



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

ORDER PO-1894

Appeal PA-000100-2

Ontario Realty Corporation



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NATURE OF THE APPEAL:

The Ontario Realty Corporation (the ORC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records referable to the Ontario Hospital Cemetery property (the property) located near Evans and Horner Avenues, Etobicoke, including various documents relating to the ORC's proposal selection process for the sale of the property.

The ORC identified approximately 600 pages of records and, following third party notification, granted partial access to the requester. Access to the undisclosed records or portions of records was denied on the basis of one or more of the following exemption claims contained in the *Act*.

- section 13(1) - advice or recommendations
- sections 17(1)(a), (b) and (c)
- sections 18 (1)(a), (b), (c), (d) and (e)
- section 19
- section 21

The ORC also identified six records which, in its view, were not responsive to the request.

The requester (now the appellant) appealed the ORC's decision.

During mediation, a number of things transpired:

- The parties resolved the issues concerning access to certain maps.
- Issues concerning continuing access to records were resolved.
- The parties agreed that duplicate records were not at issue. Accordingly, Records 203, 204, 206, 207, 281-282 and 419-513 have been removed from the scope of this appeal.
- The Mediator obtained the consent of one of the third parties to release that party's information, and the ORC disclosed Records 212, 213 and portions of Records 185, 187 and 205 to the appellant.

Mediation was not successful in resolving the appeal, so the matter moved to the adjudication stage. I sent a Notice of Inquiry initially to the ORC and to three third parties whose interests may be affected by this appeal (the affected parties). The ORC and one affected party (the prospective purchaser) submitted representations in response. I then sent the Notice of Inquiry, along with the representations of the ORC and the non-confidential portions of the prospective purchaser's representations to the appellant, who provided a brief response.

Status of the Sale of the Property

The representations of the parties make reference to the status of the sale of the property. The ORC identifies that the property was advertised for sale in February 1998, and that a conditional Agreement of Purchase and Sale was executed a few months later. One of the conditions of the

Agreement related to the zoning of the property, and the issue of the zoning was the subject of an appeal to the Ontario Municipal Board (the OMB). Although the hearing of the OMB appeal has been completed, the ORC identifies that a decision by the OMB remains pending.

Based on the information provided to me, it would appear that the actual sale of the property has not yet taken place. I will review the representations of the parties and make my decisions on that basis.

RECORDS:

There are approximately 225 pages of records remaining at issue in this appeal. They consist of the conditional Agreement of Purchase and Sale, documents relating to the offer, proposals and bidding process, negotiations and conditions relating to the sale of the property by the ORC.

DISCUSSION:

RESPONSIVENESS OF RECORDS

The ORC takes the position that Records 345-347, 438 and 440-441 are not responsive to the request. These records can be described as follows:

- Record 345 - notes of a telephone discussion between an ORC employee and a citizen who was inquiring about the status of the property;
- Record 346 - notes of a telephone conversation between an ORC employee and an individual inquiring generally about lands near Evans Avenue;
- Record 347 - notes of a telephone inquiry regarding a public meeting;
- Record 438 - Record 438 is a handwritten message that includes the names of two companies, and Record 440 is a copy of Record 438 containing additional fax information;
- Record 441 - a memorandum referring to the appellant's access request.

The ORC submits that these records have "no bearing on and are not 'reasonably related' to the proposal stage, selection of a purchaser, or subsequent negotiations or agreement with the purchaser".

Previous orders have established that in order to be responsive, a record must be "reasonably related" to the request. In Order P-880, former Adjudicator Anita Fineberg stated:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The record itself sets out the boundaries of

relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

[See also Order P-1051]

I agree with this statement, and will apply Adjudicator Fineberg's approach to my assessment of the six records identified by the ORC as non-responsive.

The appellant's initial request was for "a copy of all records referable to [the property] including records referable to ...". The request went on to list a number of specific types of documents, many of which relate to the process of selling the property.

