the IPC has been that the institution should interpret it broadly rather than restrictively.⁴

[17] The ministry identified each of the records at issue in this appeal as responsive to the request. The appellants did not specifically identify which records they believe are not responsive. I have reviewed all of the records remaining at issue and I find, based on the background information provided by the parties outlined above and the actual wording of the request, that each of the records at issue reasonably relates to the request. As a result, I decline to consider this aspect of the appellants' representations further.

Issue A: Is the request for access frivolous or vexatious?

[18] As noted above, the appellants also assert that the portion of the request dealing with the records it says are publicly available should be dismissed as being frivolous and vexatious, as set out in section 10 of the *Act*. The previous adjudicator provided the appellants with detailed information about the types of circumstances in which a request may be considered frivolous and vexatious and referred them to Order PO-3798-I, where this issue was thoroughly canvassed. The adjudicator asked the appellants to provide supplemental representations addressing these matters. They submitted the following:

- the requester is using the *Act* to conduct a fishing expedition,

³ Orders P-880 and PO-2661.

⁴ Orders P-134 and P-880.

- The requester is concerned that their private wells may be impacted by the appellants' proposed land development, yet they have requested access to information that is unrelated to this concern,
- The documents relating to the proposed development are publicly available and copies of some of the requested items have already been provided to the requester,
- The appellants have complied with the requirements of the *Planning Act* with regard to disclosure of documents, and
- The requesters "only possible purpose is not to obtain access but to simply vex the appellant" and "public policy should not allow such a flagrant abuse of process."

[19] As set out in the letter the previous adjudicator provided to the appellants, the "frivolous or vexatious" provisions in section 10(1)(b) of *Act* and Regulation 460 are as follows:

Section 10(1)(b) reads:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 460 reads:

A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

(a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

(b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[20] Section 10(1)(b) provides institutions with a mechanism to deal with frivolous or vexatious requests and this discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be

exercised lightly.⁵

[21] However, as noted in Order PO-3738-I, as a preliminary matter, I must address the issue of whether the appellants are entitled to raise the “frivolous or vexatious” provisions in the *Act*. Paragraphs 37 to 41 in Order PO-3738-I clearly explain that section 10(1)(b) of the *Act* is intended to benefit the institution and is not available to “outside parties objecting to the disclosure of records that would be otherwise subject to the *Act* simply because they are suspicious of the requesters motives or the nature of the request.”⁶

[22] The appellants were directed to consider Order PO-3738-I and despite the fact that the explanation at paragraphs 37 to 41 was available to them, they made no representations about why I should depart from this reasoning. I have considered the circumstances of the request and the records and I see no basis upon which I should allow the appellants to raise the issue of whether the requester’s access request is frivolous or vexatious.

[23] Nevertheless, as also set out in Order PO-3738-I, although the appellants may not avail themselves of the *Act* frivolous or vexatious provisions, they do, as parties to an IPC appeal, have right to argue that a request constitutes an abuse of process at common law. It is well established that I have the authority to permit a request to proceed or dismiss it based on a finding that allowing it to proceed would be an abuse of process.⁷

[24] The grounds considered in determining whether a request constitutes an abuse of process at common law are found in the wording of sections 5.1(a) and 5.1(b) of Regulation 460: a pattern of conduct, bad faith and purpose other than to obtain access.⁸

[25] As the appellants do not allege that there is a pattern of conduct such that 5.1(a) might apply, I will consider section 5.1(b). Previous IPC orders have commented on the meaning of the term “bad faith.”⁹ Some of the agreed upon characteristics are as follows:

- The opposite of “good faith;”

⁵ Order M-850.

⁶ Paragraph 41 of Order PO-3738-I; See also Order PO-2688.

