



Information and Privacy
Commissioner/Ontario

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

FINAL ORDER PO-1804-F

Appeal PA-990362-1

Ontario Realty Corporation



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NATURE OF THE APPEAL:

This is my final order disposing of all issues in Appeal PA-990362-1 not addressed in Interim Order PO-1786-I.

The appellant, a journalist, submitted a request to Ontario Realty Corporation (ORC) under the Freedom of Information and Protection of Privacy Act (the Act) for information pertaining to all properties sold by the ORC since 1995.

The responsive records consist of five lists dated from May 5, 1995 to June 28, 1999 which identify the properties sold by ORC. The list was expanded during mediation to cover properties sold up to March 31, 2000. The lists include the name of the purchaser (individual or business), the legal description of the property, the closing date, a project number assigned by the ORC, and the purchase price. However, the only information sought by the appellant from these records is the name of the purchaser, the location (legal description) of the property and the purchase price.

The ORC eventually issued a decision regarding business purchasers, providing access to some information and denying access to other information pursuant to section 17(1) of the Act (third party commercial information). This decision was appealed. I notified all business purchasers for which I was able to obtain mailing addresses. One consented to disclosure. Following an inquiry, I issued Interim Order PO-1786-I, where I found that none of the withheld information relating to business purchasers qualified for exemption, and I ordered the ORC to disclose this information to the appellant. This disclosure has been made.

As far as the information relating to individual purchasers is concerned, the ORC denied access to all of it pursuant to section 21(1) of the Act (invasion of privacy). I notified 145 individual purchasers for whom I had contact information, five of whom provided written consent to disclose their information. Again, following an inquiry, I found that the information relating to individual purchasers was their personal information, and that disclosure would constitute a presumed unjustified invasion of privacy. In Interim Order PO-1786-I, I ordered the ORC to disclose information relating to the individual purchasers who provided written consent, and accepted the ORC's position that the information relating to the rest of the individual purchasers satisfied the requirements for exemption under section 21(1) of the Act.

During the course of processing this appeal, the appellant claimed that there was a compelling public interest in disclosure of the records, thereby raising the possible application of the public interest override in section 23 of the Act. I deferred my decision on this issue in order to provide a Supplementary Notice of Inquiry to the ORC, the appellant, and the 115 individual purchasers who did not consent to disclosure.

I received written representations from the appellant and nine individual purchasers. The ORC did not respond to the Supplementary Notice. Five individual purchasers consented to disclosure of their information. Four Notices were returned to this office as undeliverable.

I find that the personal information of the individual purchasers who consented to disclosure falls within the scope of the exception provided by section 21(1)(a) of the Act, and should be disclosed to the appellant on that basis.

DISCUSSION:

COMPELLING PUBLIC INTEREST

Section 23 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.

General

In Order P-241, former Commissioner Tom Wright made the following comments on the burden of establishing the application of section 23, which I agree with:

The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner [Sidney B.] 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.

In Order P-1398 (upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner) (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A.No.134 (note), former Inquiry Officer John Higgins made the following statements concerning the potential application of section 23:

An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption. If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply.

Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has

been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Is there a public interest in disclosure, and if so, is it “compelling”?

The appellant submits:

The issue of the manner of the disposition of public property by Ontario Realty Corporation (“ORC”) is a matter of compelling public interest. There has been widespread media coverage of the improprieties the ORC alleges in the disposition of the real estate. In consequence the Ontario Realty Corporation has filed a Statement of Claim in Ontario Superior Court to recapture money that the ORC claims was siphoned and in addition, the ORC seeks to recover land that was sold in questionable deals. Provided with this Representation is a newspaper clipping file, the contents of which are detailed in Schedule “A”. However, by way of example, the newspaper clipping from the *Toronto Globe and Mail*, Saturday, May 20, 2000 titled ORC Documents Allege Fraud and subtitled Court Filing by Ontario Realty Corporation Claims Three Employees took part in scheme is a report by media concerning the filing of the claim in the Ontario Superior Court by the ORC. The report states that “the documents also indicate the ORC and the auditors investigating the agency files expect more revelations of apparent wrongdoing. The ORC is not aware yet of all of the transactions and all of the parties involved in the fraud but its investigation continues”. The report also indicates:

- (1) “Many documents are missing from ORC files for the fraudulent transactions”.
- (2) Auditors and the ORC have gone to court twice in the past month to get orders allowing them to seize records held by the defendants in that particular action.
- (3) The Ontario Provincial Police have been called in to investigate deals signed by the ORC after reports in the *Globe and Mail* about questionable practices of the agency.
- (4) The story quotes Dominic Agostino, a liberal MPP, that “in this document, for the first time, the ORC and through it, the government have admitted that taxpayers have been ripped off” and that “these people, under their system, could work independently and make decisions on their own with scrutiny. There was clearly a management problem, a serious management problem”.

