



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

ORDER PO-1901

Appeal PA-000213-2 and PA-000255-1

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 access to an appraisal report dated May 30, 1999 pertaining to 12 cottage lots located on various lakes in the Thunder Bay district. The requester subsequently verified with the ORC that the request related to nine, rather than 12 lots. The ORC received a second request from the appellant seeking access to an Appraisal Report on Private Recreational Camps prepared for the Ministry of Natural Resources and dated August 1998. The requester subsequently verified with the ORC that the request related to the "Benchmark Summary Values" appraisal report for Northwestern Ontario, designated as MNR file 888/98. The ORC located the records responsive to both requests and denied access to them, in their entirety, claiming the application of the following exemptions contained in the *Act*:

- section 13(1) - advice or recommendations
- section 18(1)(a) - valuable government information
- sections 18(1)(c), (d) and (e) - economic and other interests

The requester, now the appellant, appealed the Ministry's decision to deny access to both of the records. This office opened appeal file PA-000213-1 in relation to the first request and appeal file PA-000255-1 for the second. During the mediation stage of the appeal, the appellant also raised the possible application of the "public interest override" contained in section 23 of the *Act*. The parties were unable to resolve the issues in dispute, the appeals were moved into the inquiry stage of the appeals process.

I decided to seek the representations of the ORC, initially and received submissions from it, which were shared, in their entirety, with the appellant. The appellant also made representations in response to the Notice, which were then shared with the ORC. Finally, the ORC was invited to, and did, make submissions by way of reply.

The records at issue consist of an Appraisal Report relating to nine cottage lots in the Thunder Bay district (the Cottage Lot Report) and an Appraisal Report relating to five categories of recreational camp sites in the Districts of Rainy River, Kenora and Thunder Bay (the Benchmark Report).

DISCUSSION:

VALUABLE GOVERNMENT INFORMATION/ECONOMIC AND OTHER INTERESTS OF AN INSTITUTION

The ORC submits that both of the Appraisal Reports which comprise the records at issue in these appeals are exempt from disclosure pursuant to sections 18(1)(a), (c), (d) and (e) of the *Act*. These sections provide:

- (1) A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
- ...
- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

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

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 ORC submits that the disclosure of the information contained in the reports can reasonably be expected to harm the economic interests or competitive position of the ORC or to harm the financial interests of the Government of Ontario. It specifically argues that:

. . . one of the main responsibilities of the ORC is the disposal of real property owned by the Government of Ontario. The value obtained for real property sold, subject to certain exceptions, is to be maximized. With certain exceptions, it is generally in the financial interests of the Government and in the public interest for the value of such sales to be maximized.

Value is maximized when proposals or offers to purchase are made based on market information. Value can reasonably be expected to be lost if potential purchasers learn of confidential appraisal information.

. . . disclosure of the report would allow potential purchasers of the lots to take advantage of the appraisal information to the detriment of the ORC/Government of Ontario.

More specifically, the detriment or prejudice is generally that a potential purchaser would know the appraised value and would also know that authority may exist to accept up to certain amounts less than the reserve price depending on the value of the property. If so, a purchaser would be unlikely to offer to pay any amount higher than the minimum. This would effectively deprive the ORC/MNR (the Ministry of Natural Resources) and the Government of the opportunity to obtain a higher price through natural market forces.

. . .

In summary, to disclose appraisals would deny the Government, through its agents, the right to sell land as a commercial activity. In the commercial marketplace, sellers of property are not compelled to disclose confidential appraisals. They can therefore sell their property in an open and competitive marketplace. To compel disclosure of its land appraisals would destroy the ability to sell Government Real Property in an open, competitive marketplace and thwart the goal of maximizing value on sales.

The appellant takes issue with the ORC's position. First, the appellant suggests that the reports are, in fact, out-of-date, having been prepared in May 1999 and August 1998, and that the ORC and MNR have an established policy of stale-dating their appraisals after a 90-day period has elapsed. The appellant relies on several pieces of correspondence which indicate that the ORC will accept offers on certain advertised properties for a limited period of time, 90 days for example. In addition, the appellant has provided me with part of an excerpt from the ORC's Guidelines and Procedures regarding appraisals which states that:

Appraisals older than 6 months will be considered stale dated. . .

