



**Information and Privacy  
Commissioner/Ontario**  
**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER P-1509**

**Appeal P-9700082**

**Ministry of Municipal Affairs and Housing**



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## **NATURE OF THE APPEAL:**

The Ministry of Municipal Affairs and Housing (the Ministry) received 38 detailed requests for information under the Freedom of Information and Protection of Privacy Act (the Act). The requester sought access to records relating to the development of the former Goodyear Tire site and the on-going operations of a co-operative housing venture (the Co-operative) which was built on the site. The appellant also sought any information relating to her or her spouse personally.

The Ministry informed the requester that there were no records which responded to 15 of the requests. With respect to the remaining requests, in a decision letter dated January 10, 1997, the Ministry granted the appellant full or partial access to a number of records.

In its decision letter, the Ministry also informed the requester that the interests of seven third parties (the affected parties) could be affected by disclosure of a number of other responsive records. The Ministry stated its intention to notify the affected parties pursuant to section 28 of the Act and request representations with respect to the release of the information contained in the responsive records. The affected parties are school boards, the Co-operative, the developer of the project and a number of consultants who completed reports on the development of the site.

The Ministry received responses from six of the seven affected parties. With the exception of one document in each case, the affected parties objected to the release of the information at issue.

The Ministry issued a second decision letter. It released the document for which third party consent had been obtained and denied access to the remaining records based on sections 17(1)(a), (b) and (c) of the Act (third party information). The requester (now the appellant) appealed this decision.

During the course of mediation, the Ministry agreed to release one additional document. In addition, the Ministry raised the possible application of section 21 to some of the information contained in the records. The appellant agreed that she would no longer be pursuing access to three of the documents contained in the records. The appellant also raised the application of section 23 - the public interest override.

A Notice of Inquiry was sent to the appellant, the Ministry and the seven affected parties. Representations were received from the appellant and six of the affected parties.

Mediation continued and the Ministry agreed to the release of some additional documents on the consent of the affected parties. A Supplementary Notice of Inquiry was sent to the affected parties identifying the documents and seeking their permission to disclose them to the appellant. Representations were received from the Ministry and six of the seven affected parties. All of the affected parties repeated their earlier objections to the disclosure of the records.

## **RECORDS:**

The 21 records remaining at issue are responsive to the appellant's requests bearing the Ministry request numbers 960119, 960123, 960126, 960141, 960142, 960144, 960146, 960148, 960150 and 960153. They consist of budget information, memoranda, letters, agreements and reports.

The records are described in detail in an Appendix which is being sent to the parties only with this order.

## **PRELIMINARY ISSUES:**

### **RESPONSIVE RECORDS**

One of the affected parties has argued that portions of the records are not responsive to the request.

I have reviewed the appellant's request 960153 with respect to Record 21 and find that the appellant has not restricted her request to information in the report about one co-operative housing development only. Therefore, all of the information contained in the appraisal report is at issue.

I have also reviewed Record 19 with respect to the appellant's request 960148. In my view, only one part of the record addresses the issue of Parkland. Therefore, this is the only part of Record 19 at issue.

In request 960141, the appellant asked for a copy of an amenities agreement dated January 17, 1991 between two of the affected parties. One of the affected parties points out that there is no amenities agreement dated January 17, 1991. The affected party explains that there is an agreement between a developer, a municipality and a bank bearing the date January 17, 1991, however, this agreement is not an amenities agreement. The Ministry has provided a copy of an agreement between the affected party and the developer which is not dated except as to the year, 1991.

I have reviewed both agreements and I find that the agreement dated January 17, 1991 is not an amenities agreement. The undated agreement is an amenities agreement and, therefore, responds to the appellant's request.

## **DISCUSSION:**

### **PERSONAL INFORMATION/INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where 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 Ministry states that some of the information contained in the records contains the personal information of individuals other than the appellants:

The personal information in the records at issue lists the address of individuals along with other personal information such as name, apartment number, rent, and whether on subsidy.