In my view, this request is for all records which relate to the property, and the fact that the appellant listed specific types of records does not narrow the scope to those records alone. The appellant used the word "including" in scoping his request and, in my view, any records which are referable to the property are responsive in these circumstances.

Record 345 contains notes of a telephone discussion between an ORC employee and a citizen who was inquiring about the status of the property. It includes the employee's response to the inquiries about the property. In my view, this record is referable to the property and responsive to the request.

Record 346 contains notes of a telephone conversation between an ORC employee and an individual inquiring generally about lands near Evans Avenue. In response to the inquiry, the ORC employee makes passing reference to the property, but the content of the notes is unrelated to the property itself. I agree with the position of the ORC that this record is not responsive to the request.

Record 347 is three lines of notes of a telephone inquiry regarding a public meeting. I agree with the position of the ORC that this record is also not responsive to the request.

Record 438 is a handwritten message that includes the names of two companies, and Record 440 is a copy of Record 438 containing additional fax information. In my view, these records are also not responsive to the request.

Record 441 is a memo referring to the appellant's request for information under the *Act*. This record was clearly created after the appellant's request was submitted, and for that reason I find that it is not responsive.

In summary, I find that Record 345 is responsive to the request, and that Records 346, 347, 438, 440 and 441 are not responsive and will not be considered in this order.

In its representations, the ORC indicates that if I determine that Record 345 is responsive to the request, section 21 would apply to this record. Accordingly, I will consider Record 345 in my discussion of the section 21 exemption.

ECONOMIC AND OTHER INTERESTS

The ORC originally denied access to a number of records on the basis of the exemptions in sections 18(1)(a), (b), (c), (d) and (e). However, the ORC's representations only deal with sections 18(1)(c) and (d). Because sections 18(1)(a), (b) and (e) are discretionary exemption claims, I will consider them to have been withdrawn by the ORC.

The ORC claims that sections 18(1)(c) and (d) apply to the following records or portions of records: Records 58, 62-63, 70, 191-195, the undisclosed portion of Record 205, Records 208, 218-219, 220, 224-238, 240-250, 269-273, 277, 278-279, 288-300, 301-314, 315, 320-325, 326, 327-328, 329-332, 336, 352-362, 377-379 and 420-436.

Sections 18(1)(c) and (d)

Sections 18(1)(c) and (d) state:

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;

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 (Order P-441).

To establish a valid exemption claim under section 18(1)(d), the ORC must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario (Orders P-219, P-641 and P-1114).

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.), 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.)].

Applying this reasoning, in order to establish the requirements of the sections 18(1)(c) or (d) exemption claims, the ORC must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm as described in these sections resulting from disclosure of the records.

The records under consideration can be broadly categorized as follows:

- correspondence or documentation regarding the possible use or value of the property (Records 58, 62-63, 70 and 277);
- information concerning proposals from affected parties regarding the property, including possible uses and value of the property, as well as some analysis of the proposals (Records 191-195, the undisclosed portions of Record 205, and Records 208 and 278-279);
- possible conditions on the sale of the property, and related negotiations (Records 218-219, 220, 315, 320-325, 327-328, 329-332, 336, 377-379 and 433-436);
- drafts of Agreements of Purchase and Sale, and notations and summaries concerning the drafts (Records 224-238, 240-250, 269-273 and 288-300);
- the executed conditional Agreement of Purchase and Sale (Records 301-311 and 420-432);
- a fax cover sheet and registration documents relating to the Agreement of Purchase and Sale (Records 312-314);
- correspondence regarding certain conditions of the Agreements (Records 352-362); and
- note to file of a conversation from an interested party concerning the proposed sale (Record 326).

The ORC submits that sections 18(1)(c) and (d) apply because:

... one of the main responsibilities of the ORC is the disposal of real property owned by the government of Ontario. The ORC must maximize the value

obtained for the land sold ... [I]t is generally in the financial interests of the government and in the public interest for the value of such sales to be maximized.

