

Information and Privacy Commissioner,
Ontario, Canada



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

NOTICE OF INQUIRY

under the
Freedom of Information and Protection of Privacy Act
(*FIPPA* or the *Act*)

Appeal Number:	PA16-128
From Decision of:	Ministry of Natural Resources and Forestry
Institution File Number:	A-2015-00061/JSG
Date of This Notice:	February 24, 2017
Representations Due:	March 17, 2017

BACKGROUND:

The Ministry of Natural Resources and Forestry (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for:

All records relating to the proposed Hydro-electric Generating Station at the Bala Falls.

The ministry identified responsive records relating to the request. Before releasing the records to the requester, the ministry notified the third party to obtain its view regarding disclosure of the records.

The third party's representative provided the ministry with submissions stating that its position is the information should not be disclosed.

After considering the representations from the third party, the ministry issued a decision granting full access to the records subject to the third party notification.

The third party, now the appellant, appealed the decision of the ministry.

During mediation, the ministry notified the appellant of additional records responsive to the request and solicited its views on the release of the records. After reviewing the appellant's submissions, the ministry issued a decision to disclose those records in full. The appellant appealed the ministry's decision, and those records have been added to the records at issue in the appeal.

During the course of mediation, the appellant consented to the release of 53 pages of records at issue. As such, those records have been removed from the records at issue in the appeal.

The appellant claims that sections 17(1) (third party information), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act* apply to the remaining records at issue.

The requester has advised that he is not interested in the records identified by the ministry as duplicate records. Accordingly, TIFB A0261047 pages 8830-8832 are no longer at issue in the appeal.

The requester has also raised the possible application of the public interest override in section 23 to the records at issue.

No further issues have been resolved at mediation, and this appeal proceeds to the adjudication stage, where an adjudicator conducts an inquiry. I sought the appellant's representations initially. The appellant's initial and supplemental representations are enclosed, less the confidential portions.

The appellant will be sending a copy of its Appendix B and Appendix D directly to the ministry advising what it has consented to disclosure of to the requester. The ministry should then be issuing a supplementary decision letter to the requester enclosing a copy of the information that the appellant has agreed to the disclosure of.

Furthermore, the appellant in its initial representations raised the application of additional discretionary exemptions in sections 16, 18, and 20. I sought additional representations from the appellant as follows:

The appellant is seeking to raise the application of discretionary exemptions in sections 16, 18, 19, and 20. This office has considered the raising of discretionary exemptions by parties that are not institutions under FIPPA in previous orders and has determined that it only applies in rare circumstances. A recent order on this topic is found at Order PO-3512.

See

<http://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/134825/index.do?r=AAAAAQAIImRpc2NyZXRp25hc nkgZXhIbXB0aW9uIGJ5IGFmZmVjdGVkIGE>

- If the appellant wishes to pursue these four discretionary exemptions, the adjudicator asks that it provide representations on: Given the mandatory exemptions already claimed in this appeal, why this case qualifies as a "rare exception to the general presumption that affected parties are not entitled to raise the possible application of the discretionary exemptions".

Please also respond to the appellant's representations as to whether this case qualifies as a "rare exception to the general presumption that affected parties are not entitled to raise the possible application of the discretionary exemptions".

RECORDS:

The chart attached as Appendix A to the mediator's report outlines the records that remain at issue in the appeal, less the records that the appellant has agreed to the disclosure of as set out in its representations.

BURDEN OF PROOF:

Please note that under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

ISSUES:

SHARING OF REPRESENTATIONS

Issue A: Do your representations contain confidential information that you do not want me to share with other parties to this appeal?

The sharing of representations is addressed in *Practice Direction Number 7*, issued by this office.

Your representations may be shared with other parties to the appeal unless they meet the confidentiality criteria identified in *Practice Direction Number 7*, which are reproduced on page 3 of the enclosed "Inquiry Procedure at the Adjudication Stage".

Please state your position concerning the sharing of your representations.

If you believe that portions of your representations should remain confidential, please identify these portions and explain why the confidentiality criteria apply to the portions you seek to withhold.

If there is more than one other party, please indicate to which party your confidentiality request applies.

If you make no submissions on this issue, I may decide to share some or all of your representations without further notice to you.