From the number of media reports, which is by no means an exhaustive list in Schedule “A”, there is clearly a matter of compelling public interest and a matter in which according to affidavits filed by the ORC in support of its court application that the “ORC is not aware yet of all of the transactions and all of the parties involved in the fraud but its investigation continues”.

As reported in the Report by the Globe and Mail, Saturday, May 20, 2000, the ORC is an agency under the supervision of the Chairman of the Management Board, which manages 25,000 hectares of real estate owned by the government, including 1,000 buildings. The real estate has a value of more than five billion dollars.

The affected persons who responded to the Supplementary Notice (other than those who consented to disclosure) submit that they were involved in private transactions with the ORC and that there is no compelling public interest in disclosure of information associated with these transactions.

There can be no dispute that there is a public interest in ensuring that the sale of land by the ORC on behalf of the citizens of the province is conducted in a legal and defensible manner. In my view, the disposal of public property which, as the appellant points out, is valued in the billions of dollars, is inherently a matter of public interest. The land registration system in Ontario, and indeed in all Canadian jurisdictions, recognizes the need for public accountability in the sale of all land through the statutory registration requirements administered by the government; this need for accountability, in the public interest, can only be magnified in the case of public property.

Turning now to whether this clear public interest is “compelling”, former Adjudicator Holly Big Canoe interpreted the phrase “compelling public interest” in Order P-984, as follows:

“Compelling” is defined as “rousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, 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.

Former Inquiry Officer Higgins applied this definition in Order P-1398, where he stated:

Order P-984 relies on the Oxford dictionary's definition of “compelling” to mean “rousing strong interest or attention”. I agree that this is an appropriate definition for this word in the context of section 23.

In upholding Inquiry Officer Higgins' decision in Order P-1398, the Court of Appeal in Ontario (Ministry of Finance), supra, found:

... in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term “compelling” in the phrase “compelling public interest”, the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at p. 1].

For the purposes of this appeal, I too adopt the dictionary approach to the definition of “compelling” originally articulated by former Adjudicator Big Canoe in Order P-984.

As the appellant points out, the sale of property by the ORC has been the subject of considerable public debate over the course of the past several months. Issues relating to the sale of property and the operation of the ORC have been prominently featured in the media, particularly the print media. As recently as this past week, commentary on various aspects of ORC land dealings appeared in the Globe and Mail newspaper. The activities of the ORC also predominated debate in the Legislature throughout much of the 2000 spring session. Between April 3 and May 17, 2000, questions concerning the ORC were directed to the Chair of Management Board of Cabinet or the Premier by both opposition parties on 20 out of 26 sitting days. These questions most often came from the Leaders of both the Official Opposition and the New Democratic Party as lead questions, and on many days more than one question dealt with ORC-related issues. In response to allegations of irregularity in the sale of certain properties, the Chair of Management Board announced earlier this spring that the ORC had initiated a forensic audit into all property sales over the course of the past 15 years. In addition, as noted by the appellant, criminal investigations are underway by the Ontario Provincial Police concerning allegations of improper conduct on the part of former employees of the ORC and others involved in the sale and clean up of certain properties.

In my view, the current and ongoing public debate involving land dealings by the ORC, together with the priority attention given by the ORC, the provincial government and law enforcement authorities in attempting to get to the bottom of allegations of irregularity in the conduct of business at the ORC, clearly indicate a “strong interest or attention” in issues involving the sale of land and property by this public agency over the past several years, including the time-frame covered by the appellant’s request. The names, locations and purchase prices paid by various individual purchasers, which comprise the records remaining at issue in this appeal, are directly related to this “strong interest”, and the disclosure of their content would serve the purpose of informing the citizens of Ontario about the activities of the ORC and the provincial government, and add to the information available for use by members of the public in expressing public opinion and making political choices. For these reasons, I find that there is a compelling public interest in disclosure of the personal information of the individual purchasers contained in the records.

Does this compelling public interest clearly outweigh the purpose of the section 21 exemption?

If a compelling public interest has been established, it must then be balanced against the purpose of the particular exemption, in this case section 21. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information (Order P-1398).