Property is sold, and in this case was sold, through a competitive request for proposal process. Value is maximized when competitive proposals are based on market information. Value can reasonably be expected to be lost if potential purchasers learn of confidential information of the ORC as vendor, particularly its negotiating positions, its reserve price, its confidential appraisals or terms of agreements which did not close.

... the disclosure of the confidential negotiating file identifying the positions, terms, draft agreements and final [Agreement of Purchase and Sale] in the circumstances where the sale has not closed would allow future potential purchasers to take advantage of this information to the detriment of the ORC and the Government of Ontario.

The appellant's representations do not specifically address the section 18 exemption claim.

Having reviewed the records, I am satisfied that information which relates to the terms of the conditional agreement of purchase and sale, which has not yet closed, qualifies for exemption under section 18(1)(d) of the *Act*. I am also satisfied that records containing information about the possible uses or value of the property also qualify for exemption under this section. I accept that until the purchase and sale of the property has been finalized, it is possible that the sale will not take place, and that the ORC may have to find a new purchaser for the property. If that were to occur, disclosure of the terms negotiated between the ORC and the current prospective purchaser could place the ORC in a disadvantageous position with future potential purchasers. Furthermore, disclosure of prospective uses and the value placed on the property by various parties could similarly be disadvantageous. Given that the ORC is charged with the responsibility for the proper administration of the land holdings of the Government of Ontario, I find that premature disclosure of this type of information could reasonably be expected to be injurious to the financial interests of the Government of Ontario.

Accordingly, any correspondence or documentation regarding the possible use or value of the property (Records 58, 62-63, 70 and 277); any records containing information regarding proposals from the affected parties regarding the property, including possible uses and value of the property, as well as any analysis of the proposals (Records 191-195, the undisclosed portions of Record 205, Records 208 and 278-279); any records referencing the possible conditions on the sale of the property, and related negotiations (Records 218-219, 220, 315, 320-325, 327-328, 329-332, 336, 352-362, 377-379 and 433-436); drafts of Agreements of Purchase and Sale, and notations and summaries concerning the drafts (Records 224-238, 240-250, 269-273 and 288-300); and the executed conditional Agreement of Purchase and Sale (Records 301-311 and 420-432) qualify for exemption under section 18(1)(d) of the *Act*.

Records 312-314 consist of a fax cover sheet with a Document General and order-in-council attached. These latter two records appear to be publically registered documents, and I am not persuaded that their disclosure, nor the disclosure of the fax cover sheet, could reasonably be

expected to lead to any of the harms identified in sections 18(1)(c) or (d), and I find that they do not qualify for exemption.

Record 326 is a note to file of a June 15, 1998 conversation between an interested party and an ORC employee concerning the proposed sale of the property. It identifies generally the status of the sale at the time of the call. I am not satisfied that disclosure of this record could reasonably be expected to lead to any of the harms identified in sections 18(1)(c) or (d), and I find that it too does not qualify for exemption.

In summary, Records 58, 62-63, 70, 191-195, the undisclosed portions of Record 205, Records 208, 218-219, 220, 224-238, 240-250, 269-273, 277, 278-279, 288-300, 301-311, 315, 320-325, 327-328, 329-332, 336, 352-362, 377-379 and 420-436 qualify for exemption under section 18(1)(d) of the *Act*.

THIRD PARTY INFORMATION

The ORC submits that sections 17(1)(a), (b) and (c) apply to the undisclosed portions of Records 58, part of Record 185, Record 186, part of Record 187, Records 188, 191-195, 196-201, part of Record 205, Records 208, 209-211, 214-217, 218-219, 220, 221, 224-238, part of Record 239, Records 240-250, 251-255, part of Record 268, Records 269-273, 277, 278-279, 288-300, 301-314, 315, 320-325, 326, 327-328, 329-332, 336, 348-351, 352-362, 374-375, 377-379, 420-436 and 470-490.