⁷ Paragraph 42 of Order PO-3738-I citing Orders PO-2906, PO-2490 and MO-2635. All refer to Order M-618, where former Commissioner Tom Wright concluded that the authority of the IPC, as an administrative tribunal, to prevent abuses of its own process was supported by *Sawatsky v. Norris* (1992), 1992 CanLII 7634 (ON SC), 10 O.R. (3d) 67, where, “even absent the express power to deal with abuses of process granted by section 23 of the *Statutory Powers Procedure Act* ... a review board under the *Mental Health Act* ‘has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right’ (at p. 77).” See section 52(2) *FIPPA*.

⁸ Paragraph 43 of Order PO-3738-I.

⁹ For a detailed discussion, see Order PO-37380I starting at paragraph 46.

- Typically involving actual or constructive fraud;
- Designed to mislead or deceive; and/or
- Prompted by a sinister motive.¹⁰

[26] As noted in Order M-850, “bad faith” is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.

[27] With regard to the second final part of section 5.1(b), a “purpose other than to obtain access,” an adjudicator considered the meaning of that phrase in response to an institution’s argument that the objective of obtaining information to further a dispute between it and the requester was not a legitimate exercise of the right of access. In rejecting that position, the adjudicator concluded that “in order to qualify as a ‘purpose other than to obtain access’, [...] the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.”

[28] I agree with and adopt these formulations of the principles regarding “bad faith” access requests. I note again that although the appellants were directed to Order PO-3738-I, which outlines the criteria for establishing that a request has been made in bad faith, they do not address it. Their arguments are essentially that much of the information requested is already available, that the requester is seeking records that do not relate to the concerns they expressed about the appellants’ proposed development, and that the access request is a “fishing expedition.”

[29] Based on the circumstances before me, I am not satisfied that the requester is making the request for a purpose other than to obtain access to the requested records or that submitting this access request constitutes bad faith on the requester’s part such that the request ought to be deemed an abuse of process and I dismiss this aspect of the appellants’ appeal.

Issue B: Can the appellants raise the application of the discretionary exemptions in section 22 of the *Act*?

[30] The appellants assert that the discretionary exemption at section 22 of the *Act* applies to some of the records at issue and that as a result, the ministry should not disclose these records to the requester.¹¹

[31] The *Act* contains both mandatory and discretionary exemptions. A mandatory exemption indicates that a head “shall” refuse to disclose a record if the record qualifies for exemption under the particular section. A discretionary exemption uses the

¹⁰ See Order M-850.

¹¹ See Appendix B.

permissive “may”. In other words, the *Act* gives the head of the institution the discretion to claim, or not to claim, these exemptions.¹² As set out in Order P-1137, and reiterated by a number of decisions of this office, if the head of an institution feels that, despite the application of a discretionary exemption, a record should be disclosed, he or she may do so.¹³

[32] In this case, the appellants assert that the discretionary exemption in section 22 of the *Act* applies, despite the fact that the ministry did not claim this exemption. As noted in the Supplemental Notice of Inquiry provided to the appellants by the previous adjudicator, the purpose of the discretionary exemptions is to protect institutional interests and therefore, it would only be in the most unusual of cases that an affected party could raise the application of an exemption which has not been claimed by the head of an institution.¹⁴ Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in sections 17(1) (third party information) or 21(1) (personal privacy) of the *Act*.

[33] A number of past orders have considered the issue of whether a party other than the institution can claim a discretionary exemption.¹⁵ Generally, where a third party raises the possible application of a discretionary exemption, the adjudicator must consider the situation before them in the context of the purposes of the *Act* to decide whether the appeal might constitute the “most unusual of circumstances” in which such a claim should be allowed.

[34] The appellants were provided with the information in the preceding paragraphs about the circumstances where a party other than the institution may be permitted to raise a discretionary exemption and they were asked to submit representations about why they should be permitted to raise the discretionary exemption. In their reply representations, the appellants assert only that section 22 applies to some of the information at issue. They do not address the issue of whether they should be permitted to raise the discretionary exemption. They do not offer an explanation or evidence about what in particular makes the circumstances of this appeal unique, unusual or rare such that they should be able to raise a discretionary exemption that the head of the institution declined to apply.

