Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4382

Appeals PA20-00786 and PA20-00817

Ministry of Northern Development, Mines, Natural Resources and Forestry

April 27, 2023

Summary: The Ministry of Northern Development, Mines, Natural Resources and Forestry (the ministry) received an access request for communications between itself and property owners related to a work permit for a specific property. The ministry issued a decision granting partial access to email chains withholding information pursuant to section 21(1) of the *Act* (personal privacy). The property owners and a consultant working on their behalf (the appellants) appealed the ministry's decision, claiming that the email chains are exempt from disclosure in full pursuant to section 17(1) (third party information exemption), as well as the fact that the request is frivolous or vexatious (section 10(1)(b)) and the records are beyond the scope of the request (section 24). In this order, the adjudicator finds that the appellants are not permitted to claim that the request is frivolous or vexatious and finds that the records are responsive to the request. She also finds that the records are not exempt under the mandatory third party information exemption and that they do not contain personal information beyond that already identified and redacted by the ministry. She dismisses the appeals and upholds the ministry's decision to disclose the records to the requester.

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"), 2(3), 10(1)(b), 10(2), 21(1), 17(1) and 24; sections 5.1(a) and (b) of Regulation 460.

Orders Considered: M-352, PO-2050, PO-2490, PO-2688, PO-3642, PO-3738-I, PO-4242 and PO-4331.

OVERVIEW:

[1] This order resolves two related appeals from a decision by the Ministry of Northern Development, Mines, Natural Resources and Forestry[1] (the ministry).

[2] By way of background, the owners of a property[2] (the appellant property owners), with the assistance of a consultant (the appellant consultant), who acted on their behalf, (collectively, the appellants) applied to the ministry for a work permit (the work permit) to construct a dock, boathouse, walkway and path to the docket and parking area on a specific property (the property). The ministry issued the work permit for all structures except the proposed boathouse, and the appellants continued to communicate with the ministry after this issuance related to the construction of the approved structures and ongoing issues about the proposed boathouse.

[3] An individual made eight access requests to the ministry for access to records related to the work permit.[3] The appeals that are the subject of this order arise out of one of these requests for "All communications between [the appellant property owners], and [the ministry] regarding a work permit to construct a commercial marina dock…."

[4] Following notification, the ministry issued a decision to the requester and the appellants granting partial access to the responsive records with severances pursuant to section 21(1) of the *Act*.

[5] The appellants filed appeals of the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).[4]

[6] During mediation, the appellants confirmed that they are appealing the ministry's decision to disclose to the requester the records at issue in these appeals on the basis that they should be withheld in full pursuant to section 17(1) of the *Act*. They also believe the information being disclosed goes beyond the information requested and raised the issue of scope at section 24 of the *Act*. In addition, the appellants take the position that the request is frivolous and vexatious pursuant to section 10(1)(b) of the *Act*.

[7] While the requester did not file an appeal of the ministry's decision, they continue to seek access to the records at issue in these appeals. The ministry advised that it was maintaining its decision to grant partial access to the records.

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[1] At the time of the request, the ministry's name was Ministry of National Resources and Forestry (MNRF).
[2] The appellants are the property owners (the appellant property owner), as well as a consultant hired by the property owners to act on their behalf (the appellant consultant).
[3] While the ministry maintained six of these requests, two were transferred to another ministry.
[4] PA20-00786 was opened for the appeal filed by the property owner appellant and PA20-00817 was opened for the appeal filed by the consultant appellant.

[8] No further mediation was possible and these appeals were transferred to the adjudication stage of the appeals process, in which an adjudicator may conduct an inquiry under the *Act*.

[9] I decided to conduct a joint inquiry into PA20-00786 and PA20-00817, as they arise out of the same request, deal with the same facts and issues, and involve parties known to one another. As my review of the records shows that they may contain additional information that qualifies as personal information and therefore, may be subject to section 21(1) of the *Act*, I decided to add these issues to the scope of the appeals.

[10] I sought and received representations from the appellants, which were shared with the ministry and the requester. I then received representations from the ministry and the requester. In addition, I sought and received additional representations from the parties.[5] The representations of the parties were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[11] In this order, I find that the appellants are not permitted to claim that the request is frivolous or vexatious. I also find that the records are within the scope of the request. I further find that the records are not exempt under the mandatory third party information exemption and that they do not contain personal information beyond that already identified and redacted by the ministry. Accordingly, I dismiss the appeals and uphold the ministry decision to disclose the records to the requester.