I have already determined that Records 58, 191-195, the undisclosed portions of Record 205, Records 208, 218-219, 220, 224-238, 240-250, 269-273, 277, 278-279, 288-300, 301-311, 315, 320-325, 327-328, 329-332, 336, 352-362, 377-379 and 420-436 qualify for exemption under section 18(1)(d) of the *Act*. Therefore, I will not consider them further here. The remaining records which I will consider under section 17(1) are undisclosed portions of Records 185, 187, 239 and 268, Records 186, 188, 196-201, 209-211, 214-217, 221, 251-255, 312-314, 326, 348-351, 374-375 and 470-490. Although not specifically claimed by the ORC, based on my independent review of the records, I have determined that Records 182, 183 and 184 may also contain information which qualifies for the mandatory exemption under section 17(1), and I will include these records in the section 17(1) discussion.

These remaining records can be generally described as follows:

- correspondence discussing drafts of the Agreement of Purchase and Sale or proposed terms and positions of the parties (the undisclosed portions of Records 239 and 268 (containing a dollar amount) and Records 348-351;
- correspondence or notes disclosing the positions or bids of third parties (other than the prospective purchaser) regarding the purchase of the property (Records 182-184, the undisclosed portions of Records 185 and 187, Records 186, 188, 196-201, 209-211, 214-217, 221, 251-255, 374-375 and 470-490;
- a fax cover sheet and two attached public documents (Records 312-314);

- a note to file of a conversation from an interested party concerning the proposed sale (Record 326).

The ORC and the prospective purchaser submitted representations on the application of section 17(1).

Sections 17(1)(a), (b) and (c) read as follows:

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

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

For a record to qualify for exemption under any of these sections, the parties resisting disclosure (in this case, the ORC and the prospective purchaser) must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the ORC 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 subsection 17(1) will occur.

(Orders 36, P-363, M-29 and M-37)

Part one: Type of information

The ORC submits that:

... the information contained in the ... records constitutes commercial information as it is information exchanged between the ORC as vendor and a third party as purchaser for the purpose of setting out their negotiating positions ... and any

offers. The records also contain confidential commercial information exchanged between the ORC and the unsuccessful bidders.

Previous orders of this Office have found that commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises (see Order P-493). I am satisfied that the records under consideration contain information pertaining to the buying, selling or exchange of merchandise or services and that they relate directly to the commercial operations of the third parties (see Order PO-1722). Further, to the extent that some records contain specific bid or purchase price amounts, this information also constitutes "financial information", as that term is used in section 17(1) of the *Act*.

Therefore, I find that the first part of the section 17(1) test has been met.

Part two: Supplied in confidence

In order to meet the second part of the test, the ORC and/or the affected parties resisting disclosure must establish that the information at issue was supplied in confidence to the ORC. Previous orders of this Office have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis (Orders M-169 and P-1605).

The ORC submits that:

... it is implicit in commercial relations that the negotiation of terms between vendor and purchaser and between vendor and bidder regarding the sale of land are intended by the parties to be confidential. As a matter of practice, such communications are treated as confidential, in part to preserve the confidentiality of information shared by the parties and in part to avoid prejudicing the parties' interests by letting other parties know what their positions are.

... it was the intention of the ORC and [the prospective purchaser] that all communications regarding negotiations, proposed terms for the APS [Agreement of Purchase and Sale], and the final APS would remain confidential. The records were consistently treated by ORC representatives and by [the prospective purchaser] as confidential and they were not otherwise disclosed publically ... Further, the bid packages received from the unsuccessful bidders were also treated by both parties as confidential and intended to be so.

The prospective purchaser submits:

Clearly, where terms were negotiated, those were negotiations conducted on a confidential basis, and any documentation evidencing the negotiation satisfies the test of being financial and commercial information supplied in confidence to the Institution. Any expression of position on terms, or documentation recording

negotiations, clearly is based on information submitted by [the prospective purchaser] to the institution, in confidence.