[35] In the absence of a response to the issues the appellants were directed to consider, I have reviewed the balance of their representations about why they believe section 22 applies and I have analyzed the records at issue with a view to identifying any information in those records that would suggest there is something unusual about the circumstances of this appeal that would weigh in favour of permitting the appellants to raise the discretionary exemption in section 22 of the *Act*. I find nothing that would

¹² Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

¹³ Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

¹⁴ Orders P-1137, PO-1705, MO-2635, MO-2792 and PO-3489.

¹⁵ See Orders P-1137, PO-3601 and PO-3841.

support a finding the appellants should be permitted to raise the discretionary exemption.

[36] The essence of the appellants' arguments regarding section 22 of the *Act* is that the information the requester seeks is available online or has been provided to them and that the release of these same records through this process is duplicative and should not be permitted. In my view, this is insufficient. The appellants have not offered sufficient evidence or explanation to demonstrate that there is something extraordinary about the circumstances of this appeal that would permit them to raise the discretionary exemption in section 22 of the *Act*. I also did not identify any basis from my review of the records themselves to allow the appellant to raise a discretionary exemption when the head of the institution has not done so.

[37] As such, I reject the appellants' request to raise the section 22 exemption and dismiss this part of their appeal. The ministry must disclose to the requester the records that the appellants claimed section 22 applied to, with the exception of record 104, which the appellants claimed both section 22 and section 17(1) applied to and records 1 and 146, which the affected party says section 17(1) applies to. I will consider whether section 17(1) of the *Act* applies to those records below.

Issue C: Does the mandatory exemption at section 17(1) apply to the records?

[38] The appellants and the affected party submit that section 17(1) applies to the remaining records at issue. Section 17(1) states:

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

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

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

[40] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: Type of Information

[41] Both the appellants and the affected party say that the information at issue is “technical” information. Technical information has been defined in previous IPC orders as follows:

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.¹⁸

[42] Neither the appellants nor the affected party made any specific representations to support their assertion that the records at issue contain technical information. As such, I have reviewed each of the records to determine whether they meet the criteria set out above. I find that 30 of the records at issue contain technical information in that they refer to, or contain, plans, maps, drawings, reports or investigations prepared by archaeologists, engineers, botanists, urban planners and other related professionals in

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.*).

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

¹⁸ Order PO-2010.

relation to the proposed development.¹⁹ Although some of the records I found were comprised of technical information, they were not prepared by the professionals noted above directly, they nevertheless reveal information that was prepared by those individuals. I will consider whether each of these records meets the second part of the three-part test for section 17(1) later in this decision.

[43] The remaining 36 records at issue do not meet the definition of technical information.²⁰ Some of these records include references to technical information but, as the adjudicator in Order PO-1825 noted, information which refers in a general way to technical matters is not “technical information”, where it does not itself contain details of a technical nature. The same reasoning is applicable to the remaining records at issue in this appeal. These records may contain general comments about investigations, reports or processes, discussions about planning or meetings, and/or policies and procedures but they do not contain specific details about the technical aspects of the matters to which they refer. To be clear, none of the remaining records at issue contain detailed information about the technical aspects of the proposed development.

[44] I also note that none of these remaining records at issue fall into any of the other types of information referred to in section 17(1). Although the appellants stated that the records at issue contain commercial information, I see no such information. Previous orders have defined *commercial information* as the following:

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.²¹ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.²²

[45] The appellants have not provided any guidance in their representations about what specific information in the records they believe qualifies as commercial information. They state only that the records at issue are of “a commercial nature.” I have not identified any information that would meet the criteria described above. While I accept that the proposed development project is, on a high level, a commercial endeavor, it does not follow that all of the records at issue are commercial records. Each individual record must be examined to determine whether or not it meets the definition of the type of information set out in Part 1 of the three-part test.

¹⁹ Records 1, 8, 10, 16, 18, 19, 22, 26, 28, 30, 34, 43-45, 55, 59, 60, 71, 80, 81, 84, 104, 111, 114, 117, 120, 123, 127, 128, 135, 142 and 146 contain technical information, as that term is used in section 17(1) of the *Act*.

