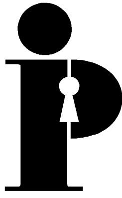

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1631

Appeal P_9800106

Ministry of Natural Resources

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NATURE OF THE APPEAL:

A requester made two identical, simultaneous requests to the Ministry of Natural Resources and the Ministry of the Attorney General under the under the Freedom of Information and Protection of Privacy Act (the Act). The requests were for records relating to the settlement of litigation involving a named individual, the Village of Grand Bend and the province of Ontario, and transactions arising from the settlement. Specifically, the requester sought access to:

> 1. An unedited copy of the "Minutes of Settlement" ... outlining all financial and other obligations of parties to the share-purchase and land-transfer agreement;
>
> 2. A complete breakdown of the costs incurred by the Ontario government, if not specifically set out in the "Minutes of Settlement", from its agreed financial contribution - through [the Ministry of the Attorney General, the Ministry of Natural Resources] or any other provincial ministry - to end the litigation ... through the share-purchase and land transfer agreement(s);
>
> 3. Copies of all minutes, memos and other records, to which the province was a direct or indirect party, related to negotiations and agreements to end the litigation ... and to resolve it with the ... share-purchase and land transfer.

Since the Ministry of the Attorney General considered that the Ministry of Natural Resources (the Ministry) had a greater interest in the records, the Ministry of the Attorney General transferred the request it had received to the Ministry, pursuant to sections 25(2) and (3) of the Act.

The Ministry identified 137 records responsive to the request and, pursuant to section 28 of the Act, notified seven individuals whose interests may be affected (the affected parties) and sought their representations regarding disclosure of the records. Two of the affected parties objected to disclosure, a third took no position and the four others did not respond.

The Ministry then issued a decision to the appellant granting access in full to 46 records, partial access to 15 records and denying access in full to the remaining 76 records. The Ministry included a detailed index of the records with its decision. For those records to which access was denied either in whole or in part, the Ministry claimed one or more of the following exemptions contained in the Act:

- Cabinet records - sections 12(1)
- advice or recommendations - section 13(1)
- third party information - section 17(1)
- solicitor-client privilege - section 19
- invasion of privacy - section 21

The requester (now the appellant) appealed the decision to deny access to records in full or in part, and claimed that there was a compelling public interest in disclosure of the records pursuant to section 23 of the Act.

There are 91 records at issue in this appeal (76 in full and 15 in part). The records consist of e-mail communications, notes from meetings, draft press releases, briefing notes, minutes of settlement, a share purchase agreement and numerous other records relating to the settlement and related transactions.

This office sent a Notice of Inquiry to the Ministry, the appellant and the affected parties. Representations were received from the Ministry, the appellant and two of the affected parties.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

On April 14, 1998, the Commissioner's office provided the Ministry with a Confirmation of Appeal indicating that an appeal from the Ministry's decision had been received. The Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry had 35 days from the date of the confirmation, until May 19, 1998, to raise any new discretionary exemptions not originally claimed in its decision letter. The Ministry did not raise any additional exemptions during this 35-day period.

The policy referred to in the Confirmation of Appeal was initially brought to the attention of the Ministry in the form of a publication entitled "IPC Practices: Raising Discretionary Exemptions During an Appeal" which was sent by the Commissioner's office to all provincial and municipal institutions in January of 1993.

In the Ministry's representations, dated July 13, 1998, it indicated for the first time that it was claiming the section 19 exemption for Records 1, 2, 6, 7, 8, 11, 12, 16, 32, 33 (e-mail communications) and 141 (index of settlement documents). The Ministry, however, has not provided me with any explanation as to the reasons why it did not claim the application of section 19 to these records before the expiration of the 35-day period or why I should consider the application of this exemption to these records at this late stage of the appeal.

Previous orders issued by the Commissioner's office have held that the Commissioner and her delegates have the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject to a consideration of the particular circumstances of each case.

The objective of the 35-day policy is to provide government institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the parties in a timely adjudication of the issues in the appeal are prejudiced. This approach to the application of the policy was upheld by the Divisional Court in the case of Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg (21 December 1995), Toronto Doc. 220/89.

In this appeal, the Ministry initially claimed the exemption in question, section 19, but only for other records. The exemptions claimed for each record to which access was denied were indicated on the index the Ministry provided to the appellant and, subsequently, to this office. Section 19 was not indicated on this index for the above-noted records. The Ministry now seeks to extend the application of this exemption to include these records.