RECORDS:

[12] The records at issue in these appeals are three email chains in their entirety,[6] which the appellants claim should not be disclosed to the requester (the records).[7] They are described as follows:

- A0357198 pages 6-7[8] for PA20-00786;
- A0357199 pages 8-9 for PA20-00817; and
- A0357200 page 10 for PA20-00817.

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[5] The requester's representations were brief and did not directly address the issues in these appeals. They submit that the issuance of the work permit and the work conducted has negatively affected the value of properties in the area and the continued safety of those living in the area.

[6] While there appear to be attachments to individual emails in the email chains, the attachments are not part of the email chains. Accordingly, they are not at issue in these appeals.

[7] The ministry's decision to withhold portions of these records pursuant to section 21(1) of the *Act* is not at issue in these appeals because the requester has not filed an appeal of the ministry's decision.

[8] While only pages 6-7 are at issue in PA20-00786, given the record-by-record approach discussed below, I will be reviewing pages 5-7 to capture the complete email chain.

ISSUES:

A. Should the appellants be permitted to claim that the request is frivolous or vexatious pursuant to section 10(1)(b)? If so, is the access request frivolous or vexatious?

B. What is the scope of the request for records? Which records are responsive to the request?

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

D. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

DISCUSSION:

Issue A: Should the appellants be permitted to claim that the request is frivolous or vexatious pursuant to section 10(1)(b)? If so, is the access request frivolous or vexatious?

[13] Section 10(1)(b) of the *Act* provides institutions with a straightforward way of dealing with frivolous or vexatious requests. It 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,
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> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[14] Section 5.1 of Regulation 460 under the *Act* elaborates on the meaning of the phrase "frivolous or vexatious":

> 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,
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> > (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.

[15] There are four grounds for claiming that a request is frivolous or vexatious:

- the request is part of a pattern of conduct that amounts to an abuse of the right of access,
- the request is part of a part of a pattern of conduct that would interfere with the operations of the institution,
- the request is made in bad faith, and/or
- the request is made for a purpose other than to obtain access.

Representations

[16] The appellants submit that the request is not a bona fide request but rather a frivolous and vexatious request that forms part of a larger campaign of harassment by the requester[9] against the appellants for constructing a dock in the vicinity of the cottages of the requester and others. They reference ongoing litigation proceedings, which have been referred to by a court as being "frivolous and vexatious" and as not involving "a serious issue to be tried", and involves trespassing on the property, drilling holes in ice and taking aerial photos of the property and sharing them.

[17] They submit that the request is not being made for any proper purpose. With reference to ongoing legal proceedings between he parties, the appellants submit that the information being sought has no relevance to the facts and matters that remain at issue in the ongoing legal proceedings mentioned above.

[18] In its representations, the ministry raises the issue of whether the appellants should be permitted to claim that the request is frivolous or vexatious. It submits that "it is clear…that the discretion to determine that a request is frivolous or vexatious is granted to the institution." It points out that "[t[he IPC rarely permits affected parties, such as the appellants, to claim that an access to information request is frivolous or vexatious" and that "[p]revious orders suggest that…third party claims under [section] 10(1)(b) of the *Act* may be considered in rare cases such as where the alleged harm of disclosure rises to the level of danger to life, health, or safety."[10]

[19] The ministry indicates that the possible harm alleged by the appellants relates to property damage, trespass, nuisance and invasion of privacy, submitting that such allegations do not fall within the exceptional circumstances, in which the affected parties have been permitted to rely on section 10(1)(b) of the *Act*. It submits that the appellants have neither stated nor demonstrated that they have a reasonable fear of damage to themselves or other persons.

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[9] The appellants assume that the requester is a member of a local landowner group, who opposed the issuance of the work permit and continued to challenge the decision to issue it, and which resulted in legal proceedings between the parties.

[10] See for example, Orders PO-2688 and PO-2050.

[20] In addition, the ministry submits that the appellants have failed to satisfy the relevant requirements to demonstrate that the request is frivolous or vexatious. It submits that:

- After considering the cumulative nature and effect of the current request together with other requests by the same requester, the requests do not form a pattern of conduct that amounts to an abuse of the right of access;
- Based on the number and nature of the requests, the requests are unremarkable and do not interfere with its operations; and
- It is not aware of any evidence of bad faith on the part of the requester in making their access requests.

