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

INTERIM ORDER PO-1871-I

Appeal PA-000084-1

Ministry of Training, Colleges and Universities

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NATURE OF THE APPEAL:

The Ministry of Training, Colleges and Universities (the Ministry) received a request for access to information under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant sought records relating to Trent University's November 14, 1999 application for infrastructure funding pursuant to the Ontario government's SuperBuild Growth Fund program. With his request, the appellant gave a detailed explanation of his (and, according to the appellant, the public's) concerns with the application.

While the Ontario government has provided grants as a result of the SuperBuild application, contracts for construction work to be performed in relation to the grants have yet to be awarded.

The Ministry identified eight records responsive to the request, and then advised the appellant that his request may affect the interests of a third party, Trent University (the University), under section 17(1) of the *Act* (third party information). The Ministry also advised that it would be giving the University an opportunity to make submissions on whether or not the records should be disclosed.

The Ministry then notified the University of the request, and solicited its views on disclosure of the records. In turn, the University provided submissions to the Ministry on the issue of disclosure of the responsive records. The University took the position that the records were exempt under section 17(1). The University submitted that its application contains financial information which was supplied to the Ministry in confidence, and that disclosure of this information would result in competitive harm and undue loss to the University.

The Ministry then wrote to the appellant advising that it was granting partial access to the eight records. The Ministry indicated that it was withholding Records 1, 3, 6, 7 and 8 in their entirety, and portions of Records 4 and 5, on the basis of the exemptions at sections 12(1)(c) (cabinet records), 17 and 18(1)(g) (proposed plans, policies or projects of an institution). The Ministry advised that it was disclosing Record 2 in its entirety. The Ministry provided the appellant with severed copies of Records 4 and 5, as well as an index describing the records and the applicable exemptions.

The appellant appealed the Ministry's decision to this office. The appellant stated that he was appealing the decision to withhold records or portions of records. The appellant also indicated that he believed the Ministry had not conducted an adequate search for all of the records responsive to his request.

During the mediation stage of the appeal, the appellant raised the possible application of the section 23 "public interest override".

Later, prior to the commencement of this inquiry, the Ministry issued a revised decision to the appellant. The Ministry advised that it was no longer relying on the exemptions at section 12(1)(c) and 18(1)(g) to withhold portions of Records 1, 3, 4, 5, 6, 7 and 8. As a result, only portions of Records 1, 6, 7 and 8 for which section 17 was claimed remain at issue in this appeal. The Ministry enclosed all of Records 3, 4 and 5, and additional portions of Records 1, 6, 7 and 8 with its revised decision letter. Whether or not the Ministry has conducted an adequate search for responsive records also remains an issue in this appeal.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry and the University. I also sent this Notice of Inquiry to Sir Sandford Fleming College (the College), which appeared to have an interest in some of the issues in this appeal. All three parties provided representations in response. I then sent these representations to the appellant, together with the Notice of Inquiry. Later, I received representations from the newspaper Peterborough This Week and the Trent Central Student Association, both in support of the appellant's position, particularly on the application of the section 23 public interest override. Subsequently, the appellant provided representations in response to the Notice of Inquiry, which incorporated the representations I received from Peterborough This Week and the Trent Central Student Association.

In this order I may refer to the University and the College collectively as "the schools".

THE RECORDS

The records containing the information remaining at issue in this appeal are described as follows:

Record 1

This record is a letter to the Ministry from the University and the College dated December 13, 1999, with an enclosed "Application for SuperBuild Growth Fund for Postsecondary Education Support".

The only items withheld by the Ministry in Record 1 are five dollar figures on page 2 under the heading "Project Cost Summary". These figures relate to the following lines:

1a. Contract/Purchase Price- Major Contract
2. Allowance for Professional Fees and Disbursements
5. Equipment
8. Less GST Rebates
9. Total Estimated Project Cost

The schools both submit that they are concerned only with the disclosure of the figures under lines 1a, 2 and 5. (This is the only record in which the College indicates it has an interest). In my view, this is sufficient to constitute the schools' consent to disclosure of the figures under lines 8 and 9, within the meaning of section 17(3) of the *Act*. Accordingly, I will order the Ministry to disclose these two dollar figures.

In addition, as a result of an earlier request under the *Act*, the Ministry provided the appellant with a copyof this record, referred to as Record 69 in the earlier matter (Ministry request number MCTU-000007, appeal number PA-000262-1). As Record 69, the appellant received the figure at line 5, although the remaining four figures were withheld. The appellant has indicated that he no longer seeks the line 5 amount and, therefore, I will not consider the application of section 17(1) to it.