In adjudicating the issue of whether to allow the Ministry to claim this discretionary exemption at this time, I must weigh the public interest of maintaining the integrity of the appeals process and the appellant's (and other parties') interests in a timely adjudication, against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the parties arising from the outcome of my ruling. In the absence of any evidence from the Ministry as to why it was unable to raise the additional exemption claims in a timely manner, and in light of the prejudice which would accrue to the appellant (and other parties) in delaying the adjudication of this appeal through the seeking of additional representations, I conclude that this is not an appropriate case in which to allow the Ministry to extend its claim to the section 19 exemption beyond those records for which it had originally been applied.

In my view, the Ministry had ample time to review the records and consult with counsel to confirm the discretionary exemptions on which it wished to rely as the appeal proceeded through the mediation stage of the process. I am not, therefore, prepared to consider the application of the section 19 discretionary exemption to the above-noted additional records.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

This exemption is found in section 13(1) of the Act, which states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It is subject to the exceptions listed in section 13(2).

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Order P-363, upheld on judicial review in Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner), Toronto Doc. 721/92 (Ont. Div. Ct.).] Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the Act (Order P-233).

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

The Ministry claims that the following records, either in whole or in part, qualify for exemption under section 13(1): Records 1-2, 6-8, 11-12 (12 is an exact duplicate of 11), 14-17, 32-34, 36-37, 104, 117, 131-132, 136 and 138. Because I will be dealing with Records 15 and 17 under the heading "Invasion of Privacy" and Records 37, 132, 136 and 138 under the heading "Solicitor-Client Privilege", I will not consider them here.

The Ministry submits that the records for which this exemption has been claimed were used for discussions with senior Ministry officials in order to obtain directions relating to the settlement of the litigation. The Ministry further argues that by reviewing those records which do not explicitly contain advice, it is possible to adduce or infer the advice given. The Ministry does not further elaborate on this point nor has it provided specific representations on the application of section 13(1) to each of the records for which it is claimed.

I have reviewed the records in detail and I find that the records or portions of records described later in this paragraph would reveal advice and/or recommendations of a public servant which may be accepted or rejected by its recipient. In each case the advice or recommendations being given relate to proposed options and courses of action, along with the "pros" and "cons" of each in many cases, that could be taken by the Ministry with respect to its position in the settlement negotiations. Therefore, these records qualify for exemption under section 13(1) of the Act. I also find that none of the exceptions listed under section 13(2) apply in the circumstances. These records are: Records 36 and 131 in their entirety, the severed portions of Records 11 and 12 (with the exception of the last page of each of these two records), 32, 33, and 117, the information severed under the heading "Recommendations" on pages 7 and 8 of Record 6, the information severed after the heading "Options Considered" starting on page 3 of Record 7, the information severed after the heading "Options Considered" on pages 3 to 7 of Record 8, the information severed under the heading "Options Considered" on pages 9 to 13 of Record 8, and the information severed from the sixth, seventh, eighth and ninth pages of Record 16 (starting under the heading "Proposal").

With respect to the remaining records or portions, I find that section 13(1) does not apply for the following reasons. Records 1 and 104 and the remaining portions of Records 6, 7, 8, 11 and 12, and the information severed from Record 14, simply list factual information about, or the results of, the negotiation. They contain no advice nor would they reveal advice or recommendations. Record 2 is an internal e-mail that attaches a document identical to the eleventh page of Record 16. Neither record contains or would reveal advice or recommendations. The information severed from the third page of Record 16 merely reports the progress of the negotiations to date (factual information) and Record 34 is a two-line letter from outside counsel to the Ministry and, therefore, is not a communication from a public servant or other person described in section 13(1). Further, this letter neither contains nor reveals advice or recommendations.

Because no further exemptions have been claimed for Records 2 and 34, and no mandatory exemptions apply, they should be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order P-1342]

The Ministry relies on the first part of Branch 1, the common law solicitor-client communication privilege. The Ministry has also provided its representations on this issue to certain classes of records. I will follow this format.

The appellant's representations focus on specific records, which I will address in relation to those records.

Records 9, 10 and 122

The Ministry submits that Records 9, 10 and 122 are minutes of a meeting involving Ministry staff and counsel, and Management Board Secretariat staff and counsel, for the purposes of obtaining legal advice relating to the question of whether the matter in question should be settled.