²⁰ Records 25, 40, 47, 49, 56-58, 61-70, 72, 78, 79, 85, 91, 94-96, 99-102, 107, 109, 110, 115, 116, 131, 138, 141, 143 do not contain technical information. These records do not qualify for exemption pursuant to section 17(1) of the *Act* and must be disclosed to the requester.

²¹ Order PO-2010.

²² Order P-1621.

[46] As the information in the remaining 36 records does not satisfy the first part of the test under section 17(1), these records do not qualify for exemption under this section and the ministry must disclose them to the requester.²³

Part 2: supplied in confidence

[47] Part two of the three-part test itself has two parts: the appellants must have "supplied" the information to the ministry, and must have done so "in confidence," either implicitly or explicitly.

Supplied

[48] 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.²⁴

[49] 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.²⁵

[50] The appellants state only that the information was supplied to the ministry during negotiations that were part of a litigation process. The affected party says that the information at issue that relates to it was "exchanged" in confidence. In the absence of any additional specific representations regarding the "supplied" aspect of the test in section 17(1) of the *Act*, I have reviewed each record and considered it in conjunction with the background information provided by the parties (outlined at the beginning of this decision) to determine whether the information remaining at issue was supplied to the ministry.

[51] I find that many of the records remaining at issue were not supplied to the ministry. For example, record 8 is a package of information that the appellant sent to a specific region. The ministry is not listed as a recipient to this communication and it is not clear how it came to be in possession of it. Similarly, record 10 is a letter from a party other than the appellants or the affected party to a different ministry. Records 18 and 19 are copies of a report from an affected party that did not provide representations for this inquiry with comments from a Niagara Escarpment Commission. The balance of the records at issue suggest these records were not supplied by the appellants or the affected party. Without any further evidence on how the ministry came to be in possession of these records, I am unable to find that they were supplied for the purposes of section 17(1).

[52] Other records the appellant claims were supplied are email chains that discuss

²³ See footnote 19 for a full list of the records that do not contain the type of information described by section 17(1) of the *Act* and must be disclosed to the requester.

²⁴ Order MO-1706.

²⁵ Orders PO-2020 and PO-2043.

policies, planning or processes. Some of the emails set up meetings or site visits. I note that in some of the email communications the ministry provides information to the appellants, and in others information is exchanged with various outside parties. These email communications do not include information that could be considered “supplied” for the purposes of section 17.²⁶

[53] For the reasons set out above, I find that none of the information referred to in paragraphs 51 and 52 was supplied for the purposes of section 17(1), nor would the disclosure of this information permit the accurate inference of third-party information that was supplied to the ministry.²⁷

[54] I accept that the remaining records were supplied to the ministry. Based on the context of each of the remaining records it is clear to me that the information at issue was either provided to the ministry by the appellants, or the affected party, or that revealing the record would reveal information that was supplied.²⁸

[55] As such, I will continue to consider whether the records I found were supplied to the ministry were supplied in confidence, as required by part two of the two part test in section 17(1).

Supplied in confidence

[56] The next step is to determine whether the information I have concluded was supplied to the ministry was supplied in confidence.

[57] In order to satisfy the “in confidence” component of part two, a party 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.²⁹

[58] 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 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;

²⁶ For example, see records: 16, 60, 80, 84, 120, 123, 142.

²⁷ I find that the following records were not supplied to the ministry for the purposes of section 17(1) and must be disclosed to the requester: Records 8, 10, 16, 18, 19, 60, 80, 84, 120, 123, 142.

²⁸ I find that records 1, 22, 26, 28, 30, 34, 43-45, 55, 59, 71, 81, 104, 111, 114, 117, 127, 128, 135 and 146 were supplied to the ministry.

²⁹ Order PO-2020.

- prepared for a purpose that would not entail disclosure.³⁰

[59] The appellants' only submission regarding the "in confidence" aspect of the section 17(1) test is that the records "were supplied to the approval authorities in confidence, in light of the impending litigation" at the Local Planning Area Tribunal and that they were "supplied in confidence implicitly or explicitly as part of the negotiations taking place as a part of the litigation and or on a 'without prejudice basis.'"