Consequently, the only information at issue in Record 1 is the dollar amounts at lines 1a and 2.

Record 6

This record is the University's Application for SuperBuild Growth Fund for Postsecondary Education Support dated November 14, 1999.

The Ministry withheld only lines 1a, 2, 5, 8 and 9 from the Project Cost Summary in this record. The University indicates that it does not contest the disclosure of any information in this record and, in addition, it appears that the Ministry disclosed the entire Project Cost Summary as a result of the appellant's previous request (Record 70 in that matter). Since the appellant has indicated that he does not continue to seek access to the Project Cost Summary, I will not consider the application of section 17(1) to any of Record 6.

Record 7

This record is described as "Trent University Infrastructure Plan: An Investment in a Liberal Arts and Science Education". The Ministry withheld from the appellant all of pages 7, 8 and 20 of this record.

Pages 7 and 20 each contain a chart entitled "Deferred Maintenance & Facilities Condition Index (FCI)", for the University's Operating Buildings (page 7) and its Residential Buildings (page 20). The charts contain six columns of information respecting the various University buildings, as follows: the names of the buildings, current replacement value, deferred maintenance amount, "facilities condition index" (*i.e.*, the ratio of the deferred maintenance amount to the current replacement value), a condition rating (*e.g.*, poor, fair, good), and the age of the building in years. The charts also include sub-totals for groups of buildings (*e.g.*, a particular college) and totals for all of the buildings.

Page 8 is entitled "Construction Costs" and contains a breakdown of the type and size of space in question, unit rate and total cost.

The appellant advises that in response to his earlier request, the Ministry disclosed pages 8 and 20 to him (Record 72 in the other matter). Since the appellant has indicated that he does not continue to seek access to pages 8 and 20, I will consider the application of section 17(1) to page 7 only.

Record 8

This record is entitled "Trent University Infrastructure Plan" and is dated November 15, 1999. The Ministry withheld pages 3.4, 3.5, 3.6, 3.7, 6.1 and 6.4 in full. Pages 3.4 and 3.5 contain charts regarding the University's operating and residential buildings which are similar to those on pages 7 and 20 of Record 7 described above. Pages 3.5 and 3.6 contain descriptive information relating to those charts. Page 3.7 contains descriptive information under the heading "Maintenance Costs" and a chart entitled "Building Renewal Costs for Downtown Campuses - to 2005". Page 6.1 contain information and charts under the headings "Project Cost Estimates", "Constructions Costs" and "Project Cost Summary", similar to information in Records 1, 6 and 7 described above. Finally, page 6.4 contains a chart and descriptive information under the heading "Economic Analysis - Impact on Deferred Maintenance".

DISCUSSION:

THIRD PARTY INFORMATION

Introduction

The Ministry claims that portions of Records 1, 7 and 8 qualify for exemption under sections 17(1)(b) and (c) of the *Act*. The University cites only paragraph (c) in its representations, while the College cites paragraph (a) and (c).

Those sections read:

> 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; [or]
>
> (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) of the *Act*, each part of the following three-part test must be satisfied:

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, M-29, M-37, P-373].

Part one: type of information

Introduction

Representations

The Ministry submits:

> . . . Both [of the schools] believe that the records in question reveal financial and/or commercial information . . .
>
> Applications for the SuperBuild program contain details about the financial situation of the [schools]. This is required in order for the applications to be assessed both on a needs basis as well as for financial viability and resource assessment. Commercial information is also provided as [the schools] were encouraged to partner with other institutions as well as private business.

The University submits that the information at issue in Records 1, 7 and 8 contains financial and/or commercial information.

The College submits that the withheld portions of Record 1 contain financial information.

The appellant makes no specific submissions on the type of information contained in the records.

Record 1

The term "financial information" has been described by this office as referring to information relating to money and its use or distribution [see Orders P-47, P-87, P-113, P-228, P-295 and P-394]. These orders also have stated that the information must contain or refer to specific data, such as profit and loss data, overhead and operating costs.

The information at issue in this record consists of the estimated contract/purchase price and estimated allowance for professional fees and disbursements for the project in question. These dollar figures clearly qualify as "financial information" for the purpose of part one of the three part test.

Record 7

In my view, the dollar figures in this record clearly qualify as financial information. However, I am not persuaded that the remaining information, concerning the name, age and condition of the buildings, constitutes financial information.

In addition, I am not satisfied that the remaining information qualifies as commercial information. That term has been defined by this office as information which relates solely to the buying, selling or exchange of merchandise or services [Order P-493]. In my view, the name, age and condition of the buildings is, at best, only remotely related to the buying, selling or exchange of merchandise or services.