Records 9, 10 and 122 are clearly communications between the Ministry and its counsel and clearly relate directly to the seeking and giving of legal advice. I am also satisfied in the circumstances that these communications were made in confidence. On this basis, I find that these records qualify for solicitor-client communication privilege under section 19 of the Act and are therefore exempt.

Records 125, 130, 132, 133, 138, 140

The Ministry submits that these records are notes and briefing material used to communicate advice and obtain instructions relating to the settlement of the litigation to senior management of the Ministry. The Ministry argues that they form part of the decision making process relating to instructions to Ministry's counsel and that, although some of the communications to counsel occurred through intermediaries, this does not impair the solicitor-client privilege.

Records 125, 130, 132, 133 and 138 are all drafts of documents relating to the settlement negotiations which were forwarded by Ministry staff to Ministry counsel seeking advice in regards to their content. These represent confidential communications between solicitor and client made for the purpose of seeking legal advice. As such, they qualify for solicitor-client communication privilege under section 19 and are exempt from disclosure.

Record 140 is not a direct communication between a solicitor and client. Rather, it is a communication from one Ministry official to another containing instructions to seek advice from counsel on a particular issue. However, I am satisfied that in the circumstances this communication was made confidentially for the purpose of obtaining legal advice from counsel and therefore qualifies for exemption under the solicitor-client communication privilege in section 19 of the Act [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618 (S.C.C.)].

Records 37, 38, 97, 98, 100, 110, 111, 112, 114, 116, 118, 120, 121, 124, 126, 135, 136 and 139

The Ministry submits that these records are communications between Ministry staff and Ministry counsel relating to the settlement of the litigation. The Ministry further submits that these records "contain instructions to counsel and advice and information supplied by counsel and the client Ministry upon which the advice is based."

Records 37, 116 and 124 are communications from the Ministry to its counsel and Records 38, 97, 110, 111, 114, 118, 120 and 126 are communications from counsel to the Ministry. All of these documents contain information regarding the continuing settlement negotiations and relate to such things as a review of draft documentation and reports on the proceedings of the negotiations. These records are confidential communications, all of which relate to the seeking, formulating or giving of legal advice in relation to the settlement discussions and, therefore, qualify for exemption under the solicitor-client communication privilege in section 19.

Record 112 is a letter from the Ministry to the Director of the Crown Law Office of the Ministry of the Attorney General. Although this is not a direct communication between the client and its legal advisor, I am satisfied that in the circumstances it was made confidentially for the purpose of obtaining legal advice. Therefore, Record 112 is subject to solicitor-client communication privilege under section 19.

Record 136 is a briefing package for the Assistant Deputy Minister. This record is not a communication between the client Ministry and its counsel. Nevertheless, I am satisfied that in the circumstances this communication was made confidentially for the purpose of seeking legal advice. Therefore, this record qualifies for exemption under the solicitor-client communication privilege in section 19.

Records 98 and 139 are identical and are letters from counsel for the named individual to Ministry counsel concerning the process of settlement negotiations. These records do not constitute communications between a solicitor and client; rather, in effect, they are communications between opposing parties and, as such, they lack the requisite element of confidentiality for solicitor-client communication privilege to apply (Order P-1551). In the circumstances, these records do not qualify for exemption under the solicitor-client communication privilege in section 19

Record 100 (Record 135 is a duplicate) is the retainer agreement between the Ministry and its counsel. This is a confidential communication made between a solicitor and its client for the purpose of retaining the solicitor and as such is subject to solicitor-client privilege [R.D. Manes and M. Silver, Solicitor-Client Privilege in Canadian Law (Markham, Ont.: Butterworths, 1993), p. 47; Stevens v. Canada (Prime Minister) (1998), 161 D.L.R. (4th) 85 at 100 (Fed. C.A.)]. In addition, disclosure of Record 121 would reveal specific terms of the retainer agreement, and therefore is also privileged. Accordingly, Records 100, 121 and 135 are exempt under section 19 of the Act.

Records 39, 56-66, 73-77, 80, 101, 104, 106, 109, 119, 123, 127-129 and 139

The Ministry submits that these records relate to the settlement of the litigation, and implementation of the settlement, and formed part of Ministry counsel's working papers. I have already found that Record 139 does not qualify for exemption under the solicitor-client communication privilege in section 19 and, therefore, I will not consider it further under this group of records.

