



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

ORDER PO-1853

Appeal PA-000011-1

Ministry of Education



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NATURE OF THE APPEAL:

The Ministry of Education (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to “any and all records from January 1995 to the [date of the request] pertaining to the sale of approximately 33 acres of land constituting the rear portion of the Ernest C. Drury and Trillium school complex”. The requester asked the Ministry to include any directives, records of meetings, memos or electronic mail regarding the disposition and disposal of these lands.

The Ministry identified 13 responsive records, and granted partial access to each of them. Access to the remaining information was denied pursuant to either or both of the following exemptions contained in the *Act*:

- sections 17(1)(a), (b) and (c) - third party information
- sections 18(1)(c), (d) and/or (e) - economic and other interests of the Ministry

The Ministry’s decision letter also identified that, because the land in question belongs to the Crown, the Ontario Realty Corporation (the ORC) has custody and control of the majority of records relating to the sale identified by the requester. All parties in this appeal are aware of a parallel request for similar records which was made to the ORC, and which is also currently under appeal.

The requester, now the appellant, appealed the Ministry’s access decision.

During mediation, the appellant abandoned his request for certain records, including all records subject to the section 17 exemption claim. Accordingly, these records and this exemption claim are no longer at issue in this appeal. The appellant also raised the possible application of the "public interest override" contained in section 23 of the *Act*.

Further mediation was not possible and the appeal proceeded to the inquiry stage. I sent a Notice of Inquiry to the Ministry initially, and received representations in response. I then sent a copy of the Notice, along with the Ministry's representations, to the appellant. The appellant also submitted representations.

PRELIMINARY MATTERS:

The appellant identified in his representations that Record 4 may still be at issue in this appeal. This record was removed from the scope of the appeal during mediation, when it was determined that Record 4 was a duplicate of Record 11B in the parallel appeal involving the ORC. The Report of Mediator sent to the parties at the conclusion of the mediation stage indicates that Record 4 is no longer at issue, and the Notice of Inquiry which I provided to the parties also excludes Record 4 from the scope of this inquiry. Based on the documentation in the file, I have concluded that Record 4 is not at issue, and I will not address it in this order.

RECORDS:

The records which remain at issue in this appeal are the undisclosed portions of Records 8, 9 and 10. They consist of one memorandum, a second memorandum with attachments, and a series of e-mail messages.

The authors and recipients of these records are all Ministry employees, and their identities have been provided to the appellant as part of the severed records disclosed to him in response to the request.

DISCUSSIONS:

ECONOMIC AND OTHER INTERESTS

The Ministry takes the position that sections 18(1)(c), (d) and (e) of the *Act* apply to the remaining portions of the records.

This section reads as follows:

A head may refuse to disclose a record that contains,

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

Section 18(1)(c)

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice the economic interests of an institution or the position of an institution in the competitive marketplace (see Order P-441).

In Order PO-1747, Senior Adjudicator David Goodis stated:

The words “could reasonably be expected to” appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated “harms”. In the case of most of these exemptions, in order to establish that the particular harm in question “could reasonably be expected” to result from disclosure of a record, the party with the burden of proof must provide “detailed and convincing” evidence to establish a “reasonable expectation of probable harm” (see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.)).

In order to establish the requirements of the section 18(1)(c) exemption claim, the Ministry must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm as described in this section.

The Ministry's representations emphasize the importance of timing with respect to the withheld information in Records 8, 9 and 10. The Ministry points out that the sale of this property has not been finalized, and refers to the possible harm and prejudice to an institution's interests in disclosing this information should the sale not go through. Both the appellant and the Ministry also refer to a recently concluded Ontario Municipal Board (OMB) hearing where the sale of the property was apparently conditionally approved. Based on the information provided to me, it appears that, although the OMB gave conditional approval to the sale, the actual sale of the subject property has not taken place, and I will review the representations of the parties and make my decisions on that basis.

The severed portions of Records 8, 9 and 10 all contain similar information relating to the conditions and bargaining positions taken by the Ministry in the context of negotiating the sale of surplus lands at the E. C. Drury school.

The Ministry's representations on section 18(1)(c) include the following:

The Ministry submits that the release of information pertaining to bargaining positions, terms and conditions that the Ministry negotiated with the prospective buyer would prejudice its economic interests, since E. C. Drury school might lose possible benefits to its facility. Since E. C. Drury is a public school, the Ministry is obliged to present as strong a bargaining position as possible in the interests of students in particular and, more generally, of the taxpayers of Ontario.

The competitive position of the Ministry could be affected in that negotiations with other developers could be jeopardized if the OMB refuses to approve this development and the information in question had been released.

...

Various meetings have been held for citizens; information has been available through the local media; and the OMB hearing is public. The only information which has not been disclosed is the commercial information - part of which are the terms and conditions affecting E. C. Drury school, the disclosure of which would be detrimental to the ability to re-market the property and affect the price obtained if the property has to be re-marketed.