Record 8

Consistent with my findings regarding Record 7, I find that the dollar figures withheld from this record qualify as financial information. The remaining information, in my view, does not qualify as either financial or commercial information for the purpose of part one of the three part test under section 17(1) of the *Act*.

Conclusion

Only the dollar figures described above in Records 1, 7 and 8 qualify under part one of the three part test. Accordingly, only this information may fall within the scope of section 17(1), subject to any findings I may make regarding parts two and three of the test. The Ministry must disclose the remaining information.

Part two: supplied in confidence

The Ministry and the schools submit that the information in the records was supplied to the Ministry. The appellant does not appear to take issue with this aspect of part two of the three part test. In my view, the dollar figures in the records clearly were supplied to the Ministry as part of the funding applications.

Part two of the three part test for exemption under section 17(1) also 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 to demonstrate simply 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 [M-169].

The Ministry submits:

> The SuperBuild program was designed and implemented as a competitive process. All applications received were assessed against an objective set of criteria. While the application form did not specifically state that the information was to be submitted in confidence, it was an implicit part of the process and it was the intention of the Ministry not to disclose SuperBuild application information. To do so before the conclusion of the program would jeopardize the competitive nature of the project selection process.
>
> In addition, the Ministry has a long standing practice of maintaining confidentiality with respect to funding requests or proposals from institutions. It is the Ministry's practice not to disclose any funding requests from an institution and to treat the associated documents as confidential information. By practice, staff at the Ministry will not share financial information of institutions with other institutions or with the public without express consent.
>
> Both [schools] contacted by the Ministry with regard to this appeal stated that they treated the documents supplied to the Ministry with the utmost confidentiality even within their own institution. Only senior administrators were given access to the information.
>
> Records 7 and 8 . . . were not required to be submitted to the Ministry, either by legislation or under the terms of the SuperBuild application.

However, the Ministry's long standing practice of maintaining confidentiality with respect to funding requests or proposals from postsecondary institutions, including the SuperBuild program, has resulted in many institutions routinely providing a level of detail about their capital plans that goes well beyond what is required to assess an individual proposal.

The University submits:

Trent supplied the information with an *implicit* expectation of confidentiality because:

a) The Ministry has a consistent past practice of treating detailed, disaggregate information of this nature in confidence. This has allowed a relationship of trust between the Ministry and [the University] that enables the sharing of confidential management information with the Ministry when necessary.
b) The information in question was supplied in a highly competitive environment - the SuperBuild program.

It was the University's expectation that the Ministry would hold records 1, 7 and 8 in confidence indefinitely.

Information of this nature is normally treated as confidential by the University. Attached for information are [the University's] "Policy on privacy protection and freedom of information" and the Board of Governors' policies on purchasing (Special Resolution II.2) and confidentiality (Special Resolution IV.1). The combined impact of the Board's policies requires that the purchase of materials and services pursuant to record 1 and the disposal of assets pursuant to records 7 and 8 would require approval of the Board of Governors *in camera*. The policy on privacy protection and freedom of information recognizes the confidentiality of this type of material in paragraphs III.2.1 through III.2.5.

Records 1, 7 and 8 have been treated as confidential by [the University]. Only a small number of administrators and Governors have had access to them. This access involved preparation, approval or subsequent work with the records. The report of which record 8 is a part has been used as evidence in an upcoming judicial review in which the Trent Board of Governors is respondent. The confidential portions of record 8, previously redacted, were provided to counsel for the applicants only via an Undertaking and Acknowledgement (copy attached) designed to protect confidentiality [emphasis in original].

The College submits:

It was our expectation that this information was supplied in confidence to the Ministry due to the competitive nature of the funding program. This expectation was further implied in the Terms and Conditions for SuperBuild Growth Fund document, page 5, section c) which states: "the Applicant is aware that the information contained herein can be used for the assessment of grant eligibility and for statistical reporting" (see attached).

Both the University and the College indicate that they have no concerns with the withheld information in Record 1 being disclosed once the contracts are awarded in relation to this proposal.
The University also indicates that once assets are disposed of, it would consent to the disclosure of Records 7 and 8.