The appellant submits that Records 39, 76 and 77, which are the executed minutes of settlement and signed releases, are not confidential communications between solicitor and client since they

would have been made available to the other parties in the litigation. The appellant further argues that such documents are not created for the purpose of seeking, formulating or giving legal advice. I agree with the appellant's submissions and find that these records do not qualify for exemption under the solicitor-client communication privilege in section 19 of the Act.

The appellant also submits that Records 56-66, 73, 75, 108 and 109 involve parties outside the solicitor-client relationship and, therefore, do not qualify for exemption under section 19 of the Act. These records consist of cheques, receipts and directions in respect of payments made in accordance with the settlement agreement, the executed minutes of settlement and proposed changes to draft minutes of settlement. Again, I accept the appellant's arguments. None of these records consists of confidential communications between a solicitor and client and, in any event, do not directly relate to the seeking, formulating or giving of legal advice. Similarly, Records 74, 106, 119, 123, 128 and 129, being communications between parties to the settlement discussions, are not confidential communications directly related to the seeking, formulating or giving of legal advice. Therefore, none of these records qualifies for exemption under the solicitor-client communication privilege in section 19 of the Act.

Record 127 is an invoice for services rendered by an alternate dispute resolution group and is addressed to Ministry counsel, Record 80 is a resolution of the sole shareholder of a numbered corporation, Record 101 is a draft copy of a share purchase agreement among the parties to the settlement negotiations, with revisions marked by counsel for the named individual, and Record 104 is a list of factual information regarding the negotiation process. None of these records contain any information directly related to the seeking, formulating, or giving of legal advice, and some do not consist of confidential communications between a solicitor and client. Therefore, I find that these records do not qualify for exemption pursuant to the solicitor-client communication privilege in section 19 of the Act.

I also note that the Ministry has argued that many of the documents for which I have found that the solicitor-client communication privilege in section 19 does not apply are the working papers of its counsel and/or contain information upon which counsel's legal advice or opinions were based. The Ministry, however, does not expand on this argument or describe in any detail how this information relates to the legal advice provided. Consequently, in the absence of such information, I am unable to conclude that these documents are privileged by virtue of being counsel's working papers.

Although the Ministry has not raised the issue of whether any of the records may be subject to litigation privilege, I believe it is important to discuss the issue of whether any litigation privilege which may have been enjoyed by the Crown has been lost through the settlement of the negotiations which terminated the litigation. The scope of this privilege was described by Inquiry Officer Holly Big Canoe in Order P_1551 as follows:

> Litigation privilege, often referred to as the "work product" or "lawyer's brief" rule, protects documents which are not direct solicitor_client communications, but which are "derivative" of that relationship. This includes communications between the solicitor or the client and third parties, documents generated internally by the solicitor or the client, or documents compiled for a lawyer's brief, where the dominant purpose for which they were created or obtained is

existing or reasonably contemplated litigation. Litigation privilege applies only if the document was made or obtained with an intention that it be confidential in the course of the litigation.

The rationale for litigation privilege is to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation [Hickman v. Taylor 329 U.S. 495 at 508_511 (1947); Strass v. Goldsack (1975), 58 D.L.R. (3d) 397 at 424_425 (Alta. C.A.); General Accident Assurance Co. v. Chrusz (1997), 34 O.R. (3d) 354 at 370 (Gen. Div.), leave to appeal granted (1997), 35 O.R. (3d) 727 (Gen. Div.)]. As the Ontario Court (General Division) Divisional Court explained in Ottawa_Carleton (Regional Municipality) v. Consumers' Gas Co. (1990), 74 D.L.R. (4th) 742 at 748:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter_productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research investigations and thought processes in the trial brief of opposing counsel.

Under the litigation privilege or work product rule, a distinction has been drawn between "ordinary" work product (documents gathered from third parties, the document itself or factual information) and "opinion" work product (counsel's mental impressions, conclusions, opinions or legal theories), with the latter enjoying a heightened protection [R.J. Sharpe, "Claiming Privilege in the Discovery Process", Law Society of Upper Canada Special Lectures, 1984 (Richard DeBoo Publishers, 1984), pp. 175_177; In re Sealed Case, 676 F.2d 793 at 809_810 (U.S.C.A., Dist. Col., 1982); C.A.); Mancao v. Casino (1977), 17 O.R. (2d) 458 (H.C.)].

Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [Boulianne v. Flynn , [1970] 3 O.R. 84 at 90 (Co. Ct.); Meaney v. Busby (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [Carleton Condominium Corp. v. Shenkman Corp. (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while

> the purpose for its recognition continues to be served. Unlike solicitor_client communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor_client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter be harmed through disclosure of the specific records for which section 19 has been claimed.

