

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4596

Appeal PA23-00553

Ministry of Municipal Affairs and Housing

January 27, 2025

Summary: An environmental rights organisation made a request to the Ministry of Municipal Affairs and Housing under the *Freedom of Information and Protection of Privacy Act*. The organisation seeks access to records of requests from landowners to modify the official plans in seven regions of Southwestern Ontario and records of directions from the minister's office to ministry staff regarding these requests.

After notifying third parties and providing them with an opportunity to comment, the ministry decided to release to the organisation some records that it had identified as possibly containing third party information. A third party appealed the ministry's decision claiming that one of those records, a letter it sent to the former minister, should not be disclosed because of the third party information exemption in section 17(1) of the *Act*.

In this order the adjudicator finds that the letter and its enclosures do not contain third party information that should be withheld and upholds the ministry's decision to disclose it to the requester.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F.31, section 17.

Order Considered: PO-2435.

OVERVIEW:

[1] In September 2022, the Ministry of Municipal Affairs and Housing (the ministry)

conducted a review of the Peel Regional official plan that had been adopted by regional council (the official plan). As part of this review, the Ontario government posted a notice on the Environmental Registry of Ontario (ERO) website inviting public feedback on the official plan. On November 4, 2022, the Minister of Municipal Affairs and Housing (the former minister) issued a decision approving the official plan with a number of modifications.

[2] This order considers whether a letter sent to the former minister requesting modifications to the official plan during the period of public feedback should be disclosed under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[3] The ministry received a request under the *Act* for access to:

All requests from landowners or their representatives, affiliates, family members or agents, to [the ministry] to modify the official plans of [seven specified regions]. All directions of the minister's office to [the ministry] staff regarding the above landowner requests. Any changes or amendments to the above resulting from the above landowner requests. This request includes documentation of any kind in all formats including emails, USB drives and SharePoint or another file sharing service.

Time period: September 1, 2022 to November 18, 2022.

[4] The ministry located over 4,000 pages of responsive records and identified information that might be relevant to a number of third parties. The ministry notified these third parties of the request and its intention to grant full access to the identified information, inviting them to comment on disclosure.

[5] The ministry then issued an access decision granting the requester partial access to the responsive records. The ministry granted the requester full access to the information at issue in this appeal.

[6] One of the third parties (now the appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC). The appellant asserts that the third party information exemption in section 17(1) of the *Act* applies to a record that the ministry has decided to disclose. The record at issue in this appeal comprises a letter and enclosures.¹

[7] A mediator was appointed to explore resolution. During mediation, the requester confirmed that it continues to pursue access to the letter and raised the application of the public interest override in section 23 of the *Act*. This issue was added to the appeal.

[8] As a mediated resolution was not achieved, the appeal was transferred to the

¹ The requester has also appealed the ministry's decision to deny access. A separate appeal file has been opened to deal with the issues in the requester's appeal.

adjudication stage of the appeal process. I decided to conduct an inquiry and invited and received representations from the appellant, the ministry and the requester.

[9] For the reasons that follow, I find that the section 17(1) third party information exemption does not apply to the letter and enclosures. Accordingly, I uphold the ministry's decision to disclose the record to the requester in full and dismiss the appeal.

RECORD:

[10] The record at issue is a letter and enclosures (20 pages) (the letter).

DISCUSSION:

[11] The sole issue in this third party appeal is the application of the third party information exemption in section 17(1) of the *Act* to a letter sent to the former minister in September 2022.

[12] The purpose of section 17(1) is to protect certain confidential information that businesses and other organizations provide to government institutions,² where specific harms can reasonably be expected to result from its disclosure.³

[13] The relevant portion of section 17(1)⁴ states:

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

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

[....]

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁴ In this appeal, the appellant asserts that disclosure of the letter is reasonably likely to result in the harms listed in section 17(1)(a) and (c). The appellant does not claim the harms specified in section 17(1)(b) (similar information no longer being supplied to the institution) or (d) (harms arising from disclosure of records containing labour relations information) will occur. In my view, sections 17(1)(b) and (d) do not apply in the circumstances of this appeal.