The appellant states:

> I firstly refer to the "Terms and Conditions for SuperBuild Growth Fund for Postsecondary Support" . . . Nowhere in these Terms and Conditions is there explicit or implicit reference to confidentiality. Standing contrary to any implication of confidentiality are the Sections 8 "Public Reports", 10 "Record Keeping and Inspection", and 12 "Acknowledgement".
>
> Section 8 . . . requires the grant recipient to submit periodic reports, stating A. . . The format of these reports is yet to be determined, but is expected to include: Grant status; amount of expenditure to date; type of expenditure; interest earned; impact on facilities condition; new enrolment spaces created; and, expected completion date." From the drafting of this section and its caption, there is good reason to believe that every aspect of the reports would be public. The scope covered under them would apply to nearly every aspect of the information already supplied to the Ministry, and the public could work backwards from the progress reported on to reconstruct the records of this request. Given the sheer scale of the SuperBuild program, and the time that has elapsed since the various tranches of grants were announced, it would be reasonable to assume such reports have already been requested of [the schools], or already received.
>
> Section 10 of the Terms and Conditions binds [the schools] to keep and maintain A... all records, invoices and other documents relating to the Grant . . ." and keep them available for a period of ten years for review by the Ministry, allowing such review on 24 hours' notice. Since the Ministry is an institution within the meaning of the Act, this section provides that essentially all the records of this request would be accessible, with the eventual level of access granted impossible to predict. Just as this implies some likelihood of access over the ten-year period the records must be available, absent from this document are references to the Act that form standard practice of Management Board and other bodies contracting for the Province when concerns over third party information exist. Section 12 of the Terms and Conditions refers to "advertising and publicity relating to the Grant", and to the contrary of any implicit confidentiality, suggests high-profile promotion of the SuperBuild program. I submit that all of the records at issue in this inquiry were supplied to the Ministry in a freewheeling atmosphere, in which not a thought or care was given to implicit or explicit confidentiality by institutions far more preoccupied with the stampede they were engaged in for large sums of cash.

In my view, the information at issue was supplied to the Ministry with a reasonably held implicit expectation of confidentiality both on the part of the Ministry and the schools although, as the schools themselves indicate, this expectation of confidentiality is time limited. The provisions of the SuperBuild application

Terms and Conditions cited by the appellant do not negate this implicit expectation. Section 8 indicates that the Ministry may require and publish periodic reports which are expected to include various categories of information, including the amount and type of expenditure to date. However, any such reports would not include this information prior to the awarding of contracts, since no expenditures would have yet beenmade. While section 10 suggests that the Ministry may inspect records relating to the projects, it does not indicate expressly that the Ministry may publish these records. Section 12 is a general provision regarding publication of the program, and does not support the appellant's position that there was no expectation of confidentiality of specific financial information in the records.

To conclude, I find that the financial information at issue in the records was supplied to the Ministry in confidence for the purpose of part two of the three part test for exemption under section 17(1).

Part three: harms

Introduction

The Commissioner's three-part test for exemption under section 17(1), and statement of what is required to discharge the burden of proof under part three of the test, have been approved by the Court of Appeal for Ontario. That court overturned a decision of the Divisional Court quashing Order P-373, and restored Order P-373. In that decision the court stated:

> 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 meaning. 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 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 (Div. Ct.)].

In order to discharge the burden of proof under part three of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that

could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Orders 36, P-373].

In Order PO-1747, I stated the following with respect to the phrase "could reasonably be expected to", which appears in the opening words of section 17(1):

> 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.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In my view, the Ministry and the schools must provide detailed and convincing evidence to establish a "reasonable expectation of probable harm" as described in paragraphs (a), (b) or (c) of section 17(1).

Section 17(1)(a) and (c): prejudice to competitive position and undue loss or gain

The Ministry submits:

> The [schools] submit that disclosure of the records would affect their ability to compete in the tendering and purchasing of goods and services because suppliers would be aware of the budgets available to institutions. Potential contractors, for instance, would be able to build their estimates based on knowledge of what funds are available, rather than competitive pricing.
>
> In addition, the detailed information disclosed on the financial records would also affect the [schools'] ability to dispose of assets and/or achieve maximum yield from the sale of assets.
>
> Releasing the cost projection details prior to the completion of the tendering process for the [schools] (this could carry on for several more months, even into 2001), could jeopardize the Province's investment. The SuperBuild funds have been awarded on the premise that institutions will effectively manage the monies available using best practices. The business practice of the institutions when developing RFPs and awarding contracts is to keep financial cost estimates and budgets confidential during any tendering process.
>
> Disclosure of the records would result in a loss to both the Ministry and the [schools]. This . . . loss is not quantifiable in advance because the records reveal information about activities that may occur in the future. The integrity of a competitive system in which public

institutions are encouraged to put forth their best business proposals would be jeopardized if institutions were afraid to compete because their financial situations could be made public to their detriment. Institutions believe this to be undue loss as it is not loss normally encountered in good business practice.