[60] The affected party says that the information at issue was explicitly exchanged in confidence. It says that the project referred to in the records is subject to an agreement which contains a contractual confidentiality provision that requires it to obtain written approval from its client prior to disclosing any confidential information acquired in the course of the project. The affected party asserts that its client does not consent to the disclosure of the records.

[61] I have reviewed each record and taken into consideration the background information provided by the appellants and the affected party, their assertions about the impending litigation and the negotiations they say were taking place on a 'without prejudice basis.' For the reasons that follow, I do not reach the same conclusions about whether the information at issue was supplied in confidence.

[62] In order for third party information to be supplied in confidence there must be a mutuality of understanding between the institution and the party providing the information that the information is being provided on that basis. Based on all of the information before me, I am not convinced that this was the case for any of the remaining records at issue. I find the parties' representations about the circumstances under which they provided the information at issue to the ministry to be vague and not fully supported by the evidence. To begin, neither the appellants nor the affected party specifically referenced any of the records in their representations. Furthermore, I find that there is evidence in the records that contradicts their assertions that the information at issue was supplied in confidence.

[63] For example, while I cannot describe the exact content of the records at issue, page 4952 of record 127 indicates that the ministry's position was that the information it received was "on the public record." The record indicates that there was a difference of opinion between the appellant and the ministry about the status of the relevant administrative proceedings. Record 127 makes it clear that the ministry did not accept the information being provided by the appellants was being done so on a without prejudice basis. In my view, absent any additional information from the appellant about how this information could have been provided in confidence despite the clear indication from the ministry about its belief that it was not, I am unable to conclude that the appellants had a reasonable expectation of confidentiality, implicit or

³⁰ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

explicit, at the time this information was provided.

[64] Next, I note that the appellants have claimed that both section 22 (information available to the public) and section 17(1) apply to record 104. The appellants have not specified which part of which record they claim each section applies to. As set out above at paragraph 58, a record that has been otherwise disclosed or is available from sources to which the public has access does not meet the confidentiality criteria under section 17(1).

[65] With respect to record 34, I note that the appellant asked the ministry to obtain feedback on the information it supplied and suggested that it "circulate it as you deem necessary." In my view, this statement is fundamentally incompatible with the appellants' assertion that the information was supplied in confidence.

[66] I also note that in some instances the ministry is simply copied on an email from the appellants that forwards information to multiple parties. It is not clear who all the parties to the email correspondence are, or what their role is in the matters discussed. There is no indication any of the parties are receiving the information on the basis that they will keep it confidential.³¹ In circumstances where the appellants have not provided any additional representations about how this information was supplied in confidence, I am unable to conclude that it was.

[67] Similarly, some of the email chains have a variety of participants other than the ministry and the appellants attach materials, such as maps or meeting minutes, and request feedback without any indication that the information being provided is intended to be kept confidential.³² The appellants have not explained who the parties to the email correspondence are, or what was communicated to those parties about sharing the information. As such, I am unable to conclude that this type of information meets that "in confidence" portion of Part two of the three-part test in section 17(1).

[68] I have reviewed each of the remaining records at issue and I did not see any evidence that would suggest that any of the information that remains at issue was supplied in confidence. In making this determination I have considered the affected parties' representations, specifically that the affected party is contractually obligated to obtain written approval from its client prior to disclosing any confidential information acquired during the course of the project. However, having reviewed the records, I am not satisfied with that explanation. First, I note that the appellants have claimed that section 22 applies to some of the information that relates to the affected party.³³ If this information is already publicly available, as suggested by the appellants, then it cannot meet the "supplied in confidence" portion of the test for section 17(1) to apply.³⁴

³¹ For example, see records 80 and 81.

³² For example, see records 59 and 71.

³³ Records 1 and 146.

³⁴ See paragraph 58.