[....]

[14] 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.

[15] Section 53 of the *Act* provides that where an institution refuses access to a record or part of a record, the burden of proof that a record or part of it falls within one of the specified exemptions in the *Act* lies upon the institution. Previous orders of the IPC have held that when a third party relies upon the exemption provided by section 17(1) of the *Act* to object to disclosure, the third party shares with the institution the onus of proving that the exemption applies to the record that is at issue.⁵

[16] I agree with this approach and adopt it in this appeal. In this appeal, the ministry has decided to provide the requester with full access to the letter. As the appellant is the party opposing disclosure, it bears the burden of proving that the exemption provided by section 17(1) applies to the letter.

Analysis and findings

[17] For the reasons that follow, I find that the third party information exemption in section 17(1) does not apply to the letter.

[18] For section 17(1) to apply, all three parts of the test set out above must be met. From my review of the record, the parties' representations and the relevant law, I am not satisfied that the appellant has established that disclosure of the information in the record could reasonably be expected to give rise to one of the specified harms. I set out below my reasons for finding that the third part of the test for the application of section 17(1) is not met. As all three parts of the test must be established and given my finding that the appellant has not met the third part of the test, it is not necessary for me to make findings on the type of information in the letter and whether it was supplied in confidence by the appellant to the ministry.

⁵ See Order P-203.

Harms

[19] The party resisting disclosure of a record, in this case the appellant, cannot simply assert that the harms under section 17(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.⁶

[20] The appellant must show that the risk of harm from disclosure of the letter is real and not just a possibility.⁷ The appellant does not have to prove that disclosure will in fact result in harm. The kind of evidence needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁸

[21] The appellant's position is that the third party information exemption applies to the letter. The appellant submits that disclosure of the letter could reasonably be expected to prejudice its competitive position and result in undue financial loss. This is the harm specified in sections 17(1)(a) and (c). These sections seek to protect information that could be exploited in the marketplace.⁹

[22] The appellant states that its market position would be jeopardised, if the letter were to be made public. The appellant submits that its competitors would have insight into sensitive internal matters, strategies and plans, resulting in loss of business opportunities and competitive advantage. The appellant submits that the risk of harm is real and not a mere possibility.

[23] The ministry's position is that the third party information exemption does not apply to the letter. The ministry submits that the appellant has not established that disclosure of the letter could reasonably be expected to give rise to one of the harms listed in section 17(1). The ministry relies on the fact that two years have passed since the letter was sent to the former minister and the requested modifications to the official plan have been granted, overturned and published.

[24] The ministry cites Order P-1614 in which the IPC interpreted the term "undue" to mean "excessive", "disproportionate", "not suitable" or "not owed". The ministry submits that the disclosure of the letter could not reasonably be expected to result in "undue" loss to the appellant.

⁶ Orders MO-2363 and PO-2435.

⁷ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

⁹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[25] The ministry states that the information in the letter is the type of information that is routinely disclosed to the public during official plan amendment processes.¹⁰ As such, the ministry submits that any “loss” sustained by the appellant from disclosure of the information in the letter would not be excessive or disproportionate.

[26] The requester’s position is that the third party exemption does not apply to the letter and it should be disclosed. The requester submits that the appellant has not provided the necessary evidence to meet the harms test for section 17(1) to apply. The requester states that the appellant has not provided concrete examples of how a loss might occur or what type of loss might be suffered. The requester submits that the appellant’s submissions are merely speculative.

[27] During the appeal, the appellant provided the IPC with a media article published in November 2023 about modifications to the official plan that had previously been approved by the government.¹¹ From my review of the media article, I formed the preliminary view that it reproduces, in part, the information at issue in this appeal. I invited reply representations from the appellant on the relevance of the article to the issues to be determined in this appeal.

[28] The appellant replied that it does not agree with my preliminary view. The appellant’s position is that the article appears to reiterate and reproduce certain portions of the information contained in the letter, however, other information in the article originates from other sources.

[29] The appellant submits that notwithstanding the partial disclosure of the information in the letter, it is exempt under the mandatory third party information exemption in section 17(1) of the *Act*.