With the exception of Records 312-314, 326 and portions of Records 348-351 which I will discuss below, I accept the ORC's position that the records contain information supplied by various third parties, including the prospective purchaser, to the ORC in confidence. It is clear that the proposals were supplied to the ORC by these third parties as part of the bidding process for the purchase of the property, and I accept that potential purchasers bidding on properties in these circumstances would have a reasonable expectation that the bids would be received and held by the ORC in confidence. I am also satisfied that the records containing information regarding the terms and ongoing negotiations between the ORC and the prospective purchaser contain information supplied to the ORC in confidence. Therefore, I find that the second part of the section 17 test has been established for these records.

As described earlier Records 312-314 consist of a fax cover sheet with a Document General and order-in-council attached. These records appear to be publically registered documents, and I am not persuaded that they were supplied to the ORC in confidence. Similarly, Record 326 is a note to file of a June 15, 1998 conversation between an interested party and an ORC employee concerning the proposed sale of the property. It identifies generally the status of the sale at the time of the call. I am not satisfied that this record contains any information which was supplied to the ORC in confidence. Accordingly, I find that the second part of the section 17(1) test has not been established for Records 312-314 and 326, and they do not qualify for exemption under section 17 of the *Act*.

Records 348-351 consist of a two-page internal memorandum regarding the property, and a hand-written draft of the same document. The second portion of these documents refers to the terms and conditions of the Agreement of Purchase and Sale, and I am satisfied that disclosure of these portions would reveal information supplied in confidence to the ORC. However, the first portion of these documents contain a summary of a public meeting held in 1998 to discuss the property, and I am not persuaded, based on the representations provided to me by the ORC and the prospective purchaser, that disclosure of these portions of Records 348-351 would reveal information supplied to the ORC in confidence. Accordingly, I find that the first portion of the internal memorandum and the corresponding portion of the handwritten notes does not meet the requirements of the second part of the section 17(1) test, and these portions do not qualify for exemption under section 17 of the *Act*.

Part three: Reasonable expectation of harm

To discharge the burden of proof under the third part of the test, the ORC and/or the prospective purchaser 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 (Order P-373).

The interpretation of "could reasonably be expected to" quoted earlier in the discussion of sections 18(1)(c) and (d) also applies to the harm requirements of section 17(1) (Order PO-1747). 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".

Previous orders of this Office have addressed the issue of harm under section 17(1) in the context of records containing specific bid information. In Order PO-1697, Adjudicator Holly Big Canoe commented as follows:

In past orders a reasonable expectation of prejudice to competitive position has been found in cases where information relating to pricing, material variations, bid break downs, etc. was contained in the records (Orders P-166, P-610 and M-250). Past orders have also upheld the application of section 17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts (Orders P-408, M-288 and M-511).

I concur with this reasoning.

The records remaining at issue can be divided into two categories.

The first category consists of correspondence discussing drafts of the Agreement of Purchase and Sale or proposed terms and positions of the prospective purchaser. This includes the undisclosed portions of Records 239 and 268 (containing a dollar amount) and the remaining portions of Records 348-351 (referencing the specific terms and conditions of the Agreement of Purchase and Sale). The prospective purchaser submits that the disclosure of these records would harm its competitive position, particularly since the sale has not been finalized.

The second category of records is correspondence or notes disclosing the positions or bids of third parties other than the prospective purchaser (Records 182-184, the undisclosed portions of Records 185 and 187, Records 186, 188, 196-201, 209-211, 214-217, 221, 251-255, 374-375 and 470-490). These records contain the specific bids submitted to the ORC, and details about conditions and terms of possible agreements. Records 470-490 consist of a draft agreement submitted by one of these other third parties.

The ORC submits that the disclosure of both categories of records would cause harm to the prospective purchaser and unsuccessful bidders. The ORC states:

Disclosure of the records would give rise to a reasonable expectation of harm. In particular, disclosure would prejudice the third party purchaser and the unsuccessful bidders and could reasonably be expected to interfere significantly with negotiations and potential contracts with other parties in future as the records disclose the positions of the purchaser and the other bidders.