Stakeholders in public postsecondary education expect that institutions will use best business practices. In a sector where funds are in short supply, loss of a competitive edge or the benefits of sound investments through sale or disposal of assets could mean a strain to the public purse. This is public money where ultimately, any loss is undue loss.

The University submits:

Disclosure of the records in question would result in *undue loss*. Disclosure of record 1 would impact the tendering and purchase of goods and services to the University's detriment because suppliers would be aware of the budget available and competitive pricing would be undermined. Disclosure of records 7 and 8 would have two potential negative impacts. First, the University's ability to dispose of assets would be seriously undermined. Second, the University's ability to achieve maximum yield from the sale of assets would be compromised.

It is impossible to quantify the loss.

The loss would be "undue" because it is not loss normally encountered when employing good business practices. The stakeholders of the University (i.e. the public, the government, the local community, the students, the alumni and the employees) expect that the University will use best business practices and the University endeavours to do so. Disclosure of the records in question would be contrary to good business practices. In the public sector, where funds are in short supply, any loss is undue loss.

The loss with respect to record 1 is time limited. Once contracts are awarded, there will be no risk of loss. We currently anticipate that all contracts in this regard will be awarded by October 30, 2000.

The loss with respect to records 7 and 8 is also time limited. Once the assets have been disposed of, there will be no risk of loss. The timeframe here is several years before disposal of assets is complete.

The College submits:

[The portions withheld from Record 1] contain financial information supplied to the Ministry in confidence and could result in unfair competitive advantage to contractors and undue loss to the college in terms of managing the funds. Once the contracts are awarded in relation to this proposal, we would have no objection to full release of this record. It is anticipated that the contracts will be awarded by October 30, 2000 . . .

Competitive Advantage: We believe that the specific cost projection details should not be released until such time as the tenders have been awarded. Potential contractors would be able to build their estimates based on knowing what funds are available, rather than competitive pricing.

Undue Loss: This point is related to the competitive advantage argument in that releasing the cost projection details prior to the completion of the tendering process could jeopardize the Province's investment. The SuperBuild Funds have been awarded on the premise that our institutions will effectively manage the monies available using best business practises. Our business practice in developing RFP's and awarding contracts would be to keep financial cost estimates and budget confidential during the tendering process.

The College later wrote to me to advise that contracts have not yet been awarded in relation to its project. It is my understanding that, to date, contracts have not been awarded with respect to the proposed projects for either of the schools.

The appellant submits:

Issue: Competitive Position

While allowing that the application process may have been competitive, any hint of competition ended with acceptance or rejection of the applications and public announcement of the grants.

. . . . .

Issue: Undue Loss or Gain

The arguments presented by the [schools] in this regard are remote and tenuous, and must also be tested against the confused release of records under this request and the later MTCU-000007.

- Under Record 1 at issue, Item 5 of the "Project Cost Summary" has already been released. Subtracting this item and the disclosed items 3, and 4 from Item 7 ("Total Estimated Project Gross Cost"), leaves a composite of Items 1a, 1b and 2, or taking item 1b as Anil", of Items 1a and 2. Against the harms claimed by [the schools] of a compromised tendering process, enough information is already available for bidders to gauge the range of funds available. Since the composite referred to is larger than the exempted individual items comprising it, no significant further harm could result from disclosure of Items 1a, 1b and 2. Neither institution has submitted against the disclosure of Items 8 and 9, which would have negligible impact on the tendering process, since Item 7 has already been disclosed. I ask you to note that the [schools'] submissions are both time-limited, in both cases anticipating that the contracts would be awarded by October 30, 2000, and in

Trent's case, stating that there will be no risk of loss once the contracts are awarded.

. . . . .

- Much of Record 7 has already been disclosed in the composite formed by the releases under this request and the later MTCU-000007. Conceivably, only a single sheet remains undisclosed. Therefore, the potential for harms can only be judged from the remaining material, and the degree to which it adds to or differs from the corpus of information already obtained.

- The Trent submission to this inquiry appears to link Records 7 and 8, in ascribing to both of them a claimed potential for undermining Trent's ability to dispose of assets and compromising its "ability to achieve maximum yield from the sale of assets". The potential harms from disclosure of the remaining sheets of Record 8 can only be judged from the extent they add to or differ from the information already supplied. In the event of a sale of assets, any discerning buyer would thoroughly search for defects, and the effect of a truthful disclosure of facts beforehand would have minimal net impact in a transaction in which Trent could in any case be liable through a failure to disclose defects it was aware of. These leaves the possibility that the information which has been withheld contains errors or misstatements leading to Trent erroneously to its conclusions regarding disposal of the properties. Disclosure of erroneous or misstated information offers the opportunity that the information can be corrected, potentially saving Trent from losses connected with its present controversial position. Strengthening the possibility such misstatements or errors exist are the public statements of Trent's President Patterson that Trent's obtaining funds under SuperBuild was conditional on the closing of its downtown colleges, which cast Trent in the position of having to pitch the Ministry for new construction on one hand, against its existing facilities on the other.