[21] The ministry disagrees that the request was not made for an improper purpose. It submits that, even if the appellants are correct that the information sought would be irrelevant and/or inadmissible for litigation purposes, it does not necessarily follow that the request for such information is made for an improper purpose. It explains that the *Act* provides a general right of access to records and does not limit that right to a specific purpose, nor does it require a requester to justify or even identify the reason for making a request.[11]

[22] In reply, the appellants submit that the ministry has drawn an entirely arbitrary distinction between harm that rises to the level of a danger to life, health and safety, as opposed to harm that rises to the level of trespass, nuisance and invasion of privacy. It states: "Those two categories are not mutually exclusive. It should go without saying that trespass, nuisance and invasion of privacy can give rise to a danger to life, health and safety." It provides an example of this in its representations.

[23] Also, in reply to the ministry's representations that the appellants have not demonstrated "bad faith" or a reasonable fear of danger to themselves or other persons, the appellants draw my attention to its representations on "a larger campaign of harassment". While indicating that it was unaware that it was insufficient to simply raise these concerns in their representations and requesting that "the ministry advise them on exactly what evidence is required so they may submit further evidence", it states that if affidavit evidence is required, it can arrange this or "the requisite inference can be drawn from [its] written submissions…".

Analysis and findings

Should the appellants be permitted to claim that the request is frivolous or vexatious pursuant to section 10(1)(b)?

[24] As raised by the ministry in its representations, I will first address the issue of

[11] MO-1477.

whether the appellants should be permitted to claim the frivolous and vexatious provisions, when the ministry has not done so. I note that the appellants did not directly address this issue, despite being given the opportunity to respond to the ministry's representations.

[25] 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 request is frivolous or vexatious.

[26] The frivolous and vexatious provisions in the *Act* make it clear that the decision about whether to raise these provisions lies with the institution. Previous IPC orders have determined that, to the extent that a third party may have the ability to raise these provisions (if at all), it would only be done in rare or unusual circumstances.[12] These orders have also confirmed that the frivolous and vexatious provisions of the *Act* are not intended to be used by parties resisting disclosure of records that would be otherwise subject to the *Act* because these parties do not like the request or are suspicious of the requester.[13]

[27] I have not been provided with sufficient evidence to satisfy me that the circumstances of these appeals give rise to one of those rare occasions when the IPC considers the application of a section of the *Act*, not raised by the institution and not one of the mandatory exemptions. Like the appellant in Order PO-2050, the appellants in these appeals raise concerns about the request being part of "a larger campaign of harassment" against the appellants"; however, it has not made direct representations about why I should depart from this reasoning.

[28] In making my decision, I adopt and agree with the reasoning in Orders PO-2050 and PO-2490. In particular, I share the view that the frivolous and vexatious provisions of the *Act* are not intended to be used by parties resisting disclosure of records that would be otherwise subject to the *Act* because these parties do not like the nature of the request or are suspicious of the requester. Accordingly, I find that the representations of the appellants do not support a finding that it is necessary to consider the frivolous and vexatious provisions of the *Act* in the circumstances of these appeals.

Is the request an abuse of process at common law?

[29] Nevertheless, although the appellants may not avail themselves of the frivolous or vexatious provisions of the *Act*, they do, as parties to an IPC appeal, have the 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

[12] See, for examples, Orders PO-2490, PO-2050 and PO-2688.
[13] Order PO-2688.

on a finding that allowing it to proceed would be an abuse of process.[14]

[30] 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 the Regulation 460: a pattern of conduct that amounts to an abuse of the right of access, bad faith and purpose other than to obtain access.[15]

Pattern of conduct that amounts to an abuse of the right of access

[31] The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access" process:

- *Number of requests*: Is the number excessive by reasonable standards?
- *Nature and scope of the requests*: Are the requests overly broad and varied in scope or unusually detailed? Are they identical or similar to previous requests?
- *Purpose of the requests*: Are the requests intended to accomplish some objective other than to gain access to the requested information? For example, are they made for "nuisance" value, or is the requester's aim to harass the institution or to break or burden the system?
- *Timing of the requests*: Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?[16]

[32] Other factors specific to the case can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.[17]

[33] The IPC has found that the focus should be on the *cumulative* nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from their behaviour because a requester seldom admits to a purpose other than access.[18]

Bad faith

[34] The IPC has defined "bad faith" as:

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[14] Order PO-4331; 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) of the *Act*.
[15] Order PO-4331 applying paragraph 42 of Order PO-3738-I.
[16] Orders M-618, M-850 and MO-1782.
[17] Order MO-1782.
[18] Order MO-1782.

