



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-1964

Appeal PA-000287-2

Ontario Realty Corporation



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

The Ontario Realty Corporation (the ORC) held a limited invitational tender to sell a parcel of land located in the City of Pickering. The ORC invited two bidders to participate in the tender, the appellant and the affected party in this appeal, both of whom had been leasing part of the land that was for sale. Subject to a number of limitations, the ORC advised that the parcel would be sold to the bidder submitting the highest purchase price.

The ORC determined the winning bid through a process that included a public presentation where the bids were opened and parts of the bids read out. The information made public included the name of the bidder, the amount of the bid, and any conditions attached to the bid. At the reading of the bids, it was disclosed that the affected party's offer was higher than the appellant's and thus the former was the winning bid. The affected party subsequently executed a final agreement of purchase and sale with the ORC and registered the title in the land registry office. When the appellant conducted a title search of the property, he discovered that the purchase price in the final agreement of purchase and sale was less than the affected party's offer as read out during the bidding process. The final price, however, was still higher than the appellant's tender bid.

The appellant asked the ORC to explain the discrepancy in the price in the affected party's tender offer and the final purchase price. The ORC advised the appellant that the tender document that the affected party had been provided with by the ORC had overstated the acreage for sale, while in the appellant's document it was correctly described. This meant that the affected party had bid on more acres than were actually for sale. To ensure that the purchase price reflected the number of acres for sale, the final purchase price was pro rated from the original bid using the correct number of acres. As a result, the per acre price in the final agreement of purchase and sale was identical to the per acre price in the tender offer.

NATURE OF THE APPEAL:

This appeal arises from a request made to the ORC under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

- Record 1 – the invitational tender bid for Parcel 78 submitted by [the affected party] on or about January 24, 2000
- Record 2 – any amendments to that bid/offer
- Record 3 – the fully executed Agreement of Purchase and Sale
- Record 4 – the Statement of Adjustments

These four records relate to the sale of land by the ORC to the affected party in the invitational tender bid described above. According to the appellant, the purpose of his request is to verify the explanation provided by the ORC for the difference between the purchase price in the offer and in the final agreement of purchase and sale.

The ORC advised the affected party of the request for information and he consented to the release of Record 3, but objected to disclosure of the remaining records. Accordingly, the ORC

provided Record 3 to the appellant, but denied access to Records 1, 2, and 4, relying on the exemption under section 21 (invasion of privacy) of the *Act*.

The appellant appealed the ORC's decision to this office.

During mediation, the appellant indicated that he was not seeking access to Record 2 since the information in this record was incorporated in Record 3 which had been disclosed.

I initially sent a Notice of Inquiry that set out the facts and issues in this appeal to the ORC and the ORC sent back representations. I then sent a Notice of Inquiry together with the ORC's complete representations to the appellant. In his submissions, the appellant advised that he is not seeking access to the name of the affected party. As a result, the affected party's name is not at issue in this appeal. However, the appellant also raised new issues to which I felt the ORC should be allowed an opportunity to reply. I therefore sent the ORC a summary of the new issues and received reply submissions.

Subsequently, the ORC requested that this office provide the affected party with an opportunity to reply to the issues in this appeal. As a result, I sent the affected party a Notice of Inquiry and a summary of the new issues raised by the appellant. The affected party did not provide any submissions.

RECORDS:

The records at issue consist of the tender bid for the purchase of land that was completed and submitted to the ORC by the affected party (Record 1), and a Statement of Adjustments (Record 4) that describes changes made to the final purchase price to account for amounts owing between the vendor and the purchaser.

DISCUSSION:

PERSONAL INFORMATION

It is necessary first to decide whether the records contain personal information and, if so, to whom that personal information relates, for the answers to these questions determine which parts of the *Act* may apply.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual [paragraph (h)], and information relating to financial transactions in which the individual has been involved [paragraph (b)].

The ORC submits that Records 1 and 4 disclose "the financial information or financial activities of [the affected party]" and therefore these records disclose the personal information of the affected party.

In his submissions, the appellant explains that he is seeking disclosure of the whole of Records 1 and 4, but particularly wants the description of the acreage for sale in Record 1, that is, the originally stated number of acres listed for sale in the affected party's bid document which the ORC now says is incorrect, as well as the bid price set out in Record 1. He also indicates that he does not object to the affected party's name being severed from the records and suggests that Record 1 is only an offer and therefore does not disclose financial information. I do not accept the appellant's submission that information relating to the financial aspects of an agreement loses its nature as financial information when contained in an offer to purchase rather than a final agreement of purchase and sale.

