



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

INTERIM ORDER PO-1887-I

Appeal PA_990442_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 “any and all records from July 1, 1995 to [the date of the request] pertaining to the sale of approximately 33 acres of land behind the Ernest C. Drury School” located in the Town of Milton. The requester also asked for any directives or memoranda declaring the land surplus.

The ORC identified 88 responsive 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) - third party information
- sections 18(1)(c), (d) and (e) - economic and other interests of the institution
- section 19 - solicitor-client privilege
- section 21(1) - invasion of privacy

Portions of two records were also considered not to be responsive to the request.

Along with its decision, the ORC provided the requester with two indices describing the records and identifying the exemptions claimed for each record.

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

During mediation, a number of things transpired:

- The appellant agreed not to pursue access to any information covered by the section 21 exemption claim.
- The appellant accepted that portions of two records were not responsive to his request.
- The appellant raised the possible application of the public interest override contained in section 23 of the *Act*.
- The appellant questioned whether the searches conducted by the ORC for records responsive to his request were adequate.
- Because Record 2B might contain the appellant’s personal information, section 49(a) was added to the scope of the appeal.

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 two parties whose interests may be affected by this appeal (the affected parties). The ORC and one affected party submitted representations in response.

In its representations, the ORC withdrew the section 19 claim with respect to a number of records, on the basis that solicitor-client privilege had been waived through disclosure of these records to the prospective purchaser's lawyer during the course of an Ontario Municipal Board (OMB) hearing involving the property. However, the ORC maintained that the exemptions in sections 13(1), 17(1) and/or 18(1) applied to some of these records. Sections 13(1) and 18(1) are discretionary exemptions and, because they were raised for the first time at this stage of the appeal, the issue of the late raising of discretionary exemptions was added to the scope of the inquiry. Because section 17(1) is a mandatory exemption, I must consider the possible application of section 17(1) to these additional records.

I then sent a modified Notice of Inquiry to the appellant, along with the representations of the ORC and the one affected party. The appellant provided me with representations in response.

Status of the sale of the property

The representations of all parties make reference to the status of the sale of the Ernest C. Drury School property. A significant portion of the representations provided by the ORC and the affected party (who is the prospective purchaser of the property) refer to the possible harm and potential prejudice to their interests if the records are disclosed before the purchase and sale of the property is completed. These parties also both refer to the OMB hearing involving the property, which was recently concluded, and the impact the OMB's decision has on the status of the property sale.

The appellant's representations also refer to the impact of the OMB decision. In the appellant's view, because the OMB gave conditional approval to the sale of the property, the harms associated with the sale not proceeding, and the resulting requirement for the ORC to re-market the property, are no longer valid.

Based on the information provided to me, it would appear that the OMB gave conditional approval to the sale but I have no evidence that the actual sale of the property has taken place. I will review the representations of the parties and make my decisions on that basis.

RECORDS:

The records remaining at issue consist of letters, memoranda, e-mail messages, agreements, reports, studies and other records relating to the proposed purchase and sale of the property. They are described in the ORC's two indices entitled: (1) Index of Records - ORC; and (2) Index of Records - Legal Services Branch.

Some records are duplicates of others. Specifically, Records 24B, 32B and 33B are duplicates of Records 8A, 15A and 16A; and Record 17A is a duplicate of Record 35B, although 35B contains an additional cover page. Records 24B, 32B, 33B and 17A will be treated in the same manner as their duplicates, and I will not discuss them separately in this order.

The section 19 exemption claim was withdrawn by the ORC for Records 15A and 35B. No other exemptions were claimed for certain portions of these records, specifically all parts of Record 15A with the exception of numbered paragraphs 1 through 15, and the two cover pages plus pages 1 and 2 of Record 35B. These portions of Records 15A and 35B should be disclosed to the appellant.

PRELIMINARY MATTER:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

In its representations, the ORC states that:

... documents listed in the Notice of Inquiry (for which a claim for exemption under section 19 was made) are not solicitor-client privileged as they were exchanged between counsel for the ORC and counsel for the purchaser ... However records 6A, 7A, 8A, 13A, 18A, 12B, 18B, 20B, 23B, 24B and 29B are properly exempt (in whole or in part) pursuant to either sections 13, 17 (a mandatory section) or 18 because they disclose communications regarding the confidential terms of the [Agreement of Purchase and Sale]. To claim exemptions for these records is consistent with our arguments herein for the remaining records. The ORC therefore asks that the exemption be approved for these documents on the basis of sections 13, 17 or 18.