The ORC provided me with the remainder of the excerpt which goes on to add:

. . . and the original appraiser will be contacted to determine if, and the extent to which, changes in market conditions warrant reconsideration of the appraised value. A new appraisal will be commissioned where appropriate.

The ORC contacted the appraiser who provided the May 1999 report concerning the cottage lots in order to determine whether market conditions have changed since the date of the appraisal. The ORC provided me with a letter from the appraiser in which he indicates that the market in that area for cottage properties has remained static. As a result, I find that the appraisal reports continue to accurately reflect the market value of the properties which are evaluated in each document. They have not, in fact, become stale-dated, as alleged by the appellant.

The appellant also suggests that there does not exist a “competitive market” for these recreational properties as many are leased by individuals who are then granted the right to purchase the properties. The appellant is of the view that because only the current leaseholders are granted the opportunity to purchase the lands which are the subject of the reports, they ought to be entitled to know the market value of the properties. The ORC points to the fact that the MNR might choose to offer the properties to other individuals at any time if the current leaseholder chooses not to exercise the right to purchase the lot at the price offered and the lease is not renewed.

The appellant argues that as tenants, leaseholders ought to be entitled to obtain the market data prepared by the ORC in order to assist in obtaining their own appraisals in situations where a dispute arises with respect to the value ascribed to a property by the ORC. In my view, leaseholders are not prescribed in any way from obtaining their own appraisals and do not require the ORC’s market value appraisal in order to do so.

The appellant further submits that the MNR’s policies for obtaining and evaluating appraisals is invalid and that this ought to be the subject of public scrutiny. I will address these concerns below in my discussion of the public interest override provision in section 23.

In Order PO-1887-I, Assistant Commissioner Tom Mitchinson addressed the application of sections 18(1)(c) and (d) to certain evaluation reports and feasibility studies prepared by the ORC with respect to the sale of a property owned by the Government of Ontario. He found that:

Previous orders of this Office have found that the disclosure of appraisal reports, in circumstances where the sale of the subject property has not yet closed, could prejudice the owner’s financial interests. In Order MO-1228, Adjudicator Holly Big Canoe reviewed the application of section 11(d) of the *Municipal Freedom of Information and Protection of Privacy Act* (similar to section 18(1)(d) of the *Act*) with respect to a property appraisal and stated:

The City submits that section 11(d) applies to Record 3 (the Report). To establish a valid exemption claim under section 11(d), the City must demonstrate a reasonable expectation of injury to its financial interests.

...

The City of Ottawa elected to obtain the services of a Real Estate Appraiser and Consultant to carry out a comprehensive appraisal of the Lansdowne Park site to determine an appropriate market value per unit of development based on the development proposals being considered for the site.

The purpose of the appraisal in question was in short to establish a benchmark for the City to assess its contribution and/or return from the potential redevelopment of the site.

The City also indicates that the Report was requisitioned specifically with the intent that it would form the basis for instructions to City staff in negotiating the final agreement should Council decide to proceed to that stage with the recommended developer.

The City submits that the recommended proposal and developer for the Revitalization Project has not yet been approved by Council nor has a decision yet been made to sell any portion of the Park at a particular price. The City submits that until Council has met and approved the sale of the property and the sale has been closed, disclosure of the Report could be expected to prejudice the financial interest of the City in attempting to obtain a fair return for the sale of the Park property. Disclosure at this time could also reasonably be expected to adversely affect the negotiations with the developer, according to the City.

The Report contains specific information relating to existing and proposed income generating strategies, various pricing scenarios as they pertain to the recommended and potential uses, and information which reveals potential profit and loss data in relation to the various options for redevelopment. The report also contains specific information on lease rates, lease and sales negotiations strategies and makes reference to potential overhead and operating expenses related to the development proposals which are currently under review by Council. In my view, disclosure of this detailed information at this stage in the process could weaken the City's negotiating position and interfere with its ability to obtain a fair return on its property. Accordingly, I am satisfied that disclosure of Record 3 could reasonably be expected to be injurious to the financial interests of the City, and section 11(d) applies.