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "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; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.[19]

Purpose other than to obtain access

[35] A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective.[20]

[36] The IPC has previously found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not enough to support a finding that the request is "frivolous or vexatious."[21] In order to qualify as a "purpose other than to obtain access," the requester would need to have an improper objective above and beyond an intention to use the information in some legitimate manner.[22]

[37] Overall, the representations of the appellants refer to the request as being part of "a larger campaign of harassment" against the appellants as a consequence for constructing a dock in the vicinity of their cottages, which includes litigation proceedings that have been referred to by a court as being "frivolous and vexatious" and as not involving "a serious issue to be tried". They also refer to incidents involving trespassing on the property, drilling holes in ice and taking aerial photos of the property and sharing them. They further submit that the information being sought has no relevance to the facts and matters that remain at issue in those proceedings, and would be inadmissible.

[38] It is my view that the appellants' statements related to "a larger campaign of harassment" are insufficient to conclude that the request is an abuse of process. The representations of the appellants fail to demonstrate that the request is part of a pattern of conduct that amounts to an abuse of the right of access. I am also 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.

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[19] Order M-850.
[20] Order M-850.
[21] Orders MO-1168-I and MO-2390.
[22] Order MO-1924.

[39] Accordingly, I dismiss this aspect of the appellants' appeals.

Issue B: What is the scope of the request for records? Which records are responsive to the request?

[40] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
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> (a) make a request in writing to the institution that the person believes has custody or control of the record;
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> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
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> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[41] To be considered responsive to the request, records must "reasonably relate" to the request.[23] 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.[24]

Representations

[42] The appellants submit that the information in the records goes beyond the scope of the request because, while the request is for *internal* communications between ministry staff regarding the work permit, the records include communications after the issuance of the work permit and/or communications involving parties other than ministry staff, namely, the appellants.

[43] It is the ministry's position that each of the records is responsive to the request. Before processing the request, the ministry explains that its analyst contacted the requester to seek clarification and understand the scope of the request and the requester confirmed the accuracy of revised wording.

[44] The ministry submits that, because the requester seeks records related to the work permit, all communications regarding the work permit would include records

[23] Orders P-880 and PO-2661.
[24] Orders P-134 and P-880.

created before and after the work permit was issued. It explains that the requester provided no limiting language or clarification that would support the appellant's position that the request was intended to capture only records predating the issuance of the work permit. It also explains that the context in which the records were created, namely, an application for approval under a statute, would include assessing an application and ensuring that any approved work is performed in accordance with the work permit after issuance.

Analysis and findings

[45] Based on the circumstances of these appeals and my review of the records, I find that the records are within the scope of the request, as stated by the ministry.

[46] Having reviewed the correspondence between the ministry and the requester at the request stage, I find that the scope of the request was for communication between the appellant property owners and the ministry regarding the work permit. It appears as though the appellants' interpretation of the scope of the request arose when this request, along with other related requests, were referred to generally in correspondence with the ministry and the IPC.

[47] Based on this scope, I also find that the records are within the scope of the request. The records are emails between the appellants and the ministry, where the emails' subject matter is the work permit and work undertaken under it. While the email chains also include emails of the appellant consultant, they were acting on behalf of the appellant property owners and such emails occur in the context of email chains between the appellant property owners and the ministry. Therefore, they are responsive to the request because they reasonably relate to it based on a generous interpretation. I agree with the ministry that the requester has not limited the scope of this request to internal communications between ministry staff, to communications before the issuance of the work permit. I also agree with the ministry that communications after the issuance of the work permit reasonably relate to the request and are responsive to it.

[48] Accordingly, I find that the records are responsive to the scope of the request, as stated by the ministry.

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

[49] Although the appellants did not provide me with representations on the issue of the third party information exemption to the records, I nevertheless consider its application to the records given that section 17(1) is a mandatory exemption.

[50] The purpose of section 17(1) is to protect certain confidential information that

businesses or other organizations provide to government institutions,[25] where specific harms can reasonably be expected to result from its disclosure.[26]

[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,
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> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (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.