Clearly, litigation did exist at one point in time but this was resolved when the matter was settled through negotiations.

Many of the records for which the section 19 exemption was claimed likely would have been privileged during the existence of the litigation, because they likely would have formed part of the "lawyer's brief" for the litigation, had it not been resolved. I will not undertake a detailed analysis of which records would have been privileged, since the termination of litigation renders this issue moot, with one exception: where records constitute "opinion work product" (counsel's personal mental impressions, conclusions, opinions or legal theories), they may enjoy a heightened protection which survives the termination of the litigation. Among the records found not to be exempt under section 19, I found no information which would fall within this category. Accordingly, none of the records found not to be exempt under the solicitor-client communication privilege would be exempt by virtue of litigation privilege.

To summarize, I find that Records 9, 10, 37, 38, 97, 110, 111, 114, 116, 118, 120, 122, 124, 125, 126, 130, 132, 133, 138 and 140 qualify for exemption under section 19 of the Act and that the remaining records for which this exemption has been claimed do not qualify.

Because no further exemptions have been claimed for Record 80 and no mandatory exemptions apply, it should be disclosed to the appellant.

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 information relating to financial transactions in which the individual has been involved [paragraph (b)], and the individual's name where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The Ministry states that the records relate to the financial settlement of a legal dispute and the sale of lands to the Village of Grand Bend. The Ministry submits that the portions of the records which refer to the named individual in this dispute and the details of the settlement, which amounted to the sale of land by the named individual, is the personal information of the named individual.

The appellant, on the other hand, argues that the lands in dispute were held by the named individual's numbered company. The appellant submits that since the transaction took place between two numbered corporations, none of the information contained in the records qualifies as personal information.

In Order 16 former Commissioner Sidney B. Linden made the following comments with respect to the definition of personal information:

> The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended 'identifiable individual' to include a sole proprietorship, partnership, unincorporated association or corporation, it could and would have used the appropriate language to make this clear. The types of information enumerated under subsection 2(1) of the Act as 'personal information' when read in their entirety, lend further support to my conclusion that the term 'personal information' relates only to natural persons.

However, in Order 113, the former Commissioner expanded upon this position. He stated:

> It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information.

I believe that the principle from Order 113 set out above is applicable here. In this case, until settlement terms had been fulfilled, the named individual owned the lands in question through a numbered company of which he was the sole owner. While technically the transactions involved only the numbered company, the nature and scope of the information connected to the numbered company extends beyond that which could be considered to be solely about a business entity. In my view, this information is, in fact, "about" the identifiable individual within the meaning of the definition of "personal information" contained in section 2(1) of the Act.

Accordingly, in these circumstances, I find that Records 1, 6-8, 14-17, 31, 37-40, 47, 55-77, 81, 85, 89, 94, 98 (139 is a duplicate), 101, 104, 106, 108-109, 113, 115, 123, 128, 134 and 141, and the last page of each of Records 11 and 12, all contain the personal information of the named individual either in whole or in part. The bulk of this information relates to the financial transactions of the negotiated settlement.

The records at issue also contain references to individuals in a professional or official government capacity. Previous decisions of this office have drawn a distinction between information associated with individuals in these capacities, and information associated with individuals in a personal capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (Orders P-257, P-427, P-1412, P-1621).

The following passage from a decision of the Supreme Court of Canada in Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385 at 413, 415, in the context of the federal Privacy Act, captures the essence of the distinction which this office has drawn between an individual's personal, and professional or official government capacity:

> The purpose of these provisions is clearly to exempt [i.e., from the definition of "personal information"] only information attaching to *positions* and not that which relates to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to carry out the tasks assigned to them is "personal information".
>
> ...
>
> The fact that persons are employed in government does not mean that their personal activities should be open to public scrutiny. By limiting the release of information about specific individuals to that which relates to their position, the Act strikes an appropriate balance between the demands of access and privacy. In this way, citizens are ensured access to knowledge about the responsibilities, functions and duties of public officials without unduly compromising their privacy.
>
> [Order P-1621]

In my view, other than the named individual, where the records in this case contain information associated with identifiable individuals, that information relates to them acting in their professional or employment capacities, and is not "about" these individuals for the purposes of the section 2(1) definition of "personal information".