Similarly, in the circumstances of this appeal, I am satisfied that the disclosure of Records 46B, 44B, 61B and 62B prior to the closing of the sale could reasonably

be expected to be injurious to the financial interests of the Government of Ontario, and I find that these records qualify for exemption under section 18(1)(d) of the *Act*.

I adopt the reasoning expressed by former Adjudicator Big Canoe in Order MO-1228 and applied by Assistant Commissioner Mitchinson in PO-1887-I for the purposes of the present appeal. I have been provided with evidence from the ORC to indicate that none of the properties which are appraised in either of the reports have, in fact, been sold. In my view, the disclosure of the information contained in the appraisal reports would seriously undermine the ORC's position with any potential purchasers of these properties. I accept the arguments made by the ORC that the disclosure of the appraised market values of the properties would allow possible purchasers to make use of this information to the detriment of the Government of Ontario when negotiating a price with the ORC.

In my view, the disclosure of the information contained in the appraisal reports could reasonably be expected to prejudice the economic interests of the ORC and MNR under section 18(1)(c) and to be injurious to the financial interests of the Government of Ontario under section 18(1)(d). These records are, accordingly, exempt from disclosure under these sections.

Because of the manner in which I have addressed the application of sections 18(1)(c) and (d) to the records, it is not necessary for me to consider whether they are also exempt under sections 13(1), 18(1)(a) or 18(1)(e) of the *Act*.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there exists a compelling public interest in the disclosure of the records at issue in these appeals, under section 23 of the *Act* which reads:

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

The appellant makes the following submissions in support of his arguments:

The Private Hunting and Fishing Camps Report covers some 3,400 recreational properties in Ontario. Therefore, a significant number of Ontario residents are affected by this report. As previously noted, it not only affects the amount of their annual lease, but the purchase price of their cottage lots. In addition the benchmark appraisal report by [one of the appraisers] affects a further population of approximately 100 cottage lot tenants in the District of Thunder Bay who are still leasing properties from the MNR.

Given that this is so, the appellant submits that there is a compelling public interest in the release of these reports by the institution. In his view, the affected individuals have a right to know how the MNR appraises the market value of their cottage lots, so that they can be assured that unfair pricing practices are not being used by the Ministry to artificially inflate the market value of their properties and,

therefore, the amount of their annual lease. The appellant submits that such practices are being used, at the present time, and that they are partially documented in the two benchmark reports which are the subject of this appeal.

The appellant further submits that a significant number of cottage lot tenants in Northwestern Ontario and the Thunder Bay District have registered their objections with the MNR over the unprecedented increases in the purchase price of their properties, or the amount of their annual rent, which can simply not be justified with reference to market data.

The appellant goes on to dispute the ORC's contention that the interest which exists in the disclosure of the records is purely personal to the appellant and adds that:

. . . any monetary gain to be realized [by the appellant] is minimal, to say the least, and cannot be considered a primary motivating factor for the appellant. Instead, the appellant is concerned that cottage lot tenants in Ontario receive fair and equitable treatment, by the MNR, where it involves the appraisal of their leased cottage lots and the amount of their annual leases. In addition, the appellant has a professional commitment to building institutions which are open and transparent, as well as accountable to the public. These are, in fact, his primary reasons for pursuing the appeal.

Finally, the appellant concludes his arguments on this issue by submitting:

The appellant rejects the assertion that the requested information "belongs" to the ORC because the reports were commissioned and paid for, by the ORC. Instead, he submits that the public has a right to access these reports because they were produced with public funds, not with those of the ORC, and have a direct and immediate impact on a large number of Ontario residents who are leasing cottage lots from the MNR.

...