I amended the Notice of Inquiry before sending it to the appellant in order to allow him an opportunity to provide representations on the issue of whether the ORC should be permitted to rely on the discretionary exemptions raised at this stage of the appeal. The appellant's representations do not deal with this specific issue.

When this appeal was received, the ORC was provided with a Confirmation of Appeal indicating that, based on a policy adopted by this Office, the ORC had 35 days from the date of the Confirmation to raise any additional discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period. It was only when the ORC's representations were received in response to the Notice of Inquiry, several months after the appeal began, that the ORC attempted to claim sections 13(1) and 18(1) for these other records. The reasons offered by the ORC for doing so are based on the impact of its decision to withdraw the section 19 exemption claim for these records, for the reasons previously outlined.

Previous orders issued by this Office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject, of course, to a consideration of the particular circumstances of each case. This approach was upheld by the Divisional Court in the judicial review of Order P-883 (*Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

In the circumstances of this appeal, I have decided to permit the ORC to raise these new discretionary exemptions. I have reached this decision for the following reasons:

- both of these discretionary exemptions were originally claimed by the ORC for other records;
- the records for which these exemptions are now claimed are similar in nature to the other records already subject to these exemption claims; and
- the appellant, although provided with the opportunity to do so, declined to comment on the late raising issue in his representations.

Accordingly, I will consider the sections 13(1) and 18(1) exemption claims for these additional records and include them in my discussion of these two exemptions.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

The ORC originally denied access to the following records or portions of records on the basis of sections 18(c) and (d) of the *Act*: Records 12A, 15A, 20A, 21A, 5B, 8B, 11B, 21B, 28B, 29B, 34B, 35B, 36B, 37B, 39B, 43B, 44B, 46B, 61B, 62B and 63B. Section 18(1)(e) was claimed for Record 11B, and section 18(1) was raised in the ORC's representations for Records 6A, 7A, 8A, 13A, 18A, 12B, 18B, 20B, 23B, and a previously unclaimed portion of 29B.

Sections 18(1)(c), (d) and (e) 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;
- (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 records under consideration can be broadly categorized as follows:

- an executed conditional Agreement of Purchase and Sale (Record 12A);
- earlier drafts of the conditional Agreement of Purchase and Sale (Records 21A, 28B, the last 13 pages of Record 29B and the last 15 pages of Record 35B);
- correspondence discussing draft clauses of the conditional Agreement of Purchase and Sale, or proposed terms and/or positions of the parties (numbered paragraphs 1 through 15 of Record 15A, the two remaining severances in Record 20A, Record 5B, the undisclosed portions of Records 8B, 11B, 36B, 39B and 43B, Record 21B, and numbered paragraphs 1 through 7 of Record 34B);
- other terms or conditions of the agreement (Record 37B);
- real estate valuation reports and correspondence regarding the reports, and correspondence regarding the land value (Records 44B, 46B and 61B); and
- a feasibility study for internal use (Record 62B) and the terms of reference for the feasibility study (Record 63B).

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.

... 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 submissions focus predominantly on the status of the sale of the property, and the public interest issues surrounding the sale.

Having reviewed the records, I am satisfied that disclosure of 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 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. Given that the ORC is charged with 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, Records 12A, 21A, 28B, the last 13 pages of Record 29B, the last 15 pages of Record 35B, numbered paragraphs 1 through 15 of Record 15A, the two remaining severances in Record 20A, Record 5B, the undisclosed portions of Records 8B, 11B, 36B, 39B and 43B, Record 21B, numbered paragraphs 1 through 7 of Record 34B, and Record 37 all qualify for exemption under section 18(1)(d).

Records 44B, 46B, 61B and 62B are all evaluation reports and feasibility studies involving the property. 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*.

Record 63B, on the other hand, consists solely of a cover letter and the terms of reference for the Record 62B feasibility study. This record simply sets out the ORC's requirements for the study, and contains no results or other information that could reasonably put the ORC in a disadvantageous position if required to negotiate a future sale of the property. Accordingly, I find that disclosure of Record 63B could not reasonably be expected to result in any of the harms identified in sections 18(1)(c) or (d), and it does not qualify for exemption under either of these sections of the *Act*.