Representations

[53] The ministry notes that the appellants did not explain why it claimed that the third party information exemption ought to apply to the records at the request stage and during mediation. It also notes that, during my inquiry, they did not provide any

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[25] *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.*).
[26] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

analysis or evidence to support this claim, nor have they otherwise answered the questions posed by me in the Notice of Inquiry. It further notes that the burden of proving this claim is with the appellants, who are required, inter alia, to provide "detailed" evidence that disclosure of the records could reasonably be expected to result in probable harm of the types set out in section 17(1).

Analysis and findings

[54] I agree with the ministry. I have considered the application of the mandatory third party information and, based on the records and the circumstances of these appeals, I find that the mandatory third party information does not apply to the records. Assuming that part one of the test is met, I turn my attention to part two of the test.

Part two of the section 17(1) test: supplied in confidence

Supplied

[55] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[27] 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.[28]

In confidence

[56] The party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an **objective** basis.[29]

[57] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and

[27] Order MO-1706.
[28] Orders PO-2020 and PO-2043.
[29] Order PO-2020.

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

[58] In its representations on the issue of "personal information", the appellants submit that their emails were communicated to the ministry with the implicit or explicit expectation of privacy and were in the nature of confidential communications. I have considered this representation as part of my analysis for the part two of the section 17(1) test.

[59] In contrast, the ministry submits that there is no evidence to demonstrate that the appellants had a reasonable expectation of confidence when providing the information in the records to the ministry. It submits that there is no indication that the ministry gave the appellants any explicit assurance of confidentiality, nor is there any indication that the appellants requested such assurance. It also submits that there is no implicit assurance of confidentiality. It explains that the records were created in the context of an application subject to the ministry's regulatory authority, which is not a process which an applicant typically would expect confidentiality.[31]

[60] Based on my review of the records and the circumstances of these appeals, I find that the appellants did not supply the information in the records to the ministry *in confidence* for the purposes of part two of the test under section 17(1). I agree with the ministry and adopt the reasoning in Order PO-4242. The records at issue in these appeals consist of communications related to the processing of the appellants' work permit subject to the ministry's authority, which is a process in which an applicant ordinarily would not expect confidentiality. The appellants provided the information to the ministry in order to obtain the work permit and there is no evidence before me that the appellants sought or received assurances of confidentiality from the ministry.

[61] It is my view that the appellants did not have an objectively reasonable expectation of confidentiality at the time the information was provided to the ministry, even if I accept that the appellants had a subjective expectation of confidentiality, and I find that the information was not supplied to the ministry *in confidence*. Accordingly, based on my review of the records and the circumstances of these appeals, part two of the section 17(1) test is not met.

[62] All parts of the three-part test must be met for the mandatory exemption at section 17(1) to apply. Since the appellants have not established part two of the test, I find that the records are not exempt under section 17(1). It is not necessary for me to consider the application of part three of the three-part test to the records. However, I will say that, as the party resisting disclosure of the records, the appellants have not provided *detailed* evidence about the risk of the type of harm outlined in section 17(1), if the records are disclosed, and such harm cannot be inferred from the records themselves and/or the surrounding circumstances.

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[30] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).
[31] PO-4242.

[63] Below, I consider whether the records contain personal information and if so, whether any additional personal information in the records (not already identified and redacted by the ministry) can be withheld pursuant to the personal privacy exemptions in the *Act*.

Issue D: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

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

[65] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[32] 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.

[66] Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[33] Sections 2(3) and 2(4) 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.

[67] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[34]

[68] 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.[35]

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

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[32] See the definition of "record" in section 2(1).
[33] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[34] Orders P-1409, R-980015, PO-2225 and MO-2344.
[35] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> "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
>
> (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.

[70] 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."[36]

[71] It is important to know whose personal information is in the records. If the records contain the requester's own personal information, their access rights are greater than if it does not.[37] Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.[38]

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[36] Order 11.

[37] 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.

[38] See sections 21(1) and 49(b).

Representations

[72] The appellants submit that their emails were communicated to the ministry with the implicit or explicit expectation of privacy and were in the nature of confidential communications. As a consequence, they submit that the records fall under the ambit of "personal information" as defined at paragraph (f) of section 2(1) of the *Act* and should not be disclosed. Of relevance to these appeals, they submit that records A0357199 and A0357200 ought to be redacted in full because they contain the appellants' personal opinion and views under paragraph (e) of the definition of "personal information" at section 2(1) of the *Act*.

[73] The ministry submits that record A0357199 is an email chain between the appellants, including an email from one appellant to the ministry, regarding the progress of construction, which contains the name, email address and personal opinions of the appellant property owners and the email address of the appellant consultant.