[69] I also note the affected party did not identify its client or provide a copy of the agreement. It is not clear to me that all of the information that relates to the affected party is the type of information that such a contract would intend to capture. The majority of the records that remain at issue are emails that include multiple parties whose inclusion in the correspondence has not been explained.³⁵ In the absence of any evidence in the records themselves that would support the affected party's brief representations, I find that none of the information remaining at issue related to the affected party was supplied in confidence.

[70] Since all three parts of the test to establish that section 17(1) of the *Act* applies must be met, I do not need to consider Part 3 of the test (whether the disclosure could reasonably be expected to result in any of the harms set out in that section).

[71] As such, I find that none of the records at issue are exempt from disclosure pursuant to section 17(1) of the *Act*. As a result, I will order the ministry to disclose all of the records to the requester, with the exception of any information that was withheld by the ministry pursuant to other exemptions in the *Act*, as marked in the copy of records provided to the IPC.

[72] Given my findings that section 17(1) does not apply and that the appellant is not permitted to raise the discretionary exemptions in section 22 of the *Act*, it is not necessary for me to consider whether the public interest override at section 23 of the *Act* applies to the records.

ORDER:

1. The appeal is dismissed and I order the ministry to disclose the records at issue to the requester by **January 30, 2023** but not before **January 23, 2023**.
2. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the record it disclosed to the requester.

Original signed by: _____
Meganne Cameron
Adjudicator

December 22, 2022

³⁵ I note that records 22, 34 and 135 include the appellant, multiple employees of a particular town, a conservation area, and in the case of record 135, an employee of another region. Record 34 appears to have been forwarded to the ministry by the appellants and the affected party was copied on the email. In my view, this does not align with the affected parties' representations.

APPENDIX A

The appellant indicated in "Appendix A" to its representations that it is no longer opposing the release of the following records:

Record Number	Ministry TIFF	Page Number(s)
15	A0343860	1696
21	A0344234	2453-2454
24	A0344496	2607
27	A0344505	2672-2673
28	A0344506	2674
29	A0344508	2676-2677
30	A0344509	2680
32	A0344511	2700-2710
36	A0344519	2758
37	A0344521	2759-2760
38	A0344523	2761-2762
39	A0344526	2765-2766
41	A0344535	2792-2794
42	A0344537	2795-2796
46	A0344568	2963-2967
48	A0344571	2971-2972
50	A0344576	2984-2985
51	A0344577	2986-2987
52	A0344578	2988
53	A0344581	2998-3001

54	A0344582	3003-3004
73	A0344638	3226-3227
74	A0344643	3228-3229
75	A0344644	3230-3231
76	A0344653	3265
77	A0344654	3269
82	A0344664	3293-3296
83	A0344667	3299-3300
86	A0344681	3374-3375
89	A0344688	3391
90	A0344691	3396
97	A0344712	3475
98	A0344713	3476-3478
105	A0344725	3571-3575
106	A0344728	3581-3583
108	A0344733	3591-3592
112	A0344756	3659-3660
113	A0344763	3666-3669
119	A0345447	4675-4681
121	A0345468	4698-4700
132	A0345531	5062
133	A0345533	5067-5069
134	A0345536	5075-5076

136	A0345541	5089-5090
137	A0345542	5092-5093
139	A0345551	5113-5114
140	A0345552	5115-5116
145	A0345566	5153-5154
148	A0345587	5215-5217

APPENDIX B

The following records are the records that remain at issue in this appeal:

Record Number	Ministry "TIFF" Number	Page numbers	Section Claimed
1	A0343592	2	22 17(1) (Affected Party only)
2	A0343600	5-12	22
3	A0343606	46-72	22
4	A0343609	76-102	22
5	A0343610	104-142	22
6	A0343611	157-195	22
7	A0343614	213	22
8	A0343645	303-323	17(1)
9	A0343662	352	22
10	A0343665	361-363	17(1)
11	A0343666	365	22
12	A0343676	421-550	22
14	A0343728	641-724	22