In my view, disclosure of the project cost summary amounts at issue in Record 1 could reasonably be expected to result in undue loss to the schools within the meaning of section 17(1)(c) of the *Act*. I am persuaded by the schools' argument that disclosing cost projections for a specific project, prior to the completion of the tendering process, could reasonably be expected to harm the integrity of the competitive process. It is reasonable to expect that bidders would alter their cost estimates in light of knowledge of the schools' cost projections, which is likely to lead to undue loss to the schools.

It may be the case that because some of the information in the project cost summary has been disclosed, an individual might be able to make reasonably accurate inferences about the other figures. However, even with the disclosure of some figures, it is not possible, in my view, to precisely determine the remaining amounts. Therefore, the disclosure of the precise figures could reasonably be expected to cause at least some degree of harm which, in the circumstances, would not be insignificant or trivial. Further, although item 5 of Record 1 has been disclosed by the Ministry, it is my understanding that this was done so without the consent of either of the schools and, therefore, they should not be prejudiced because of this action.

Turning to Records 7 and 8, I have already found that the names, the condition ratings and the ages of the buildings cannot be exempt under section 17(1) since they do not meet part one of the three part test for exemption. In my view, disclosure of the current replacement value and deferred maintenance figures for each of the listed buildings could reasonably be expected to result in undue loss to the schools. I accept the University's submission that it expects to sell some of its property assets, and that disclosure of detailed information about the buildings' replacement value and the value of needed repairs could reasonably be expected to harm its competitive position in the real estate marketplace. However, I find that this argument does not apply to the total figures for current replacement value and deferred maintenance. With these aggregate figures, it is not reasonably possible to determine the specific amounts relating to each building.

Although much of Record 7 has already been disclosed, including information similar to page 7, again it appears that the Ministry disclosed some pages without the consent of the University, which should not be prejudiced by this action. In any event, I find that the additional disclosure of some of the information on page 7 could reasonably be expected to cause additional harm described above and, therefore, this information is exempt under section 17(1)(c).

The appellant argues that the University ought to disclose information about the condition of the buildings to any potential buyer, and may be liable for not doing so. While I accept that this may be the case, the *Act* is not a primary vehicle to ensure fair business practices, particularly in respect of parties which are not government institutions under the *Act*. Section 17(1) was designed, in part, to protect the competitive position of non-institutions in the marketplace, and the exemption applies if this position could reasonablybe expected to be harmed by disclosure. The fact that a non-institution may have some other common law or statutory obligation to disclose information in a business context cannot itself negate the application of the exemption. In addition, I am not satisfied that disclosure of this information would, as the appellant argues, enhance the position of the University by revealing any errors, in the context of section 17.

Record 8 contains both project cost summary information similar to that in Record 1, and current replacement value and deferred maintenance information similar to Record 7. My findings above with respect to Records 1 and 7 apply accordingly to the relevant portions of Record 8.

Conclusion

The figures at lines 1a and 2 on page 2 of Record 1 are exempt under section 17(1)(c) of the *Act*. The detailed current resale value and deferred maintenance information on page 7 of Record 7 also is exempt under section 17(1)(c) of the *Act*. Information of the same nature in Record 8, in addition, is exempt under the *Act*. The remaining information at issue is not exempt under section 17(1).

PUBLIC INTEREST OVERRIDE

Introduction

Section 23 of the *Act* reads:

> 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 [emphasis added].

In order for the section 23 "public interest override" to apply, two requirements must be met: (i) there must be a compelling public interest in disclosure; and (ii) this compelling public interest must clearly outweigh the purpose of the exemption (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note).

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 [Order P-1398, cited above].

Representations

The appellant makes extensive submissions on the application of section 23. The appellant submits firstly that the SuperBuild program involves a very large amount of money, at a minimum $742 million, which would represent $118 for every Ontario household. The appellant submits that the program has a very large impact on all Ontario residents and, in particular, the residents of the local Peterborough community. The appellant also states that the Ministry has confirmed that this request and another of his requests are the only ones received by the Ministry concerning SuperBuild. The appellant goes on to state:

> In the forced relocation of students and their consumption away from Peterborough downtown core, these expenditures will also bring hardship to many community businesses.