The appellant's representations focus primarily on the public interest generated by the proposed sale of the property; however, the appellant does submit:

... information in the public record indicates that the property transaction was largely conducted on a single source basis. Significant agreements were in place with the current developer long before a cursory public offering. The Ministry fails to show how this

unusual land deal, completely lacking in public accountability until it was almost too late, would have a bearing on a future competitive bid and negotiation.

The appellant's argument appears to be that, because there are concerns about the propriety of the proposed sale - and its allegedly unusual nature - the disclosure of the records would not prejudice the future competitive position of the institution. The appellant is, in effect, asking me to make a finding regarding the propriety of the proposed sale and, based on a finding of impropriety, determine that section 18(1)(c) does not apply. It is not within my mandate to make such a finding. Rather, I must determine, based on the evidence and argument provided to me, whether the Ministry has established the requirements of the section 18(1)(c) exemption claim. The considerations raised by the appellant are appropriately dealt with under section 23 of the *Act*.

I am satisfied that the undisclosed portions of Records 8, 9 and 10 contain information which relates to the bargaining positions, terms and conditions that the Ministry adopted in negotiating the sale of land with the prospective buyer. This sale has not yet closed, and I accept the Ministry's position that, prior to closing, disclosure of the severed portions of the records could reasonably be expected to prejudice the economic interests or competitive position of an institution, particularly in the event that the property would have to be re-marketed. The records contain the Ministry's positions and proposed negotiating strategies regarding the property and, in the event the property has to be re-marketed, I accept that disclosure of this information could have a prejudicial impact on subsequent negotiations with a new purchaser. Accordingly, I find that the undisclosed portions of Records 8, 9 and 10 qualify for exemption under section 18(1)(c) of the *Act*.

Because of this finding, it is not necessary for me to consider the possible application of sections 18(1)(d) or (e).

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the *Act* reads:

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

It has been established in a number of orders that in order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [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 (January 20, 2000), Doc. 27191 (S.C.C.)].

In Order P-984, former Adjudicator Holly Big Canoe discussed the first requirement 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.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 18. 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 (Order P-1398).

The appellant's representations point out that the proposed sale has generated significant public interest. In the appellant's view, it is in the public interest that the terms and conditions of the proposed sale should be discussed and examined through open communications between all parties.

The appellant also identifies concerns about the process followed for the sale of the property. He states:

The larger issue is whether the government fulfilled its obligations to the citizens of Ontario when it declared surplus a tract of land comprising approximately one-third of its E. C. Drury School holdings. Moreover, did the government conduct a fair, open and accountable process in keeping with legal requirements and its own policies for such transactions.

I am not disputing the government's right to declare this land or any other crown property surplus or to dispose of these assets, I am only trying to add to the body of information being assembled so I can decide for myself if the interests of the public were served in the matter at hand.

Already there are serious concerns by the government itself in this transaction. There is an Ontario Provincial Police investigation. In addition, a special government forensic auditor has been hired by the ORC. ...

...

The information at hand sufficiently undermines the public trust to justify your finding in favour of public access to the records in full.

In addressing section 23, the Ministry submits:

In order to invoke the compelling public interest override, there must be a compelling public interest that clearly outweighs the purpose of the exemption, as distinct from the value of disclosure to the requester of the particular record in question.

Information obtained from the televised sessions of the Ontario Legislature, newspapers, and other media reports indicates that an independent auditor and the Ontario Provincial Police (OPP) are examining all sales transactions of the ORC for the last 15 years and that the auditor's report will be made public.

It would appear that the public interest has been met by the auditor's review and the OPP investigation.

Based on the submissions made by the parties, I am satisfied that there exists a compelling public interest in the sale of government property by the ORC. Indeed, in Order PO-1804-F, I examined this issue in a different factual context and stated:

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.

I went on to conclude in Order PO-1804-F that this compelling public interest clearly outweighed the purpose of the section 21 personal information exemption, based on a variety of reasons which were particular to that appeal. I must now determine whether the compelling public interest clearly outweighs the purpose of the section 18(1)(c) exemption claim, taking into account the relevant facts in this appeal.

The purpose of the section 18(1)(c) exemption is to protect the ability of institutions to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests or compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions. [Orders M-862, P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)) and P-1210].

Having considered all relevant facts and the representations provided by the parties, I find that the compelling public interest present in this appeal does not clearly outweigh the purpose of the section 18(1)(c) exemption claim. I have reached this finding based on the following reasons:

- unlike the situation in Order PO-1804-F, the identity of the prospective purchaser is known, and the sale in question has not been completed;
- the appellant has been provided with most of the information contained in Records 8, 9 and 10, and the portions withheld relate specifically and narrowly to some of the proposed terms and conditions of the sale;

- the sale of the property has been subject to review by the OMB, a statutory body established to deal with certain public interest considerations in the sale of land, including public land;
- there is an ongoing OPP investigation and an independent forensic audit into the sale of land by the ORC, both of which are ongoing and directed at determining the propriety of individual land transactions, including the sale which is the subject of the records at issue in this appeal.

Therefore, I find that section 23 of the *Act* does not apply in the circumstance of this appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ January 10, 2001