PERSONAL INFORMATION

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

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) 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.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their

¹ Order 11.

dwelling and the contact information for the individual relates to that dwelling.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

Does the record contain "personal information"? If so, to whom does it relate?

Is the information about an individual in a personal capacity, or in a professional, official or business capacity? Please explain.

If the information is about an individual in a professional, official or business capacity, does the information reveal something of a personal nature about the individual? Please explain.

Is it reasonable to expect that an individual may be identified if the information is disclosed? Please explain.

PERSONAL PRIVACY

Issue C: Does the mandatory exemption at section 21(1) apply to the information at issue?

Note: the text of section 21 is set out in the appendix to this Notice of Inquiry.

General principles

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

Do any of paragraphs (a) to (e) of section 21(1) apply?

If the information fits within any of paragraphs (a) to (e) of section 21(1), it is not exempt from disclosure under section 21.

21(1)(a): consent

For section 21(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.⁵

Did the individual consent to disclosure of their personal information?

21(1)(b): health or safety

Are there compelling circumstances affecting the health and/or safety of an individual?

21(1)(c): public record

Is the personal information collected and maintained specifically for the purpose of creating a record available to the general public?

21(1)(d): another Act

In order for section 21(1)(d) to apply, there must either be specific authorization in the statute for the disclosure of the type of personal information at issue, or there must be a general reference to the possibility of such disclosure in the statute together with a specific reference to the type of personal information to be disclosed in a regulation.⁶

For example, the Ontario *Public Sector Salary Disclosure Act* (the *PSSDA*) expressly authorizes the disclosure of salary and benefit amounts and this authorization meets the requirements of section 21(1)(d).⁷

Is there an Act of Ontario and/or Canada that expressly authorizes disclosure?

⁵ Order PO-1723.

⁶ Orders M-292, MO-2030, PO-2641 and MO-2344.

⁷ Orders PO-2641 and MO-2344.

21(1)(e): research

For a discussion of the meaning of "research", see Orders PO-2693 and PO-2694.

Is the disclosure for a research purpose? If so, what is the research purpose? Who is conducting the research?

What are the conditions or expectations of disclosure under which the personal information was provided, collected or obtained? Are the expectations of disclosure reasonable?

What evidence exists that the research purpose for which disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form?

Has the person who is to receive the record agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations?

Would disclosure be "an unjustified invasion of personal privacy" under section 21(1)(f)?

Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

Do any of the presumptions in paragraphs (a) to (h) of section 21(3) apply?

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.⁸

21(3)(a): medical history

Does the personal information relate to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation?

⁸ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

21(3)(b): investigation into violation of law

Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁹ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁰

Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.¹¹

The presumption can apply to a variety of investigations, including those relating to by-law enforcement¹² and violations of the Ontario Human Rights Code.¹³

Was the personal information compiled and is it identifiable as part of an investigation into a possible violation of law? Please identify the law or legislative provision.

21(3)(c): eligibility for social service

Does the personal information relate to eligibility for social service or welfare benefits or to the determination of benefit levels?

21(3)(d): employment or educational history

Information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption.¹⁴

Information contained in resumes¹⁵ and work histories¹⁶ falls within the scope of section 21(3)(d).

A person's name and professional title, without more, does not constitute "employment history".¹⁷

⁹ Orders P-242 and MO-2235.

¹⁰ Orders MO-2213, PO-1849 and PO-2608.

¹¹ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

¹² Order MO-2147.

¹³ Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

¹⁴ Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050; see also Orders PO-2598, MO-2174 and MO-2344.

¹⁵ Orders M-7, M-319 and M-1084.

¹⁶ Orders M-1084 and MO-1257.

Does the personal information relate to employment and/or educational history?

21(3)(e): tax

Was the personal information obtained on a tax return or gathered for the purpose of collecting tax?

21(3)(f): finances

To qualify under this section, information about an asset must be specific and must reveal, for example, its dollar value or size.¹⁸

Lump sum payments that are separate from an individual's salary have consistently been found not to fall within section 21(3)(f).¹⁹

Contributions to a pension plan have been found to fall within section 21(3)(f).²⁰

Does the personal information describe an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness?

21(3)(g): personal recommendations

The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards.²¹

The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, etc., by that individual.²²

Does the personal information consist of personal recommendations or evaluations, character references or personnel evaluations?

21(3)(h): racial origin

Does the personal information indicate an individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations?

¹⁷ Order P-216.