The appellant states that there is a high degree of media and public awareness, and controversy surrounding the Trent SuperBuild applications "and proposed disposition of Trent's downtown colleges . . ." The appellant cites a number of articles in two local newspapers and Trent's student newspaper, as well as several stories on a Peterborough based television station. The appellant submits that much of the Trent SuperBuild controversy stems from "the lack of public disclosure surrounding Trent's applications . . . Concerned groups include the Peterborough community at large Trent students, alumni, faculty, founders, and local businesses."

The appellant also submits that downtown Peterborough businesses "would be adversely affected by the closing of Trent's downtown colleges." The appellant refers to a petition made by a group of "downtown merchants, business owners and operators, and students" to the Mayor of Peterborough, asking the Mayor to convey to the University its "opposition to the university's [SuperBuild] application . . ." The petition goes on to state "We believe that the closing of the downtown colleges will ultimately not offer any short or long term benefit to our community. Indeed, we predict our businesses and livelihoods may experience in some cases net profit losses of up to 25%."

The appellant attaches to his representations a letter from the newspaper Peterborough This Week which states:

> Our reporters have covered the Trent University SuperBuild debate since it began in November, 1999. We have continually been frustrated and baffled by the limited information coming out of the university at such a time of change and related upheaval. The lack of information has created an atmosphere of distrust and dissatisfaction within the community.
>
> The documents released so far to [the appellant] only compounds those feelings. We believe there is a compelling public interest in revealing the paper trail that led to the approval of SuperBuild grants for Trent University. The nature of the exemptions also raises suspicions about the validity of the claims of university leaders.
>
> We feel the public good in releasing this information outweighs the potential harm to the university's business case. The impact of this decision reaches beyond the borders of this community and into the entire province since this is the only set of Freedom of Information requests currently filed with the SuperBuild office, a small-staffed yet extremely well-funded branch of the provincial government.

The appellant also includes in his representations a letter from the Trent Central Student Association [the Association] which states:

> . . . It is my understanding that while some of the materials were provided to [the appellant], key portions of three records numbered 1, 7, and 8 . . . were not disclosed . . . I am writing to you . . . to alert you to what would in [our] opinion . . . constitute a compelling public interest in the information contained within these documents.
> Trent University's SuperBuild application was of a most contentious and divisive nature. The [Association], representing the full-time undergraduate students of the university stood in opposition to it insofar as the application proposed to dispose of the university's downtown properties comprising of Catherine Parr Traill and Peter Robinson Colleges. A decision in support of the SuperBuild application was made nonetheless by Trent's Board of Governors, chiefly under the premise of financial exigency. Public debate over the issue has largely been stifled as a result of a lack of access to data detailing the physical condition of the facilities in question and the costs associated with their operation. This date is of particular importance because academic and pedagogical arguments against closure of the facilities have been countered only by mention of the allegedly decrepit condition of the buildings and the financial need to dispose of them. To my knowledge, although the SuperBuild application has been approved by Trent's Board of Governors and supported by the Government of Ontario, the facilities in question have not yet been disposed of and so the question of whether or not they should be still remains an open one. Evidence suggesting that there were not compelling financial arguments for divesting of the downtown properties according to the recommendations and timelines of the SuperBuild application would undoubtedly impact significantly on the final decision taken.

> I would emphasize that whatever information may be contained within the records numbered 1, 7 and 8 would be of public interest within only certain very specific parameters: first should the documents contain information, data or recommendations pertaining to the divestment of Catharine Parr Traill or Peter Robinson Colleges and, second, should the documents in some way build an argument or present evidence against the disposal of these properties, advocating a delay in their disposal or demonstrating benefits from their retention.
>
> It is true that as students we expect the governing bodies of the university to employ best business practices in administering the finances and property of the university. To the extent that the documents may contain information pertaining to assets of the university, in most cases it would neither be in the interest of nor the will of students that the university should suffer an undue loss as a result of a contaminated tendering process. It remains equally true, however, that as students we expect the university's administration to be forthright and transparent in its decision-making processes. Public debate on the issue of disposal of Trent's downtown properties has been consistently over-ruled through appeals to financial imperatives. Any evidence suggesting that their disposal may not be necessary or that there would be benefits to their retention would make a significant impact on the public discussion of the proposal, an impact which might outweigh any financial loss which could be suffered by the university. Indeed, depending on the information contained within the documents, its release could permit the avoidance of undue financial loss from an imprudent administrative decision.
>
> I conclude by making mention one last time to the very sincere desire of [the Association] that the university should not unduly suffer financial loss, which of course would not be in the interest of students. A loss would be undue if the documents in question only confirmed the case for divesting of the assets in question and so would not impact on or alter decisions already taken. Should, however, the documents provide evidence to the contrary, they would undoubtedly make an important impact on the public debate around the issue and access to them ought to be available to all who will be affected by the decisions made based on them, including and particularly the students of the university . . .