16	A0343866	1857-1858	17(1)
17	A0343868	1861-1862	17(1)
18	A0343869	1871-1889	17(1)
19	A0343873	1896-1914	17(1)
20	A0344227	2366-2452	22
22	A0344241	2455-2456	17(1)
23	A0344247	2457-2474	22
24	A0344496	2622-2624	22
25	A0344499	2637-2638	17(1)
26	A0344504	2664-2670	17(1)
28	A0344506	2675	17(1)
29	A0344508	2678-2679	22
30	A0344509	2681	17(1)
31	A0344510	2682, 2697-2699	22
32	A0344511	2711-2712	22
33	A0344516	2742-2744	22
34	A0344517	2745-2746	17(1)
35	A0344518	2747-2757	22
39	A0344526	2781-2783	22
40	A0344534	2789-2791	17(1)
43	A0344538	2797-2799	17(1) (Appeal PA20-00025)
44	A0344547	2807-2811	17(1)
45	A0344557	2849-2919	17(1)

47	A0344569	2968-2970	17(1)
49	A0344575	2981-2982	17(1)
55	A0344591	3023-3102	17(1)
56	A0344612	3137-3141	17(1)
57	A0344613	3144-3145	17(1)
58	A0344614	3149-3150	17(1)
59	A0344617	3155-3156	17(1)
60	A0344619	3160-3163	17(1)
61	A0344621	3164-3173	17(1)
62	A0344622	3175-3176	17(1)
63	A0344623	3177-3182	17(1)
64	A0344624	3183-3189	17(1)
65	A0344625	3190-3193	17(1)
66	A0344627	3194-3195	17(1)
67	A0344628	3196-3197	17(1)
68	A0344629	3198-3199	17(1)
69	A0344631	3200-3203, 3205-3208	17(1)
70	A0344632	3211-3212	17(1)
71	A0344634	3217	17(1)
72	A0344636	3222-3224	17(1)
78	A0344655	3271-3273	17(1)
79	A0344656	3274-3275	17(1)
80	A0344658	3278-3279	17(1)

81	A0344663	3289-3292	17(1)
84	A0344668	3301, 3303-3306	17(1)
85	A0344679	3372-3373	17(1)
87	A0344682	3376	17(1)
88	A0344684	3379-3380	17(1)
91	A0344693	3402-3405	17(1)
94	A0344697	3416-3430	17(1)
95	A0344698	3433-3436	17(1)
96	A0344700	3439-3441	17(1)
99	A0344714	3479-3480	17(1)
100	A0344720	3493-3494	17(1)
101	A0344721	3496-3497	17(1)
102	A0344722	3499-3500	17(1)
103	A0344723	3503-3533	22
104	A0344724	3535-3566, 3568-3570	17(1) and 22
107	A0344732	3587-3590	17(1)
109	A0344738	3605-3606	17(1)
110	A0344741	3617-3618	17(1)
111	A0344752	3650-3654	17(1)
114	A0344765	3670-3672	17(1)
115	A0344766	3673-3674	17(1)
116	A0344767	3675-3681	17(1)
117	A0344771	3692-3695	17(1)

118	A0344903	4022	22
120	A0345464	4687	17(1)
121	A0345468	4701-4729	22
122	A0345477	4777	22
123	A0345481	4792-4798	17(1)
124	A0345490	4884-4888	22
125	A0345491	4896-4900	22
126	A0345493	4926	22
127	A0345503	4952-4991	17(1)
128	A0345505	4996-5003	17(1)
129	A0345510	5036	22
130	A0345512	5037	22
131	A0345525	5057-5059	17(1)
135	A0345539	5084-5086	17(1)
138	A0345547	5103-5104	17(1)
141	A0345554	5119-5122	17(1)
142	A0345555	5123-5124	17(1)
143	A0345557	5136-5138	17(1)
144	A0345560	5141	22
146	A0345574	5174, 5176, 5177	22 17(1) (Affected Party only)
147	A0345575	5178-5180	17(1)
149	A0345591	5230-5233	22