¹⁸ Order PO-2011.

¹⁹ Orders M-173, MO-1184, MO-1469, MO-2174 and MO-2318.

²⁰ Orders M-173, P-1348 and PO-2050.

²¹ Orders PO-1756 and PO-2176.

²² Order P-171.

Do any of the section 21(2) factors apply?

Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2).²³ If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.²⁴ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.²⁵

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).²⁶

21(2)(a): public scrutiny

This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.²⁷

In order for this section to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application.²⁸

The public has a right to expect that expenditures of employees of government institutions during the course of performing their employment-related responsibilities are made in accordance with established policies and procedures, carefully developed in accordance with sound and responsible administrative principles.²⁹

Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 21(2)(a).³⁰

Is disclosure desirable for the purpose of subjecting the activities of the government of Ontario and its agencies to public scrutiny?

²³ *John Doe v. Ontario (Information and Privacy Commissioner)*, cited above.

²⁴ Order P-239.

²⁵ Orders PO-2267 and PO-2733.

²⁶ Order P-99.

²⁷ Order P-1134.

²⁸ Order PO-2905.

²⁹ Orders P-256 and PO-2536.

³⁰ Order P-256.

21(2)(b): public health and safety

May access to the personal information promote public health and safety?

21(2)(c): purchase of goods and services

Would access to the personal information promote informed choice in the purchase of goods and services?

21(2)(d): fair determination of rights

For section 21(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing³¹

Is the personal information relevant to a fair determination of rights affecting the person who made the request?

21(2)(e): pecuniary or other harm

In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

Will the individual to whom the information relates be exposed to pecuniary or other harm? Why would the harm be unfair?

³¹ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

21(2)(f): highly sensitive

To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.³²

Is the personal information highly sensitive?

21(2)(g): inaccurate or unreliable

Is the personal information unlikely to be accurate or reliable?

21(2)(h): supplied in confidence

This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.³³

Has the personal information been supplied by the individual to whom the information relates in confidence? What assurances of confidentiality, if any, were given, and who gave and received those assurances?

21(2)(i): unfair damage to reputation

The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.³⁴

Might the disclosure unfairly damage the reputation of any person referred to in the record? Whose reputation may be damaged? How would this damage be unfair?

Other factors/relevant circumstances

In previous orders, relevant considerations that have found to apply include:

- inherent fairness issues;³⁵
- ensuring public confidence in an institution;³⁶
- personal information about a deceased person;³⁷ and

³² Orders PO-2518, PO-2617, MO-2262 and MO-2344.

³³ Order PO-1670.

³⁴ Order P-256.

³⁵ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

³⁶ Orders M-129, P-237, P-1014 and PO-2657.

- benefit to unknown heirs.³⁸

Are there any other factors or other relevant circumstances that should be considered?

Does section 21(4) apply?

If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21.

21(4)(a): employment

This section applies to the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister.

Who is an employee?

Black's Law Dictionary (6th. ed.) defines "employee" as:

A person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed . . . One who works for an employer; a person working for salary or wages. Generally, when person for whom the services are performed has right to control and direct the individual who performs the services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an "employee".

An independent contractor would not be considered an employee. Relevant factors that may be considered in deciding whether or not a person is an employee or an independent contractor may include:

- the level of control and supervision exercised by the person requiring the work to be done, with respect to how the work is to be performed, in what setting and under what conditions, the hours of work, as well as the results of the work; and
- whether the work was part of the essential ongoing operation of the employer.³⁹

³⁷ Orders M-50, PO-1717, PO-1923, PO-1936 and PO-2012-R.

³⁸ Orders P-1493, PO-1717 and PO-2012-R.

³⁹ Orders P-244 and PO-2641.

What constitutes a benefit?

This office has interpreted "benefits" to include entitlements, in addition to base salary, that an employee receives as a result of being employed by the institution. The following have been found to qualify as "benefits":

- insurance-related benefits,
- sick leave, vacation,
- leaves of absence,
- termination allowance,
- death and pension benefits,
- right to reimbursement for moving expenses, and
- incentives and assistance given as inducements to enter into a contract of employment.⁴⁰

The term "benefits" does not include entitlements that have been *negotiated* as part of a retirement or termination package unless the information reflects benefits to which the individual was entitled as a result of being employed.⁴¹

Does the information disclose the classification, salary range and benefits and/or the employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister?