[74] The ministry also submits that record A0357200 is an email chain between the appellant property owners, the ministry and the appellant consultant regarding proposed construction, which contains the names of the appellant property owners, the name and email address of the appellant consultant, and the names of other individuals mentioned by one of the appellants.

[75] The ministry submits that the appellant consultant's name and email address are used in their business capacity as performing a service for the appellant property owners, and that the information does not reveal anything of a personal nature because it consists of only the name and email address, which they use for business purposes.

[76] With respect to the names and email addresses of the appellant property owners, the ministry submits that this information appears in a personal capacity, and similarly, the names of other individuals are mentioned in a personal capacity. With respect to information about the employees of the ministry, the ministry submits that this is information in their professional capacity. The ministry agrees that the appellants express personal opinions in the records, which is personal information.

Analysis and findings

[77] The IPC applies the "record-by-record" method of analysis to records subject to an access request. Under this method, the unit of analysis is the whole record, rather than individual pages, paragraphs, sentences or words contained in a record. Also, where the information at issue is the information the ministry has decided to disclose but a third party has appealed this decision, the whole of the record (including released portions) is analyzed in determining a requester's right to access the withheld information.[39]

[39] See Orders M-352 and PO-3642.

[78] Based on my review of the records and the representations of the parties, I find that the records contain the personal information of the appellant property owners and other affected parties, but not that of the requester, the ministry staff or the appellant consultant. Specifically, I find that the records contain personal information about the appellant property owners, such as email address, their opinions or views, and their name along with other information, which qualifies as recorded information about an identifiable individual and also fits within paragraphs (e) and (h) of the definition of "personal information" in section 2(1) of the *Act*. I also find that the email contains personal information about other affected parties, which qualifies as recorded information about an identifiable individual and where the disclosure of the name would reveal other personal information about the individuals, which fits within paragraphs (h) of the definition of "personal information" in section 2(1) of the *Act.*

[79] The information, including the name, email address and opinions of ministry staff and the appellant consultant, would not qualify as "personal information" pursuant to the definition of that term in section 2(1), in light of section 2(2) of the *Act*.

[80] The appellants make specific reference to records A0357199 and A0357200 and submit that these records ought to be redacted in full because they contain personal opinions and views of an appellant property owner and the appellant consultant. While I agree that the records contain some personal opinions or views of the appellant property owner, which qualify as "personal information" under paragraph (e) of the definition of "personal information" under section 2(1) of the *Act* because they are mentioned in a personal capacity, I do not agree that all of their statements qualify as "personal opinions and views"; in some cases, they provide updates and explanations related to the work undertaken under the work permit. In addition, their statements are not of a private or confidential nature, in consideration of paragraph (f) of the definition of "personal information", given that the records were created in the context of processing an application for a work permit under the ministry's authority, in which an applicant would not ordinarily expect confidentiality.[40]

[81] Moreover, I also disagree that the views and opinions of the appellant consultant expressed in the records qualify as "personal information". I find that the views and opinions of the appellant consultant expressed in the records are in their professional capacity and do not reveal anything of a personal nature about them. This is not the case of a situation where information in a professional capacity may still be "personal information" if it reveals something of a personal nature about the individual.[41] I agree with the ministry that the appellant consultant's opinions and views are in a professional capacity and do not qualify as "personal information".

[82] The ministry has decided to redact the "personal information" in the records and the requester has not appealed the ministry's decision in this regard. As the remaining

[40] Orders P-358 and PO-4242.
[41] Orders P-1409, R-980015, PO-2225 and MO-2344.

information is not personal information, it follows that such information does not qualify for exemption under the mandatory personal privacy exemption at section 21(1).[42] I am satisfied that disclosure of the remaining portions of the records would not contain personal information and that the ministry has reasonably severed the personal information of the appellants from the portions of the records to be disclosed to the requester, pursuant to section 10(2) of the *Act*.

[83] As a result, I dismiss the appellants' appeals and uphold the ministry's decision to disclose to the requester the redacted records.

ORDER:

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

2. I order the ministry to disclose to the requester the records except for the information withheld pursuant to section 21(1), as per its decision, by **June 2, 2023**, but not before **May 29, 2023**.

3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the records disclosed pursuant to provision 2.

Original signed by: April 27, 2023
Valerie Silva
Adjudicator

[42] Since I find that the records do not contain the personal information of the requester, the applicable personal privacy exemption would be 21(1) of the *Act*.