Finally, the appellant indicates that he has "no private interest in the requests, which have been made transparently on behalf of the community, at his own expense and without fee."

The University submits: "We cannot conceive of a compelling public interest in disclosure of these records. They do not concern the safety or security of the public."

The College makes no submissions on the application of section 23.

The Ministry submits that "[t]he burden regarding the applicability of this section falls on the individual seeking the application. The records on their face do not lend themselves to a >compelling public interest' argument."

Is there a compelling public interest in disclosure of the information found to be exempt?

As indicated above, I have found that only the project cost dollar amounts at issue in Record 1, as well as the specific dollar figures for each building under the current replacement value and deferred maintenance categories in Records 7 and 8 to be exempt under section 17(1). The remaining information is not exempt and must be disclosed by the Ministry.

In Order P-1398, former Adjudicator John Higgins 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's decision in Order P-1398, the Court of Appeal for Ontario in *Minister of Finance* (above) stated:

> . . . 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].

In light of the Court of Appeal's comments, I am adopting Inquiry Officer Higgins's interpretation of the word "compelling" contained in section 23.

In my view, the appellant, together with the Peterborough This Week and the Association have established that there is a strong public interest in the Peterborough community in the specific matter of the University's proposal to dispose of downtown properties, particularly among students, faculty and businesses who may be most affected by the proposal.

On the other hand, as the Association suggests, there is also a public interest in protecting the financial position of the University and the College, two institutions which are largely publicly funded. As I found above, it is reasonable to expect that the schools would suffer undue loss by disclosure of this information, which in turn would affect the interest of the public financially. In my view, this public interest in *non*-disclosure is significant, and reduces the degree of public interest in disclosure substantially.

In addition, I have found much of the withheld information not to be exempt, in particular information about the condition of the buildings in question. The disclosure of this information will, in my view, go some way towards contributing to the public debate over the issue of the sale of downtown properties.

I also note that three members of the University faculty commenced judicial review proceedings in Divisional Court, seeking to quash the resolution of the University's Board of Governors approving the University's capital development plan. Although, as I understand, the application was dismissed, these proceedings would have addressed, at least to some degree, the public interest in scrutinizing the University's proposal.

Taking all of the above into account, I find that the public interest in disclosure of the withheld information does not meet the threshold of "compelling", and therefore section 23 cannot apply in the circumstances.

As a result, it is not necessary for me to determine whether any compelling public interest in disclosure "clearly outweighs" the purpose of the section 17(1) exemption, and therefore I uphold the Ministry's decision in respect of the information I found to be exempt.

REASONABLENESS OF SEARCH

The appellant takes issue with the Ministry's position that no further records exist in response to his request, beyond the eight records already identified. In a subsequent request and appeal (PA-000033-2) regarding records relating to the same subject matter, the appellant has also taken issue with the reasonableness of the Ministry's search. The appellant has relied on statements of the Ministry in the second appeal to support his position in this appeal. In the circumstances, I have decided that it would be appropriate to address these issues together, in the second appeal, which is now pending. As a result, I will not make a finding on the reasonable search issue in this order.

THE MINISTRY'S ACCESS PROCEDURE

As indicated above, it appears that the Ministry's actions were inconsistent in approaching the same or similar records responsive to the appellant's requests. In some cases, the Ministry withheld certain information from a particular record, then subsequently disclosed it, without giving the affected parties an opportunity to appeal any decision to disclose. In other cases, it appears that the Ministry withheld information that the schools did not object to being disclosed. In these circumstances, the interests of both the appellant and the schools may well have been compromised. I recognize that it may be difficult to be perfectly consistent in responding to multiple requests which may encompass many records. However, in my view, the Ministry should make efforts to exercise greater care in responding to access requests in these circumstances, in order to safeguard the interests of the parties and protect the integrity of the process under the *Act*.

ORDER

1. I partially uphold the Ministry's decision to withhold certain portions of the records at issue under section 17(1) of the *Act*.

2. I order the Ministry to disclose Records 7 and 8 to the appellant, with the exception of the information highlighted on the Ministry's copy of the records included with its copy of this order, no later than **March 29, 2001**, but no earlier than **March 23, 2001**.

3. In order to verify compliance with provision 2, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant.

Original Signed By: February 23, 2001
David Goodis
Senior Adjudicator