Did the entitlement arise as a result of being employed or was it negotiated as part of a retirement or termination package?

21(4)(b): personal services contract

This section applies to financial and other details of contracts for personal services between an institution and a consultant or independent contractor, if that information is found to qualify as personal information.⁴²

Black's Law Dictionary (6th. ed.) defines "independent contractor" as:

Generally, one who, in exercise of an independent employment contracts to do a piece of work according to his own methods and is subject to his employer's control only as to end product or final result of his work . . . One who renders service in the course of self employment or occupation, and who follows employer's desires only as to results of work, and not as to means whereby it is to be accomplished . . . He may or may not be an agent.

⁴⁰ Orders M-23 and PO-1885.

⁴¹ Orders MO-1749, PO-2050, PO-2519 and PO-2641.

⁴² Orders MO-1361 and PO-2435.

Relevant factors that may be considered in deciding whether or not a person is an employee or an independent contractor may include:

- the level of control and supervision exercised by the person requiring the work to be done, with respect to how the work is to be performed, in what setting and under what conditions, the hours of work, as well as the results of the work; and
- whether the work was part of the essential ongoing operation of the employer.⁴³

Would disclosure of the records disclose financial or other details of a contract for personal services between an individual and an institution?

21(4)(c): licence or permit

Would disclosure of the records disclose details of a license or permit or a similar discretionary financial benefit conferred on an individual by an institution where,

- (i) the individual represents one percent or more of all persons and organizations in Ontario receiving a similar benefit, and
- (ii) the value of the benefit to the individual represents one percent or more of the total value of similar benefits provided to other persons and organizations in Ontario?

21(4)(d) – compassionate reasons

The terms "close relative" and "spouse" are defined in section 2(1) of the *Act* as follows:

"close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; ("proche parent"); and

"spouse" means,

- (a) a spouse as defined in section 1 of the *Family Law Act*, or
- (b) either of two persons who live together in a conjugal relationship outside marriage. ("conjoint")

⁴³ Order P-244.

The application of section 21(4)(d) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?⁴⁴

Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the "circumstances" to be considered would include the fact that the personal information of the deceased is also the personal information of another individual or individuals. The factors and circumstances referred to in section 21(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 21(4)(d).⁴⁵

After the death of an individual, it is that person's spouse or close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons".⁴⁶

THIRD PARTY INFORMATION

Issue D: Does the mandatory exemption at section 17 apply to the records?

Section 17(1): the exemption

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,

⁴⁴ Orders MO-2237 and MO-2245.

⁴⁵ Order MO-2237.

⁴⁶ Order MO-2245.

- (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.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.⁴⁷ 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.⁴⁸

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.

⁴⁷ *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.*).

⁴⁸ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁴⁹

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.⁵⁰

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.⁵¹

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.⁵² The fact that a record

⁴⁹ Order PO-2010.

⁵⁰ Order PO-2010.

⁵¹ Order PO-2010.

⁵² Order PO-2010.

might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵³

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁵⁴

Labour relations means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships. Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute⁵⁵
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,⁵⁶

but not to include:

- names, duties and qualifications of individual employees⁵⁷
- an analysis of the performance of two employees on a project⁵⁸
- an account of an alleged incident at a child care centre⁵⁹
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation⁶⁰

Does the record reveal a trade secret or scientific, technical, commercial, financial or labour relations information? Please explain.

⁵³ Order P-1621.

⁵⁴ Order PO-2010.

⁵⁵ Order P-1540.

⁵⁶ Order P-653.

⁵⁷ Order MO-2164.

⁵⁸ Order MO-1215.

⁵⁹ Order P-121.

⁶⁰ Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

Part 2: supplied in confidence

Supplied

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.⁶¹

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.⁶²

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.⁶³

There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.⁶⁴ The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.⁶⁵

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁶⁶

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

⁶¹ Order MO-1706.

⁶² Orders PO-2020 and PO-2043.

⁶³ This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

⁶⁴ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

⁶⁵ *Miller Transit*, above at para. 34.

⁶⁶ Order PO-2020.

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.⁶⁷

Did the third party supply the information to the institution? Please explain.

Did the third party supply the information with a reasonable expectation of confidentiality? Was the expectation explicit or implicit? Please explain.