[30] I agree with the requester and the ministry that the appellant’s submissions about the harms that could reasonably be expected to occur if the information were disclosed, lacks detail.

[31] From my review of the letter and without disclosing its contents, I find that the information in the letter relates to proposed modifications to the official plan. The type of information includes opinions regarding the nature of the land discussed in the letter and its use.

[32] I acknowledge the appellant’s submission that the information in the letter may have commercial value. However, it does not follow that its disclosure is reasonably likely

¹⁰ The ministry cites sections 22(4) and (5) of the *Planning Act* that prescribe the information and material to be provided in support of a request for amendment to an official plan and the requirement that such information be made available to the public. The ministry acknowledges that the letter at issue in this appeal was not sent to the former minister pursuant to these provisions but submits that it contains the same *type* of information.

¹¹ These modifications formed part of the government’s proposal to amend the Greenbelt, which it announced on November 4, 2022 and subsequently overturned.

to give rise to significant prejudice to the appellant's competitive position or result in undue financial loss.

[33] As I have explained, it is not necessary for me to make a finding about the type of information in the letter and whether it qualifies as commercial information for the purposes of section 17(1). However, I note that the information in the record does not include pricings, costings or information relating to buying and selling. The appellant does not describe the market sector in which it will suffer prejudice or how the plans for land use relate to the business opportunities that might be lost through disclosure. In this regard, there is no reasonable basis for me to find that the risk of harm is established.

[34] Regarding a general argument of loss of market advantage, the IPC has previously held that the possibility that a third party may be subject to increased competition in the future due to disclosure of information does not, of itself, constitute prejudice for the purposes of section 17(1)(a). In Order PO-2435, the adjudicator considered whether disclosure of information relating to pricing in ministry service agreements could reasonably be expected to cause significant prejudice to the service provider's advantage in future bidding processes. The adjudicator noted the lack of particularity in the service provider's representations. While the adjudicator accepted that disclosure of specific commercial or financial information may in limited circumstances result in the harms specified in section 17(1), he found that there was insufficient evidence to establish the harm in that appeal. The adjudicator accepted that the disclosure of pricing information could lead to a more competitive bidding process for future contracts. However, the adjudicator determined that this fact alone, in and of itself, does not significantly prejudice the service provider's competitive position or result in undue loss to them.

[35] I agree with this approach and adopt it in this appeal. The appellant makes a broad and general submission that disclosure of "sensitive internal matters, strategies and plans" would result in lost business opportunities and competitive advantage. Even if I were to find that the information at issue is related to the appellant's competitive position in a specified market sector so that its disclosure could lead to increased competition in the future, there is no reasonable basis for the finding that disclosure of this information would *significantly* prejudice the appellant's competitive position or cause undue loss. The appellant's evidence does not provide this level of detail.

[36] As noted above, in November 2023, the media published an article about the modifications to the official plan that included some of the information that is at issue in this appeal.

[37] Notwithstanding that some of the information at issue has been published, there is no evidence before me about any harm, either of the type specified in section 17(1)(a) or (c) or otherwise, that has resulted from this publication. I accept the ministry's submission that the modifications to the official plan that are set out in the letter have been granted, overturned and published. I also note the passage of time since the letter was sent to the former minister in September 2022. Based on these facts and an absence

of detailed evidence to the contrary, I find that the appellant has not established that there is a reasonable expectation that either of the harms in sections 17(1)(a) or (c) would occur if the letter at issue were disclosed.

[38] For these reasons, I find that the mandatory third party information exemption in section 17(1) of the *Act* does not apply to the information in the letter and its enclosures. Accordingly, I uphold the ministry's decision to disclose the letter and dismiss this appeal.

ORDER:

1. I uphold the ministry's decision to grant the requester access to the record at issue comprising a letter and enclosures (20 pages).
2. By **March 4, 2025** but not before **February 27, 2025**, I order the ministry to disclose a copy of the record to the requester.
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the record disclosed pursuant to provision 2.

Original Signed by: _____

Katherine Ball
Adjudicator

January 27, 2025