



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

ORDER PO-1884

Appeal PA_000244-1

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 "... a copy of the Price Waterhouse consultant's report on ORC operations prepared, according to John Barber of The Globe and Mail (24 March), last summer".

The ORC located one responsive record, and denied access to the requester on the basis that it qualified for exemption under section 13(1) of the *Act* (advice and recommendations).

The requester (now the appellant) appealed the ORC's decision, maintaining that the record fell within the scope of section 13(2)(f) and should be disclosed. Section 13(2) lists a number of exceptions to the section 13(1) exemption which, if applicable, require disclosure of a record even if it otherwise qualifies for exemption. The appellant also raised the possible application of the public interest override contained in section 23 of the *Act*.

Mediation was not successful, so the appeal moved to the adjudication stage. I sent a Notice of Inquiry to the ORC initially setting out the issues, and received representations in response. I then sent the Notice to the appellant along with the non-confidential portions of the ORC's representations. The appellant also provided representations.

RECORDS:

The record is a 24-page report by PricewaterhouseCoopers (PWC) entitled "Ontario Realty Corporation Report on Transition Planning". It is labelled as a draft and dated August 31, 1999.

DISCUSSION:

ADVICE OR RECOMMENDATION

Section 13(1) reads:

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.

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

The ORC submitted the following in support of its section 13 claim.

The ORC submits that section 13 of the *Act* applies to exempt the Draft Report from disclosure on the basis that the disclosure of the Draft Report would reveal advice or recommendations of PWC, a consultant retained by the ORC.

During a time of significant change and transition for the ORC as a whole, professional advice was required and accordingly the ORC retained PWC as their consultant. The Draft Report discloses the draft professional opinions of PWC which constitute PWC's advice and recommendations as to factors affecting the transition and how the ORC ought to conduct itself to effect the transition. The Draft Report also discloses certain work/data and analysis which form a part of the advice and recommendations.

The ORC also provides affidavit evidence from the Vice-President of Facility Support Services at the ORC, who previously held the position of Acting Vice-President, Transition. She states:

... PWC was requested to “develop recommendations for how ORC can successfully achieve all of the required milestones between now and the final hand-over of (certain management contracts)”. The key items to be addressed by PWC were identified at the outset in the “scope of assignment” of their work. These key items included making recommendations for a transition plan which would cover tasks associated with contractual requirements, tasks required to accomplish appropriate staffing, and tasks related to development of a communications plan as well as other key items.

I accept the ORC's position on this issue. The report does in fact address the various transition issues described by the ORC, and includes a series of general and specific recommendations on various aspects of the move to externally-provided facilities management that could be accepted or rejected by the ORC during its deliberative process on this matter. Therefore, I find that portions of the record satisfy the requirements of section 13(1) of the *Act*.

EXCEPTION TO THE ADVICE AND RECOMMENDATIONS EXEMPTION

Section 13(2) of the *Act* sets out a number of mandatory exceptions to the exemption provided by section 13(1). Section 13(2)(f) reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

Section 13(2)(f) is unusual in the context of the *Act* in that it constitutes a mandatory exception to the application of the exemption for a discrete type of document, namely reports on institutional performance. Even if the report or study contains advice or recommendations for the purposes of section 13(1), the ORC must still disclose the entire document if the record falls into the section 13(2)(f) category. [See Order P-726; Order P-1190, upheld on judicial review in

Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.); and Order PO-1709, upheld on judicial review in *Minister of Health and Long_Term Care v. David Goodis, Senior Adjudicator, and Ontario Association of Naturopathic Doctors*, Toronto Doc. 684/99 (Ont. Div. Ct.)]

The ORC submits that section 13(2)(f) does not apply to the record at issue in this appeal.

It first argues that:

... a draft document that has not been completed for presentation to the decision-making body does not have the requisite degree of formality to be considered to be a ‘report’ for the purposes of s. 13(2)(f). ...

In Order PO-1709, Senior Adjudicator David Goodis adopted the following interpretation of the word “report” in his discussion of section 13(2)(k), which I find equally applicable in the context of section 13(2)(f):

The word “report” is not defined in the *Act*. However, it is my view that in order to satisfy the first part of the test i.e. to be a report, a record must consist of *a formal statement or account of the results* of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact. [Orders 200, M-265, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)*, Toronto Doc. 721/92 (Ont. Div. Ct.)]

Having reviewed the record and applying Senior Goodis’ interpretation to the circumstances of this appeal, I find that the record meets the definition of a “report”. It is a formal statement and account of the results of the consulting project submitted on the letterhead of PWC to its client, the ORC. Based on its content, and my review of the terms of reference under which the project was completed, it is clear that the report represents the culmination of the work undertaken by PWC, including a detailed discussion of the various aspects of the transition to an outsourced facilities management scheme, and a series of detailed recommendations on a range of transition issues. In my view, the fact that it is characterized as a “draft” is not, in these circumstances, determinative of its characterization as a “report”. Unlike the records referred to in Order P-1054, which was identified by the ORC, the PWC report is not a draft policy paper containing one staff person’s subjective advice or preliminary discussion on the advantages of a policy option. Rather, it is, for all intents and purposes, a completed product. The fact that no final report appears to have been submitted could, in my view, reasonably imply that the ORC treated the draft as a completed product for the purposes of its contractual arrangements with PWC.