Part 3: harms

General principles

The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁶⁸

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁶⁹

In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).⁷⁰

⁶⁷ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

⁶⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁶⁹ Order PO-2435.

⁷⁰ Order PO-2435.

Section 17(1)(a): prejudice to competitive position

Could disclosure of the record significantly prejudice the competitive position of a person, group of persons or organization? Please explain.

Could disclosure of the record interfere significantly with the contractual or other negotiations of a person, group of persons or organization? Please explain.

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

Could disclosure of the record result in similar information no longer being supplied to the institution? Please explain.

Is it in the public interest that similar information continue to be supplied to the institution? What is the harm that would result if similar information were no longer supplied to the institution? Please explain.

Section 17(1)(c): undue loss or gain

Could disclosure of the record result in undue loss or gain to any person, group, committee or financial institution or agency? Please explain.

Section 17(1)(d): information supplied in a labour relations dispute

Could disclosure of the record 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? Please explain.

PUBLIC INTEREST OVERRIDE

Issue E: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the sections 17, 18, 20, and 21 exemptions?⁷¹

General principles

Section 23 states:

An exemption from disclosure of a record under sections 13, 15, **17, 18, 20, 21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

⁷¹ See below for Issues regarding sections 18 and 20.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.⁷²

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.⁷³ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.⁷⁴

A public interest does not exist where the interests being advanced are essentially private in nature.⁷⁵ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.⁷⁶

A public interest is not automatically established where the requester is a member of the media.⁷⁷

The word "compelling" has been defined in previous orders as "rousing strong interest or attention".⁷⁸

Any public interest in *non*-disclosure that may exist also must be considered.⁷⁹ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".⁸⁰

⁷² Order P-244.

⁷³ Orders P-984 and PO-2607.

⁷⁴ Orders P-984 and PO-2556.

⁷⁵ Orders P-12, P-347 and P-1439.

⁷⁶ Order MO-1564.

⁷⁷ Orders M-773 and M-1074.

⁷⁸ Order P-984.

⁷⁹ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

⁸⁰ Orders PO-2072-F, PO-2098-R and PO-3197.

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation⁸¹
- the integrity of the criminal justice system has been called into question⁸²
- public safety issues relating to the operation of nuclear facilities have been raised⁸³
- disclosure would shed light on the safe operation of petrochemical facilities⁸⁴ or the province's ability to prepare for a nuclear emergency⁸⁵
- the records contain information about contributions to municipal election campaigns⁸⁶

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations⁸⁷
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations⁸⁸
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding⁸⁹
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter⁹⁰
- the records do not respond to the applicable public interest raised by appellant⁹¹

⁸¹ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

⁸² Order PO-1779.

⁸³ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

⁸⁴ Order P-1175.

⁸⁵ Order P-901.

⁸⁶ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

⁸⁷ Orders P-123/124, P-391 and M-539.

⁸⁸ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁸⁹ Orders M-249 and M-317.

⁹⁰ Order P-613.

⁹¹ Orders MO-1994 and PO-2607.

Is there a public interest in disclosure of the record? If so, is this interest compelling? Please explain.

Is there a public interest in non-disclosure? Please explain.

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.⁹²

What is the purpose of the exemption? To what extent is the purpose being served in this case?

Does the compelling public interest in disclosure of the records clearly outweigh the purpose of the exemption in this case? Please explain.

SOLICITOR-CLIENT PRIVILEGE

Issue F: Does the discretionary exemption at section 19 apply to the records?

General principles

Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

⁹² Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.⁹³ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁹⁴ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.⁹⁵

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁹⁶

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁹⁷ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁹⁸

Are the records subject to common law solicitor-client communication privilege? Please explain.

Litigation privilege

Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.⁹⁹ Litigation privilege protects a lawyer's work product and covers material going beyond

⁹³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁹⁴ Orders PO-2441, MO-2166 and MO-1925.

⁹⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁹⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁹⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁹⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁹⁹ *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

solicitor-client communications.¹⁰⁰ It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.¹⁰¹ The litigation must be ongoing or reasonably contemplated.¹⁰²

Are the records subject to common law litigation privilege? Please explain.

Loss of privilege

Waiver

Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.¹⁰³

An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.¹⁰⁴

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁰⁵ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹⁰⁶

Has privilege been lost through waiver? Does the common interest principle arise here? Please explain.