The ORC goes on to submit that:

... the risk of harm must be considered in the factual context, that is, the requester is seeking documents and communications exchanged in negotiating a commercial transaction which is not yet complete ... Disclosure would

significantly prejudice [the prospective purchaser], in respect of negotiations or contracts in future as the records disclose [the prospective purchaser's] negotiating position. Further, harm would result from the disclosure of bid packages. In this case in particular, the ... harm ... would apply to other bidders. In the event the sale does not close, they might wish to bid again and it would be inappropriate for their prior confidential bid information to be disclosed.

I accept the position of the ORC. Given the status of the sale and the possibility that the Ministry may have to enter into a new process should the current conditional Agreement of Purchase and Sale not close, in my view, disclosure of the records could reasonably be expected to result in significant prejudice to the competitive position of the third parties - both the prospective purchaser and the unsuccessful third party bidders. Therefore, the third and final requirement for exemption under section 17(1)(a) has been established, and the records qualify for exemption under section 17(1)(a).

Specifically, I find that the undisclosed portions of Records 239 and 268 (containing a dollar amount), the remaining portions of Records 348-351, Records 182-184, the undisclosed portions of Records 185 and 187, Records 186, 188, 196-201, 209-211, 214-217, 221, 251-255, 374-375 and 470-490 all qualify for exemption under section 17(1)(a) of the *Act*.

Because of my finding that the records qualify under section 17(1)(a), it is not necessary for me to consider sections 17(1)(b) or (c).

SOLICITOR-CLIENT PRIVILEGE

The ORC claims that Records 224-238 and Records 413-414 qualify for exemption under section 19 of the *Act*. Because I have already found that Records 224-238 qualify for exemption under section 18(1)(d), I will only consider Records 413-414 here.

Section 19 of the *Act* reads:

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

Section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the Ministry must demonstrate that one or the other, or both, of these heads of privilege apply to the records at issue.

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...

[*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to “a continuum of communications” between a solicitor and client:

... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as “please advise me what I should do.” But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

[*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

The ORC submits that the records in this category are “memos or letters plus attachments providing information or advice regarding the sale which were exchanged between counsel for the ORC and the client (ORC employees responsible for the sale of the property)”. Further, the ORC submits:

Where a real estate transaction is being negotiated, a variety of terms and positions are exchanged between the parties and legal counsel are typically involved throughout the process to share information with the client, provide legal advice, draft agreements and seek instructions.

Records 413-414 are two hand-written notes from an ORC employee to the ORC solicitor asking the solicitor for his opinion regarding certain matters relating to the sale of the property. In my view, these records are clearly direct communications of a confidential nature between a client (the ORC employee) and solicitor, made for the purpose of obtaining professional legal advice.

Accordingly, I find that Records 413-414 qualify for exemption under section 19 of the *Act*.

ADVICE OR RECOMMENDATIONS

I have already determined that a number of records which were exempted by the ORC under section 13(1) qualify for exemption under either sections 18(1)(d) or 17(1)(a). Accordingly, I will restrict my discussion of section 13(1) to the remaining records only, which are Records 160, 177, 179-181, 222, 342 and 445.

Section 13(1) reads as follows:

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

It has been established in many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The ORC submits that Records 160, 177, 179-181 and 445 are memos or faxes by staff providing advice or recommendations to counsel or management regarding the choice of purchaser from among proposals received or advice regarding the use of the property. They also submit that “the nature of the advice and recommendations set out in the memos and faxes show on the face of the documents”.

Record 160 is a copy of an advertisement of the property, with hand-written notes on the side. These notes, by an ORC employee, relate to the number and nature of the calls received in response to the advertisement, and contain the employee’s view as to the possible use of the property. Although these notes reflect the views and opinions of the ORC employee, in my view, they do not contain nor reveal a “suggested course of action” which will ultimately be accepted or rejected. Accordingly, this record does not qualify for exemption under section 13(1).