As I have already found that Records 37 and 38 qualify for exemption under section 19 of the Act, it is not necessary for me to consider them here.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits disclosure of this information to any person other than the individual to whom the information relates, unless one of the exceptions listed in the section applies. In the circumstances, the only exception which may apply is section 21(1)(f), which reads:

> 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.

Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, personal information can be disclosed only if it falls under section 21(4) or if the section 23 "public interest override" applies to it.

If none of the presumptions in section 21(3) applies, section 21(2) requires me to consider all relevant circumstances, including the factors specifically listed therein and any unlisted factors, in order to determine whether disclosure would constitute an unjustified invasion of personal privacy under section 21(1)(f).

The Ministry submits that the presumption in section 21(3)(f) applies in the circumstances of this appeal. That section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

Specifically, the Ministry submits that the records contain information relating to the financial activities of the named individual in the implementation of the settlement. The Ministry argues, therefore, that disclosure of this information would result in a presumed unjustified invasion of the personal privacy of the named individual as it would describe his finances, assets and/or financial history.

I have reviewed the records in detail and I find that the following records, or parts thereof, describe the financial activities of the named individual regarding the negotiations and settlement and would result in a presumed unjustified invasion of personal privacy under section 21(3)(f), if disclosed. In addition, in some instances, while there is no direct indication of the named individual's finances, it is possible to determine with a reasonable degree of accuracy such information from the information contained in the records. In Order P-1502, Commissioner Ann Cavoukian determined that a "financial transaction" is a sub-component of "financial activity." As the records present a description and details of the financial transactions regarding the settlement, I find that they describe the financial activities in which the named individual was involved. These records are the withheld portions of Records 15, 17, 47, 58, 85 and 141, the portions of Records 1, 6-8, 11-12, 14, 16 (not including the already exempted material under section 13(1)), 31, 39-40, 56-57, 59, 61, 66-68, 70, 73, 74, 89, 101, 104, 106, 108-109, 113, 115 and 134 which I have highlighted and Records 60, 62, 63, 65, 69, 72, 75, 76, 77, 81, 94, the last five pages of Record 123 and the last 11 pages of Record 128 in their entirety. This personal information is exempt pursuant to section 21(1) of the Act, subject to any finding I may make below under the section 23 "public interest override" analysis.

The records also contain personal information which does not qualify for the presumption at section 21(3)(f). As indicated above, under section 21(2) I must consider all relevant circumstances, including the factors specifically listed therein and any unlisted factors, in order to determine whether disclosure would constitute an unjustified invasion of personal privacy under section 21(1)(f).

The appellant submits that, in the event I find that the records contain personal information, disclosure of the records would not constitute an unjustified invasion of personal privacy as section 21(2)(a) would apply ("disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario to public scrutiny"). The appellant also submits that much of the information about this case has already received public attention and notoriety and is already in the public domain and, therefore, disclosure would not result in an unjustified invasion of personal privacy.

The remaining personal information of the named individual has already been revealed through the records disclosed by the Ministry or its description of the records in the index and the information contained in public accounts of this case, including reported cases in legal publications. I find this to be an unlisted factor which weighs heavily in favour of disclosure. In the absence of submissions on the applicability of any listed factors weighing against disclosure, I find that disclosure of this information could not result in an unjustified invasion of personal privacy and does not qualify for exemption under section 21 of the Act. This information is contained in Records 1, 16, 31, 37-40, 55-59, 61, 64, 66-68, 70-71, 73-74, 85, 89, 98, 101, 104, 106, 108-109, 113, 115, 134, 139 and 141, the first page of Record 123 and the first page of Record 128.

As no other exemptions have been claimed for Record 55 and the non-highlighted portions of Records 1, 31, 40 and 104 and no other mandatory exemptions apply, they should be disclosed to the appellant.

THIRD PARTY INFORMATION

Although the Ministry claimed this exemption for several records, it has not provided any representations on this issue. I have received representations only from one of the affected parties and the appellant on the application of section 17.

Sections 17(1)(a), (b) and (c) 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.

In order for a record to qualify for exemption under section 17(1)(a), (b) or (c), the parties resisting disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **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 (a), (b) or (c) of section 17(1) will occur.

[Orders 36, P-373]

The Court of Appeal for Ontario recently overturned the Divisional Court's decision quashing Order P_373 and restored Order P_373. In that decision the Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meanings. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "**detailed and convincing**" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again, it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]
>
> [Ontario (Workers Compensation Ministry) v. Ontario (Assistant Information and Privacy Commissioner), [1998] O.J. No. 3458 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

The Ministry and/or the affected parties must provide detailed and convincing evidence that each of these elements is present in the records and surrounding circumstances.