It is submitted that this information falls within the definition of personal information defined in section 2(1)(c) and (d) of the Act.

I agree that the name, address, rent and subsidy information of individuals other than the appellant is the personal information of those individuals. This information is found in Records 6 and 7.

I have also reviewed the records and determined that Record 4 also contains the personal information of a number of identifiable individuals who were expressing their views or opinions at a meeting.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) of the Act reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,

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

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2).

A section 21(3) presumption can be overcome if there is a finding under section 23 of the Act that a compelling public interest exists in the disclosure of the record which clearly outweighs the purpose of the section 21 exemption.

The appellant did not make representations on the issue of disclosure of other individuals' personal information.

I have found that the information describing the apartment address and subsidy information of certain individuals and the views of other individuals constitutes the personal information of those individuals only. Therefore, in the absence of any representations on the part of the appellant with respect to factors which weigh in favour of disclosure of the personal information, I find that the mandatory exemption found in section 21(1) of the Act applies to this personal information.

I have highlighted the personal information in yellow on a copy of the relevant pages of Records 4, 6 and 7 which are being forwarded to the Ministry with a copy of this order.

### **THIRD PARTY INFORMATION**

The affected parties have claimed that sections 17(1)(a), (b) and (c) apply to all of the records. These sections state:

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

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

The Ministry and the affected parties must provide sufficient evidence to establish that the records contain the requisite type of information, were supplied to it in confidence, and that one or more of the harms in sections 17(1)(a), (b) or (c) could reasonably be expected to occur upon disclosure of the records. All three of these elements must be satisfied before the exemption can apply.

#### **Type of Information**

The Ministry and/or the affected parties claim that the records contain technical, commercial and financial information.

I have reviewed the records and I find that all of the records contain commercial and/or financial information.

#### **Supplied in Confidence**

The affected parties must show that the information was **supplied** to the Ministry either implicitly or explicitly **in confidence**.

#### **Supplied**

After the original Notice of Inquiry had been issued, the Ministry withdrew its reliance on section 17 for a number of records which it created. The affected parties were notified of this decision in a Supplementary Notice of Inquiry.

In their representations, a number of the affected parties refer to previous orders which have established that information contained in a record would reveal information “supplied” by a third party, within the meaning of section 17(1), if its disclosure would permit someone to draw accurate inferences with respect to information which had actually been supplied by this third party (Orders P-218, P-839 and P-1000).

I find that although Records 5, 7, 8, 10, 13 and 18 are records created by the Ministry, their disclosure would reveal information supplied to the Ministry by the affected parties. I find that the remaining records were supplied directly to the Ministry.

Therefore, I find that all of the information contained in the records was either supplied directly to the Ministry or its disclosure would permit the drawing of accurate inferences with respect to information actually supplied.

### **In Confidence**

In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the issue of confidentiality in the equivalent of section 17(1) found in the Municipal Freedom of Information and Protection of Privacy Act:

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier **at the time the information was provided**. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly. (emphasis added)

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

Apart from their statement that the records were supplied to the Ministry in confidence, the

majority of the affected parties have provided no evidence in support of this assertion. Similarly, the Ministry has not made representations on this issue other than to state that its decision not to release information pursuant to section 17 was proper.

The school boards and the developers who are signatories to the amenities agreements responsive to the appellant's request 960141 state that the agreements were negotiated in private between them. They claim that all meetings dealing with the acceptance or approval of the agreements were held in camera and the agreements are not registered on title. They state that this is a consistent practice with respect to all similar agreements with private developers, especially where each such agreement contains unique terms subject to the results of the individual negotiations between the affected party and individual developers. They also argue that disclosure of a number of other records would reveal information contained in the amenities agreements.