In its representations, the ORC raises section 18 as a new basis for denying access to Records 6A, 7A, 8A, 13A, 18A, 12B, 18B, 20B, 23B, and a portion of Record 29B. These records can be described as follows:

- Record 6A - September/98 letter confirming the extension of the vendor's conditions.
- Record 7A - September/98 letter confirming another extension of conditions.
- Record 8A - July/98 letter referencing a small error in the Agreement.
- Record 13A - July/98 letter referencing the signing of the conditional agreement.
- Record 18A - June/98 letter referencing the agreement.

- Record 12B - April/99 letter confirming extensions.
- Record 18B - November/98 letter confirming extension.
- Record 20B - Specific modifications to the agreement.
- Record 23B - Confirmation of the error in the agreement.
- Record 29B - A cover letter to the agreement, referencing modified terms .

I find that Records 20B and 29B, and the dollar figure contained in Record 18B contain information concerning the proposed terms and conditions of the conditional agreement of purchase and sale, and qualify for exemption under section 18(1)(d) for the same reason as other similar records discussed above.

However, I am not persuaded that the other records should be treated in the same manner. These records relate either to time extensions for certain conditions of the agreement (Records 6A, 7A, 12B and 18B); the reference to a minor correction in the wording of a standard clause of the agreement (Records 8A and 23B); or details concerning meetings held to discuss the agreement (Records 13A and 18A). I am not satisfied that the disclosure of these records could reasonably be expected to lead to any of the harms identified in section 18(1), nor have I been provided with the type of “detailed and convincing” evidence required to establish any of these harms. Therefore, I find that Records 6A, 7A, 8A, 13A, 18A, 12B, 23B, and all portions of Record 18B with the exception of the dollar figure do not qualify for exemption under section 18(1) of the *Act*.

Because I have determined that Record 11B qualifies for exemption under section 18(1)(d), it is not necessary for me to address the ORC’s section 18(1)(e) exemption claim for this record.

The ORC claims that Records 5A, 16A, 13B, 19B, 22B, 31B, 34B and 39B qualify for exemption under section 19 of the *Act*. Because I have already found that the undisclosed portions of Record 39B and numbered paragraphs 1 through 7 of Record 34B qualify for exemption under section 18, I will not consider Record 39B or the exempt portions of Record 34B here.

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.

The records subject to the section 19 exemption claim can be described as follows:

- Record 5A - Letter from the ORC solicitor to the responsible ORC employee, with attachments, regarding an aspect of the purchase of the property.
- Record 16A - Memorandum from the ORC solicitor identifying additional information about the sale, and it includes the solicitor’s advice regarding this additional information.

- Record 13B - Memorandum from an ORC employee to the ORC solicitor, with attachments.
- Record 19B - A copy of a portion of Record 5A, with two attachments.
- Record 22B - E-mail message from a senior law clerk at the ORC to ORC staff, including the solicitor, regarding a term of the agreement.
- Record 31B - E-mail message from the ORC solicitor to staff regarding the terms of the proposed sale.
- Record 34B - E-mail message from the ORC solicitor to staff regarding the terms of the proposed sale.

Having reviewed these records and considered the ORC's representations, I find that all of them, including any attachments, are clearly communications between a client (the ORC employees) and their solicitor made for the purpose of seeking and/or giving legal advice on the sale of the property, or form part of the continuum of communications between the solicitor and the client aimed at keeping both informed of developments in this regard. I am also satisfied, given the circumstances and context in which these records were created, that the communications were intended to be, and were treated as "confidential" by both the solicitor and client at the time they were exchanged.

Accordingly, I find that Records 5A, 16A, 13B, 19B, 22B, 31B and the portions of Record 34B not covered by my finding under section 18(1)(d) qualify for exemption under the solicitor-client communications privilege component of section 19 of the *Act*.

THIRD PARTY INFORMATION

The ORC and the affected party state that sections 17(1)(a), (b) and (c) apply to the undisclosed portions of Records 12A, 15A, 20A, 21A, 5B, 8B, 20B, 21B, 28B, 29B, 34B, 35B, 37B, 43B, 47B, 48B, 49B, 50B, 53B and 54B. In its representations, the ORC also submits that section 17(1) applies to Records 6A, 7A, 8A, 13A, 18A, 12B, 18B, 20B, 23B and 29B.

I have already determined that Records 12A, 20A, 21A, 5B, 8B, 20B, 21B, 28B, 29B, 37B, 43B and the relevant portions of Records 15A, 34B and 35B qualify for exemption under section 18(1)(d), so I will not discuss them here.