Part 1 - Type of information

The affected party submits that the records contain financial information in respect of the negotiations and settlement. The appellant appears to concede that the records may contain financial information. Given the nature of the records and the circumstances of the case, I conclude that the records contain financial information and, therefore, Part 1 of the test has been satisfied.

Part 2 - Supplied in confidence

In order for this part of the section 17(1) test to be met, the information must have been supplied to the Ministry in confidence, either implicitly or explicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

Supplied

The affected party submits that the records relating to it were supplied to the Ministry explicitly in confidence in the spirit of the negotiations and settlement of the litigation. The affected party submits that as part of the process of resolving the law suit, it was critical that all parties be able to state their positions and provide information in an atmosphere of confidence and on the understanding that these confidences would not later be made available to the public.

The appellant does not provide representations on this part of the test.

Records 6-8, 16, 39, 56, 57, 59, 61, 64, 66, 67, 68, 70, 71, 73, 74, 78, 82, 89, 101, 106, 108, 109, 113, 115 and 119 contain information relating to the actual settlement agreement or drafts of that agreement. Records 98 and 139 are two identical letters to Ministry counsel from the affected person's counsel. Record 134 is a joint mediation brief submitted to a mediator by the Ministry and the Village of Grand Bend.

Because the information in an agreement is typically the product of a negotiation process between the institution and the third party, the content of agreements will not qualify as originally having been "supplied" for the purposes of section 17(1) of the Act. A number of previous orders have addressed the question of whether the information contained in an agreement entered into between an institution and an affected party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been "supplied" it must be the same as that originally provided by the affected party. In addition, information contained in a record would "reveal" information "supplied" by the affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution. (See, for example, Orders P-36, P-204 and P-251 and P-1105).

In addition the status of an agreement as either a draft or a final document does not impact on the determination of the "supplied" issue (Orders P-1105 and M-1143).

Based on the information contained in the agreements and draft agreements and the representations of only one of the affected parties, I cannot conclude that the information contained in these records was supplied by the affected parties to the Ministry. The letters from the various counsel which accompany the draft agreements clearly indicate that the attached drafts are revised versions of those previously discussed with the Ministry and these parties. Consequently, in the absence of evidence to the contrary, it is my view that this indicates that the agreements represent various stages of the "give and take" of the negotiation process between the Ministry and the affected parties.

Accordingly, I find that Records 6-8, 16, 39, 56, 57, 59, 61, 64, 66, 67, 68, 70, 71, 73, 74, 78, 82, 89, 101, 106, 108, 109, 113, 115 and 119 were not supplied to the Ministry and, therefore, fail to satisfy Part 2 of the section 17(1) test.

Record 134 is a joint mediation brief submitted to a mediator by the Ministry and the Village of Grand Bend. It is not apparent on the face of this record that it contains or would reveal information supplied to the Ministry by a third party. In fact, most of the information in this record appears to have been supplied by, rather than to, the Ministry. In the absence of specific representations on this point, I cannot conclude that this record satisfies Part 2 of the section 17(1) test.
Record 127 is an invoice for services rendered by an independent Alternative Dispute Resolution group. Record 129 and the first page of Records 123 and 128 are letters to Ministry counsel from counsel for the Village containing factual information about the land in dispute (Records 123 and 128) and about a numbered company (Record 129). Records 98 and 139 are letters to the Ministry and thus clearly were supplied to the Ministry by the affected person's counsel. Since these records have been sent to the Ministry from third parties, I find that they were supplied to the Ministry.

I must next determine whether this information was supplied to the Ministry **in confidence**.

In confidence

In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the issue of confidentiality in section 10(1) of the municipal Act (the equivalent of section 17(1) of the 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]

I have not received representations from the Ministry or any of the affected parties to whom Records 123, 127, 128 and 129 pertain. There is no information on or contained in any of these records to indicate that they were supplied in confidence. In addition, there is nothing to indicate that the records were treated by the Ministry in a manner that indicates a concern for their protection.

Accordingly, I find that the application of the second part of the test has also not been established for these records and, therefore, they are not subject to the protection of section 17(1).

Regarding Records 98 and 139, because this document was copied to other parties to the litigation, there is no reasonable basis to conclude that the requisite element of confidentiality was present. Therefore, these two records also fail to qualify for exemptions under section 17(1).