Termination of litigation

Common law litigation privilege generally comes to an end with the termination of litigation.¹⁰⁷

¹⁰⁰ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

¹⁰¹ *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

¹⁰² Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

¹⁰³ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

¹⁰⁴ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁰⁵ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

¹⁰⁶ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

¹⁰⁷ *Blank v. Canada (Minister of Justice)*, cited above.

Legal Fees and Billing Information

Legal billing information is presumptively privileged unless the information is "neutral" and does not directly or indirectly reveal privileged communications.¹⁰⁸ In your representations, please address the question of whether the legal billing information is privileged in this case, with reference to the following questions:

- (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?
- (2) could an "assiduous inquirer", aware of background information, use the information requested to deduce or otherwise acquire privileged communications?¹⁰⁹

Branch 2: statutory privileges

Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Were the records prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital? Please explain.

Were the records prepared for use in giving legal advice?

Statutory litigation privilege

This privilege applies to records prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.¹¹⁰

¹⁰⁸ *Maranda v. Richer*, [2003] 3 S.C.R. 193; Order PO-2484, upheld on judicial review in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 (Div. Ct.); see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

¹⁰⁹ See Order PO-2484, cited above; see also *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 941 (C.A.).

¹¹⁰ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.¹¹¹ Documents not originally created for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are also covered by this privilege.¹¹² However, the privilege does not apply to records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."¹¹³

The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.¹¹⁴

In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.¹¹⁵

Were the records prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital?

Were the records prepared in contemplation of or for use in litigation? Please explain.

Loss of Privilege

Only the head of an institution may waive the statutory privilege in section 19. Disclosure by Crown counsel to defence counsel during a criminal proceeding, for example, does not result in waiver of the statutory privilege.¹¹⁶

Has the statutory privilege in section 19 been lost through waiver? Please explain.

¹¹¹ Order PO-2733.

¹¹² *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.

¹¹³ Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.

¹¹⁴ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

¹¹⁵ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

¹¹⁶ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

EXERCISE OF DISCRETION

Issue G: Did the institution exercise its discretion under sections 16, 18, 19 and 20?¹¹⁷ If so, should this office uphold the exercise of discretion?

General principles

The sections 16, 18, 19 and 20 exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹⁸ This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹¹⁹

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific

¹¹⁷ See below for Issues regarding sections 16, 18, and 20.

¹¹⁸ Order MO-1573.

¹¹⁹ Orders P-344 and MO-1573.

- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

In denying access to the record, did the institution exercise its discretion under sections 16, 18, 19 and 20?

What factors did the institution consider in exercising its discretion?

Did the institution exercise its discretion in bad faith or for an improper purpose?

Did the institution take into account all relevant factors?

Did the institution take into account any irrelevant factors?

ADDITIONAL DISCRETIONARY EXEMPTIONS CLAIMED DURING ADJUDICATION

NATIONAL SECURITY

Issue H: Does the discretionary exemption at section 16 apply to Records 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21, 27, 31 and 34?

Section 16 states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council.

It is evident from the context of this exemption that it is intended to protect vital public security interests. Section 16 must be approached in a sensitive manner, given the difficulty of predicting future events affecting the defence of Canada and other countries.¹²⁰

In order for section 16 to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹²¹

This office has applied section 16 to exempt records containing detailed technical information about the operations of a nuclear facility.¹²²

Could disclosure of the record reasonably be expected to prejudice the defence of Canada? Please explain.

Could disclosure of the record reasonably be expected to prejudice the defence of any foreign state allied or associated with Canada? What is the identity of the foreign state? How is the foreign state allied or associated with Canada? Please explain.

¹²⁰ See Order PO-2500.

¹²¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹²² Order PO-2500.

Could disclosure of the record reasonably be expected to be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism? Please explain.

Did the institution seek the approval of Cabinet to disclose some or all of the record? If so, what was Cabinet's response? If not, what factors did the institution consider in deciding not to seek the approval of Cabinet?

ECONOMIC AND OTHER INTERESTS

Issue I: Does the discretionary exemption at sections 18(1)(c), (e) and (g) apply to the records?

General principles

Section 18(1) states in part:

A head may refuse to disclose a record that contains,

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
- (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.¹²³

For sections 18(1)(c), or (g) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹²⁴

¹²³ Toronto: Queen's Printer, 1980.