Because the affected party was not notified of the possible application of section 17(1) to those records identified for the first time in the ORC's representations, I must defer consideration of Records 6A, 7A, 8A, 13A, 18A, 12B, 23B and the remaining portions of Record 18B pending notification.

The remaining records which I will consider under section 17(1) in this order are the undisclosed portions of Records 47B, 48B, 49B, 50B, 53B and 54B.

Records 47B, 49B and 50B (50B is similar to 47B, but with a date stamp) are proposals by a third party regarding the possible purchase of the property. The severed portions contain the proposed purchase price. I notified this third party at the beginning of my inquiry, but did not receive representations in response to the Notice. However, the ORC's representations on section 17(1) do deal with these records.

Records 48B, 53B and 54B are also proposals by the affected party prospective purchaser, regarding the possible purchase of the property. Again, the severed portions contain the proposed purchase price.

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 affected parties) 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.

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 amounts set out in the severed portions of the records 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). I find that these specific purchase price amounts also constitute "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 party must establish that the information at issue was supplied in confidence to the ORC by the affected party. 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 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.

I accept the ORC's position. It is clear that the purchase prices figures were supplied to the ORC by the third parties as part of the bidding process for the purchase of the property; and I accept that prospective purchasers bidding on properties in these circumstances would have a reasonable expectation that the actual bid figures would be received and held by the ORC in confidence. Therefore, I find that the second part of the section 17 test has been established.

Part three: Reasonable expectation of harm

To discharge the burden of proof under the third part of the test, the ORC and/or the affected party 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 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, and I find that, in the circumstances of this appeal, disclosure of the proposal prices set out in Records 47B, 48B, 49B, 50B, 53B and 54B could reasonably be expected to result in significant prejudice to the competitive position of the third parties. Therefore, the third and final requirement for exemption under section 17(1)(a) has been established, and the undisclosed portions of Records 47B, 48B, 49B, 50B, 53B and 54B qualify for exemption.

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).

ADVICE OR RECOMMENDATIONS

I have already determined that a number of records which were exempt by the ORC under section 13(1) qualify for exemption under either section 18(1) or 19. Accordingly, I will restrict my discussion of section 13(1) to the remaining records only, which are Records 2B, 6A, 7A, 8A, 13A, 18A, 12B, 18B and 23B.

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.

Record 2B is a draft letter to the appellant prepared by ORC staff for signature by the Chair of Management Board of Cabinet. It includes the notation “DRAFT FOR DISCUSSION ONLY”, and the ORC submits that it was prepared for use in staff discussions concerning the property. I accept the ORC’s position, and find that Record 2B reflects the advice and recommendations of staff as to the content of a letter to be signed by the Chair, which could be accepted or rejected by him, and therefore qualifies for exemption under section 13 of the *Act*.

Because Record 2B identifies the appellant, I must also determine whether it contains his personal information. If it does, then my finding regarding section 13(1) would only be the first step in determining whether the record qualifies for exemption. The ORC would also have to consider whether to exercise discretion in favour of disclosing the record to the appellant under section 49(a) of the *Act*.

Although the draft letter contains the appellant’s name, it is addressed to him in his capacity as a representative of a local organization which has an interest in the issues raised by the proposed purchase of the property. In Order P-300, I examined the issue of whether information about an individual as representative of a local organization would constitute that individual’s personal information. I stated as follows:

"Personal information" is defined under section 2(1) of the *Act* to mean recorded information about an "identifiable individual". The meaning of the term "individual" in the context of the *Act* has been considered in previous orders and found not to include a sole proprietorship, partnership, unincorporated association or corporation (Orders 16, 113); a trade union, corporation or law firm (Order 42); or the names of officers of a corporation writing in their official capacity (Orders 80, 113).

In my view, correspondence submitted to an institution by a representative of a group or association such as the body represented by the appellant in this appeal, is not the personal information of the author of the correspondence. The correspondence was submitted to the institution by the local organization on the letterhead of the organization, and signed by the appellant in her capacity as a spokesperson of the organization. Consequently, I find that the record does not qualify as the appellant's "personal information", and it not necessary for me to consider the possible application of section 21 of the *Act*.

I find this same reasoning applicable to Record 2B in this appeal. The draft letter at issue is addressed to the appellant in his capacity as a representative of the identified local organization and not to him in a personal capacity. Accordingly, I find that section 49(a) has no application to this record.

The remaining records in this category consist of correspondence concerning relatively minor details about the extension of time or correction of small errors in the agreement. I find that none of these records contain or reveal a suggested course of action which could ultimately be accepted or rejected during any deliberative process. Accordingly, Records 6A, 7A, 8A, 13A, 18A, 12B, 18B and 23B do not qualify for exemption under section 13(1) of the *Act*.