The ORC goes on to argue:

A careful review of the Draft Report shows that its purpose is to provide operational advice and recommendations for the future which are needed to address structural/administrative changes which will take place during a transition in the functions of the ORC. ... [ORC’s emphasis]

The ORC contrasts this with the type of “audit” reports at issue in previous appeals involving section 13(2)(f), and submits:

In general, the very nature of an audit report is to do a review or investigation of matters or a state of affairs already in existence. The focus of audits is to look back in history to evaluate the performance or efficiencies of an organization as a whole or of a particular activity. The transition plan required by ORC and worked on by PWC was intended to be and required to be forward looking in that it constituted advice and recommendations on future steps to be taken to accomplish new tasks assigned to the ORC. On that basis, the ORC/PWC case is distinguishable from the above-noted cases dealing with audits.

...

There is a risk that the term ‘efficiency’ may be interpreted so broadly that it could be found to apply to almost any type of review or study done by an institution. It is submitted that, in order to give meaning to the terms ‘performance’ and ‘efficiency’ in s. 13(2)(f), these terms must be applied only in cases where the clear purpose of a review or study is to assess the adequacy of a program or to study problems in a program with a view to making recommendations to fix such problems. On that basis, it is respectfully submitted that the Draft Report herein cannot reasonably be interpreted to be a report on the ‘performance’ or ‘efficiency’ of any program of the ORC.

In her affidavit, the Vice-President adds:

As can be seen from the above and from a review of the scope of the assignment, the ORC did not retain PWC to conduct an audit of the ORC nor did it request an investigation or an assessment of the performance or efficiency of the ORC either generally or in the context of the transition. The engagement of PWC was strictly for the purpose of preparing a transition plan which would include an outline of their advice and recommendations regarding tasks to be undertaken during the transition and the relative priority of such tasks.

In my view, the ORC has placed too much reliance on the distinction between an audit report dealing with past performance and its characterization of the PWC report as a forward-focused series of recommendations on transition planning.

In Order M-700, former Adjudicator Anita Fineberg made the following comments in the context of section 7(2)(e) of the *Municipal Freedom of Information and Protection of Privacy Act* which, although slightly different in wording from section 13(2)(f) of the *Act*, are nonetheless relevant and applicable in the circumstances of this appeal. She stated:

The Township submits that the record was not a report or study on the performance or efficiency of an institution; rather it was conducted as a result of actions taken by the Township’s Council in response to an employee complaint.

In my view, the reason why such a report or study was commissioned is not determinative of its characterization as a record under section 7(2)(e) of the *Act*. Rather, one must examine the nature and contents of such a record.

The record in the present appeal is clearly a report in that it consists of a formal statement or account of the results of the collation and consideration of information. Furthermore, Part 2 of the document involves the study of a number of issues and concerns relating to the internal procedures for the recording and collection of revenues of the recreation department, identifies the potential weaknesses in the existing system and makes recommendations to strengthen the system. The corrective recommendations are designed to assist the Township in establishing efficient accounting and control systems to ensure that the appropriate cash and revenues of the department flow through to the Township. They are also designed to improve the operations of the recreation department. These portions of Part 2 fit squarely within section 7(2)(e).

I agree with this approach. The reason why the PWC report was commissioned is not determinative of its characterization as a record under section 13(2)(f). It is also necessary to examine the nature and content of the report in making this determination.

In undertaking its review, PWC examined a number of aspects of transition planning, identified gaps, interviewed key personnel and made recommendations that would help ensure a successful transition. In so doing, PWC examined the management structures as well as budgetary and planning systems in place at the time at the ORC, and pointed to areas of performance in need of improvement. In many cases, in order to identify recommendations for change, PWC needed to review and discuss deficiencies in current areas of operational and management performance, and these areas form important components of the report. Once the review was completed and the report prepared, in my view, it is not dissimilar in form and content to an audit report. It assesses past performance, identifies areas requiring improvement, and recommends ways in which these improvements can be made.

I find that the recommendations contained in the PWC report arise out of an assessment on the part of the ORC that improvements were needed in its transition planning process; a decision to hire PWC to review the situation and provide recommendations; and an evaluation of the performance of the ORC's transition planning function in the context of making these recommendations. As such, I find that the report falls within the scope of section 13(2)(f).

Therefore, despite my conclusion that the record meets the requirements for exemption under section 13(1), this exemption claim is not available to the ORC. No other discretionary exemptions have been claimed, and no mandatory exemptions apply, so the record should be disclosed to the appellant.

The record provided to me during the course of this appeal contains a number of handwritten notations. The author and purpose of these notations is not clear, however they would not appear to have been made by PWC and therefore would not fall within the scope of the section 13(2)(f) exception. The notations should be severed by the ORC prior to disclosure.

Because of my findings, it is not necessary for me to consider the possible application of section 23 of the *Act*.

ORDER:

1. I order the ORC to disclose the record to the appellant in its entirety, subject to the severance of any handwritten notations, by providing him with a copy by **April 11, 2001**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the ORC to provide me with a copy of the record which is to be disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ March 21, 2001