The affected party which produced the appraisal report which is Record 21 raised the issue of copyright in support of its claim that the record was supplied to the Ministry in confidence. It directs me to a list of disclaimers and limitations on use of the report which it states is routinely given to its clients upon submission of a report. One item in the list refers to copyright

In Order M-29, former Commissioner Tom Wright dealt with the issue of copyright and its relationship to a request for access to information under the Act. He stated:

I think that it is important to note that providing **access** to information under the Municipal Freedom of Information and Protection of Privacy Act does not constitute an infringement of copyright. Specifically, sections 27(2)(I) and (j) of the Copyright Act provide that disclosure of information pursuant to the federal Access to Information Act or any like Act of the legislature of a province does not constitute an infringement of copyright.

Sections 27(2)(i) and (j) of the Copyright Act read as follows:

The following acts do not constitute an infringement of copyright:

- (i) the disclosure, pursuant to the Access to Information Act, of a record within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like material;
- (j) the disclosure, pursuant to the Privacy Act, of personal information within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like information;

Thus, even if the information in the report may be subject to copyright, **disclosure** of it pursuant to the Act is not an infringement of copyright. Therefore, I find that the reference to copyright is not sufficient to establish that Record 21 was supplied in confidence.

I have considered the factors set out in Order P-561 in relation to both the representations of the parties and the records themselves. I find that only Records 9-15, 18, 20 and a portion of Record 21 dealing with school board levies were supplied to the Ministry in confidence either explicitly or implicitly.

Because all three elements must be established in order for a record to qualify for exemption under sections 17(1)(a), (b) or (c), I find that Records 1-8, 16, 17, 19 (parkland information only) and the remainder of Record 21 do not qualify for exemption under section 17(1).

I will now consider the issues of harm with respect to the Records 9-15, 18, 20 and the portion of Record 21 dealing with school board levies.

## **Harms**

### **17(1)(a)**

The Ministry and/or the affected parties must demonstrate that disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

All the affected parties who have an interest in Records 9-15, 18, 20 and the school board levies portion of Record 21 state that they are regularly and currently engaged in negotiations with respect to the financial contributions of developers to education facilities. One affected party states that landowners, developers and other parties with an interest in the financial aspects of land development regularly seek disclosure of the individual settlements and agreements. The affected party claims that landowners and developers, in particular, have attempted to utilize previous agreements as precedents to increase their own leverage in negotiations and to limit the scope of the financial compensation, terms and conditions available. The other affected party claims that disclosure of amounts it has agreed to pay in one contract will affect the outcome of future negotiations with other parties.

In my view, the affected parties whose information is contained in Records 9-15, 18, 20 and the portion of Record 21 dealing with school board levies have established that disclosure of the information could reasonably be expected to prejudice significantly their competitive position. Because all three elements have been established, I find that Records 9-15, 18, 20 and the portion of Record 21 dealing with school board levies qualify for exemption under section 17(1)(a).

Although I need not consider Records 1-8, 16, 17, 19 and the remainder of Record 21 with respect to harms, I have carefully reviewed the records and the representations of the affected parties regarding possible harms. I find that they have not established that disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. Therefore, they would not qualify for exemption under section 17(1)(a).

I have also reviewed the records and representations with respect to the possible application of sections 17(1)(b) and (c) and find that these sections do not apply.



## **PUBLIC INTEREST IN DISCLOSURE**

Two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question.

The Act is silent as to who bears the burden of proof in respect of section 23. The burden of proof in law generally is that a person who asserts a position must establish it. However, where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record 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.

The appellant's arguments with respect to the public interest override centre on the fact that public money was involved in the development of the Co-operative. However, a number of the affected parties argue that the appellant's interest in this matter is personal.

In my view, the appellant has not established that there is a compelling public interest in the records for which I have upheld the section 17 exemption. Therefore, the public interest override does not apply.

## **ORDER:**

1. I order the Ministry to disclose Records 1-8, 16, 17, 19 (parkland information only) and 21 with the exception of the information I have found to be personal information in Records 4, 6 and 7 and the school board levy information in Record 21. This information should be disclosed to the appellant by sending her a copy of the records no earlier than **January 30, 1998** and no later than **February 4, 1998**.
2. I uphold the Ministry's decision to withhold the remaining records.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Marianne Miller  
Inquiry Officer

December 31, 1997