Record 177 is a summary of the actions taken with respect to the property, including the number of bids received and the next steps to take in the process of selling the property. Records 180 and 181 are earlier hand-written drafts of Record 177. Record 177 appears to have been prepared in response to Record 179, which is a request for information regarding the sale of the property. In my view, this request and the response (including the drafts of the response) are simply a summary of information concerning the sale of the property. I am not satisfied that they contain nor reveal a “suggested course of action” which will ultimately be accepted or rejected, and I find that they do not qualify for exemption under section 13(1) of the *Act*.

Record 222 is a copy of a newspaper article. The ORC identifies that it contains incorrect information concerning the property. Regardless of whether or not the article is accurate, it clearly does not contain nor reveal any advice or recommendations, and I find that it does not qualify for exemption under section 13(1) of the *Act*.

Record 342 is a fax cover sheet with handwritten notes sent by one ORC employee to another. The notes reflect the author's view and recommendation regarding the provision of certain material. I find that this record contains a "suggested course of action" which will ultimately be accepted or rejected, and I am satisfied that it qualifies for exemption under section 13(1).

Record 445 is a handwritten note and sketch concerning the property. I am unable to identify any advice or recommendations contained in this record, and I find that it does not qualify for exemption under section 13(1) of the *Act*.

In summary, I find that only Record 342 qualifies for exemption under section 13(1) of the *Act*.

PERSONAL INFORMATION

The ORC submits that Records 98, 126, 155, 334, 345, and portions of Records 131, 140, 141, 142, 144, 145, 146, 148, 149, 153, 154, 155, 452, 453, 454, 455, 456, 457, 458 and 459 contain the personal information of identifiable individuals, and are exempt from disclosure under section 21 of the *Act*.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

I have reviewed all of these records. Several of them have already been disclosed to the appellant, with only the names, fax numbers, or addresses of various identifiable individuals severed. Others contain notes about telephone conversations with individuals about the sale of the property.

With the exception of Records 155 and 345 discussed below, I find that all of the records listed at the beginning of the discussion of this issue contain the personal information of identifiable individuals other than the appellant.

Records 155 and 345 contain notes of telephone discussions between ORC employees and two different citizens who were inquiring about the status of the property. They include the citizens' names and telephone numbers, and the employee's response to the inquiries about the property. In my view, if the names and telephone numbers of the individuals are severed, the rest of the records do not contain any personal information and should be disclosed.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (h) of section 21(1) applies. The only section that may apply in these circumstances is section 21(1)(f), which reads:

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

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

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The ORC has categorized the records as follows:

- Records 131, 140, 141, 142, 144, 145, 146, 148, 149, 153, 154, 452, 453, 454, 455, 456, 457, 458 and 459 are initial inquiries and responses regarding bid packages and offers to purchase;
- Records 98, 126 and 334 are notes of discussions, memos or letters between ORC representatives and identifiable individuals.

The ORC submits:

The documents [at issue] ... all relate to the individuals' finances or financial activities, in this case such activities being bids for, negotiations for and offers to purchase the property.

The appellant's representations do not deal with the section 21 exemption claim.

I have determined that the records contain the personal information of identifiable individuals other than the appellant. In the absence of representations from the appellant on the issue of the application of section 21(1)(f), and after reviewing the records, I find that there are no factors favouring disclosure of this personal information. Accordingly, I find that disclosure of the records and portions of records at issue would constitute an unjustified invasion of personal privacy, and the exception in section 21(1)(f) of the *Act* does not apply (see Order PO-1851-F).

In summary, I find that the records which contain the personal information of identifiable individuals qualify for exemption under section 21(1) of the *Act*.

ORDER:

- I order the ORC to disclose Records 160, 177, 179-181, 222, 312-314, 326, and 445, and portions of Records 155, 345, and 348-351. I have attached a highlighted copy of Records 155, 345 and 348-351 with the copy of this order sent to the ORC's FOI Co-ordinator which identifies the portions of these records that should **not** be disclosed. Disclosure under this provision is to be made by **May 18, 2001** but not before **May 14, 2001**.
- I uphold the ORC's decision to deny access to the remaining records.
- 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

April 11, 2001