ADEQUACY OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the ORC has conducted a reasonable search for the records as required by section 24 of the *Act*. The *Act* does not require the ORC to prove with absolute certainty that further records do not exist. In order to properly discharge its obligations under the *Act*, the ORC must establish, however, that it has made a reasonable effort to identify and locate records responsive to the request (Order PO-1837). Although an appellant will rarely be in a position to indicate precisely which records have not been identified, the appellant must, nevertheless, provide a reasonable basis for concluding that additional records exist.

The search issue was not raised by the appellant at the time of his initial appeal. It came up after certain records were produced by the ORC during the course of the OMB hearing regarding the property, which the appellant felt should have been included as records responsive to his request. In particular, the appellant identified a June 2, 1999 letter, and copies of certain newspaper advertisements concerning the property which were not included in the list of records identified by the ORC.

The ORC provided the appellant with an explanation regarding his concerns. The ORC submits that, after learning of the concerns:

... a further review was conducted by ... the Freedom of Information Co-ordinator at the ORC. He did not find the [June 2, 1999] letter in the ORC files. With respect to the newspaper ad, a copy of the ad was not contained in the file kept for the sale of the property. However, upon searching elsewhere for the ad, a copy of the ad from the newspaper was found in the ORC's Accounting Department attached to the invoice submitted for payment to the newspaper in which the ad ran.

The Accounting Department was not searched as part of the original search of the Property file. It is submitted that it should not be considered unreasonable that the invoice records in the ORC's Accounting Department were not searched.

The ORC also states that the individual who conducted the initial searches for responsive records is no longer employed by the ORC, so the ORC was unable to explain why the June 2, 1999 letter was not in its file for the property.

The appellant refers to the fact that the documents noted above were not included in his original request, but his representations focus more on the general manner in which the ORC has conducted itself with respect to the sale. The appellant submits:

The fact that these crucial items were not present in the initial [Freedom of Information file] provides further evidence that the ORC's actions do not conform to commonly accepted business practices.

I accept that the concerns identified by the appellant raise questions regarding the record-keeping practices of the ORC. However, it does not necessarily follow that the searches conducted by the ORC for records responsive to the appellant's request were not reasonable. Other than referring to the documents disclosed at the OMB hearing, the appellant provides no other specific reasons for his belief that other records exist. In addition, I am satisfied, based on the representations provided by the ORC, that it made reasonable efforts to search for and identify all responsive records in the two areas where these records were most likely to exist: legal files, and the files relating to the sale of the property. As far as the advertisements located in the Accounting Department's files are concerned, although I question why these records were not contained in the property file, I am satisfied that once their existence was brought to the ORC's attention, the ORC conducted a search and found the records. Furthermore, although the ORC cannot explain why a copy of the June 2, 1999 letter was not in the property file, based on the various search activities undertaken by the ORC, I am nonetheless satisfied that its searches for responsive records were reasonable in the circumstances.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the *Act* reads:

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

The solicitor-client privilege exemption provided by section 19 of the *Act* is not one of the sections mentioned in section 23. Accordingly, section 23 cannot apply to override this exemption.

It has been established in a number of previous orders that, for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

In order 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 (Order P-984).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, sections 13, 17 and 18. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield

on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

The appellant has provided extensive submissions regarding the public interest that the proposed sale of the property has generated. His submissions with respect to the public interest include concerns about the sale price of the property and value of the property. The appellant also identifies concerns about the process through which the property is being sold, and questions whether the ORC indeed followed a legitimate competitive tender process for this sale.

The appellant also submits:

When an investigation is conducted and an employee is let go, questions about the process for the disposal of this property are warranted. There is a compelling public interest to be served.

Furthermore, an attachment to the appellant's representations states:

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

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

The affected party made representations on the section 23 issue, and states:

In respect of the appellant's assertion that a public interest exemption should apply to the information in respect of this sale, we would suggest that the public interest issues in this matter relate to the process by which the lands were sold, and not the details of the negotiated sale agreement.

The ORC submits:

It was noted that both a forensic audit into property sales and investigations by the Ontario Provincial Police are underway.

This publicity and these inquiries show that (i) a great deal of information is already available to the public for public debate; (ii) priority attention is being given by the ORC, by the Government and by law enforcement authorities to investigate allegations of irregularity in the sales of properties; and (iii) as yet, no findings or conclusions have been made and, as such, the investigations are ongoing. Further, results of the internal audit at the ORC are expected to be made public.