The protection of personal privacy is one of the fundamental purposes of the Act. Section 1(b) of the Act states:

The purposes of this Act are,

to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The importance of this purpose is reflected in the fact that personal information attracts the protection of one of only three mandatory exemptions in the Act, namely section 21. Clearly, there is a strong right to privacy embodied in section 21. However, this right is not absolute. Personal information can be disclosed if any of the six exceptions listed in section 21(1) are present. In Interim Order PO-1786-I, I found that the section 21(1)(a) exception (consent) applied to the personal information of certain individual purchasers, and ordered disclosure of this information on that basis. Section 21(1)(f) also introduces an exception covering circumstances where disclosure would not constitute an unjustified invasion of privacy, and sections 21(2), (3) and (4) outline a detailed statutory framework for making a determination of this nature. Finally, the fact that section 21 is included with the scope of section 23, indicates a clear recognition on the part of the Legislature that the strong public policy purpose of protecting personal privacy must at times yield to more compelling public interests that outweigh this purpose.

The appellant submits:

The information that is being sought is information in which any purchaser would have no reasonable expectation of privacy. All information is a matter of public record in the land registry system. Under the terms of Interim Order PO-1786-I, the Information and Privacy Commissioner ordered the disclosure of all information in respect of purchasers where the purchaser was a corporation.

...

All of the information requested is already in the public domain in the form of records in the Land Registry Office. Because of the number of transactions and the difficulty in identifying the transactions in the Land Registry Office, it is impractical to identify the transaction without disclosure of the information from the ORC.

...

It is respectfully submitted that in broad terms the purpose of Section 21 is to protect the individuals from the disclosure of private information which was provided in confidence. None of this information requested has been provided in confidence. In Interim Order PO-1786-I in this matter, the finding was that the information regarding the business purchasers did not satisfy the supply aspect nor was the information provided in confidence. The finding is in respect of the business purchasers. This should also apply in respect of individual purchasers. Such information was provided on the same basis as the business purchasers.

...

It is respectfully submitted that the compelling public interest of the conduct of the disposition of public property outweighed the disclosure of the list of personal purchasers

together with the identification of the transaction and the purchase price where all such information is already in the public domain in the form of a deed registered in the Land Registry Office and accordingly not submitted in confidence by the purchaser to the ORC.

...

It is respectfully submitted the purpose of the exemption is the very important duty to safeguard the privacy of individuals who provide information to the government relating to their personal lives. In this particular instance, the denial of access is not consistent as:

- (a) the information is already a matter of public record and it would reasonably be expected by any individual purchaser to be a matter of public record. All deeds are registered and indeed it would be an important feature in any real estate transaction that the purchaser obtain a registered deed which is available for public inspection at any land registry office;
- (b) the information that may be revealed relates to important issues regarding the ORC's safeguarding of the public interest that assets of the public be disposed of in a manner that is consistent with obtaining a fair price for the transactions and that the transactions are not subject to corruption by employees of the public agency or subject to difficulties of management of a public agency in safeguarding the public interest.

The affected parties resisting disclosure submit that there is no compelling public interest in the disclosure of the records, which involve private transactions, that outweighs the purpose of the mandatory exemption under section 21 of the Act.

As noted earlier, the ORC did not provide representations on this issue.

I find the appellant's arguments to be persuasive. Although the records contain financial information about the individual purchasers, this same financial information also appears in records which are accessible to the public. As I found in Interim Order PO-1786-I in the context of business purchasers:

... Based on the evidence before me in this appeal, I accept the appellant's argument that the purchase price is publicly available, either at the Land Registry Office or from the Ministry of Finance (which now includes the former Ministry of Revenue). ...

The public nature of the information that remains at issue clearly lessens any expectation of confidentiality on the part of individual purchasers. In my view, it also renders the type of information less personally sensitive than many other categories of personal information that are not by definition available to others as part of a public disclosure regime.

My task is to balance the compelling public interest in disclosure of the information concerning individual purchasers against the purpose of the personal information exemption, taking into account the particular circumstances of this appeal. In so doing, I must balance a demonstrated, current and compelling public interest in disclosure against a privacy interest that is at the lower end of relative seriousness and sensitivity. In these circumstances, I find that the balance favours disclosure. Transactions involving Ontario's public land holdings have been called into question. The controversy surrounding this issue has attracted the public's attention and has resulted in the government's decision to initiate both a forensic audit of past sales and an Ontario Provincial Police investigation into the conduct of parties involved in certain transactions. In my view, this is one circumstance where the important public policy basis for the personal information exemption claim must yield to a stronger and more compelling public interest in disclosure of records which relate directly to the integrity of the operation of the ORC.

For these reasons, I find that the requirements of section 23 of the Act are present, and the personal information of the remaining individual purchasers contained in the records should be disclosed.

FINAL ORDER:

1. I order the ORC to disclose the withheld portions of the records relating to all individual purchasers, by sending the appellant a copy by **August 18, 2000**, but not before **August 14, 2000**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the ORC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

July 13, 2000