PUBLIC INTEREST OVERRIDE

As noted earlier, the appellant claims that the "public interest override" in section 23 of the Act applies in this case. This section states:

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

I have found that the Records 9, 10, 37, 38, 97, 100, 110, 112, 111, 114, 116, 118, 120-122, 124, 125, 126, 130, 132, 133, 135, 136, 138 and 140 qualify for exemption under section 19 of the Act. As section 19 is not subject to the "public interest override", section 23 has no application to these records.

With respect to those records I found to be exempt under sections 13 and 21 of the Act, in order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the relevant exemption, either the section 21 personal information or the section 13 advice or recommendations exemption.

Section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. Section 13 is a discretionary exemption which purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making (Order 94). Put another way, the purpose of this exemption is to ensure that "persons employed in the public service are able to advise and make recommendations freely and frankly

and to preserve the head's ability to take actions and make decisions without unfair pressure" (Orders 24, P-1413).

The appellant, a member of the media, states that the litigation that gave rise to the eventual settlement was a matter of public record and keen public interest. The appellant submits that this matter was extensively covered by the media, which reflects the public's interest in the subject matter of the litigation. The appellant further argues that public funds were expended by the province to acquire the lands for public use and, therefore, the public is entitled to the extent of the expenditures. Therefore, the appellant submits that the public interest far outweighs the purpose of the exemption claims in this appeal.

The Ministry submits that the media's interest in disclosure does not constitute a public interest merely because the request is made by a member of the media. The Ministry argues that the record must deal with a subject for which there has been comprehensive media coverage which indicates that it has aroused strong public interest rather than one select portion of the public. Alternatively, the Ministry argues that the record must call into question the integrity of the institution in respect of the public's expectations of the conduct of the institution or deal with questions concerning public health or safety. The Ministry submits that the records do not fall into any of these categories.

With respect to section 13, the Ministry states that disclosure of the records for which this exemption has been applied would reveal the advice provided in respect of the settlement negotiations and, therefore, would defeat the purpose of the exemption. The Ministry submits, therefore, that it has withheld the records consistent with the purpose of the section 13(1) exemption and that there is no compelling interest which outweighs the exemption. Finally, the Ministry submits that any public interest that may exist does not outweigh the ability of the Ministry to negotiate the most favourable terms in a settlement in private and avoid further legal costs in litigation.

With respect to section 21, the Ministry submits that the details of the named individual's financial arrangements constitute one of the "most sensitive types of personal information", and that to order disclosure would defeat the purpose of the section and "one of the basic tenets upon which the Act is based, the protection of privacy."

In Order P-241, former Commissioner Tom Wright commented on the burden of establishing the application of section 23. He stated as follows:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. 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 the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

I agree with these comments and I have conducted an independent review of the records as advocated by former Commissioner Wright.

Having reviewed the records and the representations, I am not convinced that disclosure of the information which I have found to qualify for exemption under sections 13(1) and 21 of the Act is necessary in order to advance the public interest in assessing the impact of this program.

In my view, the media attention this litigation and settlement has received reflects, to a certain degree, a public interest in the matter. However, the appellant has failed to satisfy me that there is a **compelling** public interest in the disclosure of the particular advice and personal information which is at issue in this appeal. Moreover, even if the public interest in disclosure were compelling, in my view, the appellant has not established that this interest is sufficient to outweigh the purpose of either the section 13 discretionary exemption claim or the section 21 mandatory exemption claim.

Accordingly, I find that section 23 does not apply in the circumstances of this appeal. Because of these findings, it is not necessary for me to consider the application of section 12(1) to the records for which this exemption was claimed.

ORDER:

1. I order the Ministry to disclose Records 2, 34, 55, 64, 71, 78, 80, 82, 98, 119, 127 129, 139, the first page of Record 123 and the first page of Records 128 in their entirety and Records 1, 6-8, 11, 12, 16, 31, 39, 40, 56, 57, 59, 61, 66, 67, 68, 70, 73, 74, 89, 101, 104, 106, 108, 109, 113, 115 and 134 in accordance with the highlighted copies of these pages which I have attached to the Ministry's copy of this order (the highlighted portions are **not** to be disclosed) to the appellant by **January 20, 1999**, but not before **January 15, 1999**.

2. I uphold the Ministry's decision not to disclose the remaining records or portions of records.

3. In order to verify compliance with the terms 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: December 14, 1998
David Goodis
Senior Adjudicator