. . . the central purpose of the Act is to shed light on the operations of government and that the release of this information will serve the purpose of informing citizens about the activities of their government and, in particular, its policies and practices for valuing cottage lots which they are leasing from the Ministry. [appellant's emphasis]

The appellant also provided me with copies of letters written to him and to the Government of Ontario by area members of the Legislative Assembly with respect to issues concerning cottage and recreational land tenure in Northwestern Ontario. This evidence leads me to the conclusion that the question of increases in lease fees and market values of these properties has clearly been the subject of some contention in the area for the past several years.

In response to these submissions, the ORC submits that the appellant's interest in the disclosure of the records is purely a personal, rather than a public, one. It has provided me with an

explanation of the appellant's own dealings with the MNR with respect to the purchase of a cottage lot and the disagreements which have emerged from this situation. The ORC points out that as a result of these other proceedings and access requests, the appellant has obtained a great deal of information from the MNR relating to their policies and procedures for obtaining appraisals and sale of lots. It goes on to submit that:

Clearly, the only "public" interest claimed by [the appellant] is that of the nine cottage owners who lease lots which are the subject of Cottage Lots Report or perhaps that of the individuals who lease recreational sites which are the subject of the Benchmark Report. There is therefore no broader public interest a issue. It is, at best, an interest of certain identifiable lessees in relation to the asking price that will be set if they wish to purchase leased lots. It is submitted that the only real interest here is [the appellant's] desire to force the MNR to sell him [a specified piece of property] for the asking price set in November 1998 for 90 days.

Further, the only basis for a broader "compelling" public interest is [the appellant's] assertion that the MNR has not been offering the cottage lots for sale on a fair or open basis. . . . [the appellant's] assertions are not supported and, in fact, it is submitted that the various responses from MNR appended to [the appellant's] representations disclose that the MNR has in fact followed its policies and that [the appellant] and others have been treated fairly.

The ORC also takes the position that, in fact, the disclosure of the information contained in the records would serve to harm the public interest as the Government's ability to maximize the sale price of the properties would be undermined.

Principles Governing the Application of Section 23

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

"Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act's* central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

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]

Purpose of the exemption

Section 18(1)(c)

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests or compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

[Orders M-862, P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and P-1210]

Section 18(1)(d)

Generally speaking, section 18 is intended to protect certain interests, economic and otherwise, of the Government of Ontario and other government institutions. Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the “ability of the Government of Ontario to manage the economy of Ontario”, I find that section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.

Findings

The ORC and the appellant have taken diametrically opposed positions with respect to the application of the “public interest override” in section 23 to the records. The ORC is of the view that because the appellant is one of the lessees of the properties which are appraised in the Cottage Lots Report, his personal interest in the subject matter of this record outweighs any public interest which he might have in the information. The appellant, on the other hand, argues that the MNR has taken an unfair approach to cottage lot tenants and potential purchasers throughout Northwestern Ontario and that his interest in the subject matter of the records is not strictly a personal one.

In my view, there exists a public interest in issues relating to the renegotiation of cottage lot leases and the terms surrounding the purchase of cottage lots and other recreational lands in Northwestern Ontario. This is evidenced by the letters provided to me by the appellant relating to queries made by members of the Legislative Assembly of the Government. I am not convinced, however, that this public interest is reflected in the subject matter of these particular

records. The appraisal reports in question deal with only a small number of such properties, including one leased by the appellant.

I find that there does not exist a compelling public interest in the disclosure of the information contained in these records. While public interest has been demonstrated in information pertaining to the leasing of Crown lands by the MNR and their possible sale to members of the public, I cannot agree that there exists a public interest in the disclosure of these particular records.

In addition, I find that any public interest which may exist in the subject matter of the records cannot be said to clearly outweigh the purpose of the section 18(1)(c) and (d) exemptions. The ORC's position with respect to the harm which could reasonably be expected to result from the disclosure of the appraised value of the properties to potential purchasers is particularly compelling.

As a result, I find that section 23 has no application in the present circumstances and the records are properly exempt from disclosure under sections 18(1)(c) and (d).

ORDER:

I uphold the decision of the ORC to deny access to the requested records.

Original Signed By: _____ May 4, 2001
Donald Hale
Adjudicator