It is submitted that the high degree of attention to the issue combined with the investigations noted above means that reasonable investigations are being conducted and the public interest is being served well. It can be expected that once the investigations are concluded, further public debate will ensue. It is therefore submitted that the public interest is generally well satisfied by current disclosure and there is therefore no compelling public interest to compel disclosure of records containing information which is not final and otherwise not available to the public.

The ORC goes on to distinguish the circumstances in this appeal with those in Order PO-1804-F. In that order, I determined that a public interest in the disclosure of the records relating to land dealings by the ORC did exist, and that the public interest clearly outweighed the purpose of the applicable exemption. I made that finding based on a variety of circumstances which were particular to that appeal. The ORC identifies that, unlike the circumstances in Order PO-1804-F, the public interest is protected in a number of ways in this appeal. In particular, the ORC refers to the ongoing investigations, as well as the public meetings, hearings and discussions which have allowed the public to be advised of and involved in the process dealing with the sale of the property.

Based on the circumstances in this appeal, and the material provided by all parties relating to the investigations and inquiries which have been conducted into the sale of properties by the ORC, including the sale of the subject property in this appeal, I am persuaded that there exists a compelling public interest in the disclosure of the records. I must now determine whether the public interest clearly outweighs the purpose of the exemptions claimed.

Previous orders have reviewed the purposes of the exemptions applied in this appeal. With respect to section 18(1)(c), previous orders have stated:

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]

The purpose of section 13(1) is to ensure that:

... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

In Order PO-1688, Senior Adjudicator David Goodis examined the purpose of the exemption found in section 17, and stated:

The purposes of section 17(1) of the *Act* were articulated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

... The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).

Clearly, the purposes of the section 17(1) exemption are serious, and are intended to protect the public interest in the manner expressed by the Williams Commission.

I recently issued Order PO-1853, in which the records at issue related to the same property as the records in this appeal. In that appeal, the issue of the public interest in the disclosure of the records was also raised. After finding that there did exist a public interest in the records, and after reviewing the purposes for the exemptions claimed in that appeal, I made the following findings:

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

- unlike the situation in Order PO-1804-F, the identity of the prospective purchaser is known, and the sale in question has not been completed;
- the appellant has been provided with most of the information contained in Records 8, 9 and 10, and the portions withheld relate specifically and narrowly to some of the proposed terms and conditions of the sale;
- the sale of the property has been subject to review by the OMB, a statutory body established to deal with certain public interest considerations in the sale of land, including public land;

- there is an ongoing OPP investigation and an independent forensic audit into the sale of land by the ORC, both of which are ongoing and directed at determining the propriety of individual land transactions, including the sale which is the subject of the records at issue in this appeal.

I make the same findings in this appeal for the same reasons. Although in this appeal the records not only include specific terms of the agreements, but also records which would reflect the process through which the sale was discussed and negotiated, it is my view that the independent investigations and other reviews conducted concerning the sale of this property address the public interest concerns raised by the parties to the extent that, in my view, the public interest in the disclosure of these records does not outweigh the purpose of the sections 13(1), 17(1) and 18(1) exemptions in these circumstances.

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

INTERIM ORDER:

1. I uphold the ORC's decision to deny access to Records 5A, 12A, 16A, 17A, 21A, 24A, 5B, 20B, 21B, 28B, 29B, 34B, 37B, 44B, 46B, 61B, 62B, the undisclosed portions of Records 20A, 8B, 11B, 13B, 19B, 22B, 31B, 32B, 33B, 36B, 39B, 43B, 47B, 48B, 49B, 50B, 53B, 54B, numbered paragraphs 1 through 15 of Record 15A, the dollar figure in Record 18A, and the last 15 pages of Record 35B.
2. I order the ORC to disclose Record 63B, the two cover pages plus pages 1 and 2 of Record 35B, and all portions of Record 15A with the exception of numbered paragraphs 1 through 15. Disclosure under this provision is to be made by **May 3, 2001** but not before **April 28, 2001**.
3. 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 2.

I remain seized of this appeal in order to deal with the outstanding section 17(1) exemption claim regarding Records 6A, 7A, 8A, 13A, 18A, 12B, 23B, and the remaining portions of Record 18B.

Original signed by: _____ March 27, 2001
Tom Mitchinson
Assistant Commissioner