¹²⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹²⁵

The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.¹²⁶

Section 18(1)(c): prejudice to economic interests¹²⁷

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.¹²⁸

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.¹²⁹

Could disclosure of the information in the record reasonably be expected to prejudice the economic interests or competitive position of an institution? Please explain.

Section 18(1)(e): positions, plans, procedures, criteria or instructions¹³⁰

In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

¹²⁵ Order MO-2363.

¹²⁶ See Orders MO-2363 and PO-2758.

¹²⁷ The appellant submits that section 18(1)(c) applies to Records 1, 2, 3, 4, 5, 19, 22, 31, 34, 35, and 52.

¹²⁸ Orders P-1190 and MO-2233.

¹²⁹ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

¹³⁰ The appellant submits that section 18(1)(e) applies to Records 1, 2, 3, 4, 5, 19, 21, 22, 27, 31, 32, 33, 34, 35, and 52.

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.¹³¹

Section 18(1)(e) applies to financial, commercial, labour, international or similar negotiations, and not to the development of policy with a view to introducing new legislation.¹³²

The terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.¹³³

This office has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme".¹³⁴

The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations but rather simply reflects mandatory steps to follow.¹³⁵

Does the record contain positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario? Please explain.

Section 18(1)(g): proposed plans, policies or projects¹³⁶

In order for section 18(1)(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and
2. disclosure of the record could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.¹³⁷

¹³¹ Order PO-2064.

¹³² Orders PO-2064 and PO-2536.

¹³³ Orders PO-2034 and PO-2598.

¹³⁴ Orders P-348 and PO-2536.

¹³⁵ Order PO-2034.

¹³⁶ The appellant submits that section 18(1)(g) applies to Records 3, 19, 21, 27, 31, 34 and 52.

The term "pending policy decision" refers to a situation where a policy decision has been reached, but has not yet been announced.¹³⁸

Does the record contain information including proposed plans, policies or projects of an institution? Could disclosure of the record reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person? Please explain.

THREAT TO SAFETY OR HEALTH

Issue J: Does the discretionary exemption at section 20 apply to Records 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21, 27, 31 and 34?

Section 20 states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹³⁹

An individual's subjective fear, while relevant, may not be enough to justify the exemption.¹⁴⁰

The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.¹⁴¹

Could disclosure of the record reasonably be expected to seriously threaten the safety or health of an individual? What is the connection between the records and the threat to safety or health? Please explain.

¹³⁷ Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).

¹³⁸ Order P-726.

¹³⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁴⁰ Order PO-2003.

¹⁴¹ Order PO-1817-R.

Which portion or portions of the record are of concern?

Which individual or individuals could be subject to the threat?

SEVERANCES:

Section 10(2) of the *Act* obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The institution is asked to consider whether there is any undisclosed information which should be disclosed pursuant to section 10(2) and to make representations on that subject.

Please note that pursuant to sections 10(2), 54(1) and 54(3) of the *Act*, the decision maker may order the disclosure of any portions of records which are not found to be subject to an exemption.

DOCUMENTATION IN SUPPORT OF REPRESENTATIONS:

In order to assist the decision maker in this appeal, the parties are requested to submit with their representations any **background materials, documentation, policies, statutory provisions, by-laws, or case authorities**, which support their representations.

TESTS:

The tests mentioned in the Notice of Inquiry are intended to assist the parties to make their representations. Please note that where the IPC has not yet articulated a test, no test is included.

REFERENCES TO PAST ORDERS:

References to past orders in this notice of inquiry do not reflect any decision by the adjudicator of any active issue in this appeal, including the interpretation of sections of the *Act* that may be at issue. Order references are provided to assist you in making representations on the issues in this appeal. These past orders reflect determinations based on the facts that were before the adjudicator.

APPENDIX A

**STATUTORY PROVISIONS REFERRED TO
IN THE NOTICE OF INQUIRY**

21. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

(b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

(c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

(e) for a research purpose if,

(i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

(ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

(b) discloses financial or other details of a contract for personal services between an individual and an institution;

(c) discloses details of a licence or permit or a similar discretionary financial benefit conferred on an individual by an institution or a head under circumstances where,

(i) the individual represents 1 per cent or more of all persons and organizations in Ontario receiving a similar benefit, and

(ii) the value of the benefit to the individual represents 1 per cent or more of the total value of similar benefits provided to other persons and organizations in Ontario; or

(d) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons

(5) A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.