Record 1 is the affected party's offer to purchase a parcel of land owned by the ORC. As such, all the information in this record is intrinsically linked to the financial transaction which is the sale of land. Therefore I find that the information in Record 1 qualifies as the personal information of the affected party within the meaning of paragraph (b) and (h) of the definition in section 2(1). Although the appellant is not seeking the name of the affected party, information in the record may disclose the personal information of the affected party since the appellant is aware of the individual's identity.

Assistant Commissioner Tom Mitchinson in Interim Order PO-1786-I considered information similar in nature to the information at issue in this appeal and found that records indicating that a particular individual purchased a specific property from the ORC at a named price would reveal information about individual purchasers and therefore contain the personal information of individual purchasers. I agree with the Assistant Commissioner's finding, and applying it in this appeal, I find that the description of the acreage in Record 1 when taken together with other information that the appellant knows about the affected party is the personal information of the affected party.

Record 1 does not contain any personal information of the appellant.

I have reviewed Record 4 and find that as the information relates to a financial transaction, the record contains the personal information of both the affected party and the appellant within the meaning of paragraph (b) and (h) of the definition in section 2(1).

INVASION OF PRIVACY

General

Section 47 of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49(b) provides an exception to this general right of access, in the following terms:

A head may refuse to disclose to the individual to whom the information relates personal information, if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and other individuals (as in Record 4) and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information. Accordingly, I will consider whether the disclosure of the personal information in Record 4 would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 49(b).

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

Where, however, the record only contains the personal information of other individuals, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the *Act* prohibits an institution from releasing this information, unless one of the exemptions set out in that section applies. Therefore, I will consider whether the disclosure of the records would be an unjustified invasion of personal privacy under section 21(1) for Record 1 and under section 49(b) for Record 4.

In both these situations (where the record contains the personal information of the appellant and of others, and where the record contains the personal information of others only), sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

With respect to section 21(3), the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 21(3) is found to apply, the factors in section 21(2) cannot be resorted to in favour of disclosure.

Section 21(3)(f)

Neither party addresses Record 4 in its representations, but this record contains similar types of information to that in Record 1. I will consider whether the presumption in section 21(3)(f) applies to both Records 1 and 4.

The ORC has submitted that the presumption in section 21(3)(f) applies to Record 1. This section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

Describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The ORC submits that:

It was determined in Order M-536 that the release of a contract for the purchase of land would result in the disclosure of personal information describing the individual's financial activities and would constitute an unjustified invasion of personal privacy pursuant to the provisions of the municipal statute similar to section 21(3)(f) of the Act. Further, Order P-1420 held that a record acknowledging payment of a certain amount of property qualified as financial information falling within the provisions of section 21(3)(f).

It is submitted that the information contained in an invitational bid package falls within the same general category of records as a contract for the sale of land. Further, bid packages may contain more sensitive personal information (than a final contract of sale) as they set out the positions of the potential purchaser as they are generally not publicly available. In this case, the invitational bid package was considered to be confidential and was treated as confidential by the ORC.

The appellant, in his representations, submits that:

The land does not become an asset of [the affected party] until the bid is accepted (either by agreement or by operation of law);

The information [in Record 1] is the same information as was publicly read aloud at the opening of the tender bids in January 2000 (at which [the appellant's representative] was present). [The affected party] and all other bidders were invited to attend the opening of the bids and so he knew, or ought to have known, that his bid price would be disclosed. Under the circumstances the information was not provided in a confidential manner, as was suggested. If [the affected party] was indeed the highest bidder, then the release of this information will provide this to be the case.

Assistant Commissioner Tom Mitchinson made the following statements in Interim Order PO-1786-I:

In my view, the primary information in an agreement of purchase and sale that could be said to describe an individual's assets and/or financial activities is the

very information at issue in this case, namely the individual's name, *the purchase price* and the location of the property.

...disclosure of the names, *purchase price* and property locations listed in relation to the individual purchasers (except those who consented to disclosure) would reveal information that describes their financial activities, and therefore I find that the presumption at section 21(3)(f) applies [emphasis added].

I find the Assistant Commissioner's conclusion in PO-1786-I applicable in the context of section 21(3)(f), that is, disclosure of the personal information in Record 1, including the acreage and the purchase price, would reveal information that describes the affected party's financial activity. Accordingly, the presumption at section 21(3)(f) applies to Record 1.

Applying the same reasoning, I find that the information in Record 4, which describes changes made to the final purchase price to account for amounts owing between the vendor and the purchaser, similarly qualifies as personal information describing the affected party's financial activity. Accordingly, I find that the section 21(3)(b) presumption applies to this record.

Section 21(4) does not apply to this information.

Following the *John Doe* decision referred to above, I find that the information in Record 1 is exempt from disclosure under section 21(1) of the Act. I also find that there was nothing improper in the ORC's exercise of discretion under section 49(b) to deny access to the personal information in Record 4.

ABSURD RESULT

With respect to Record 1, the appellant submits that he and his representative were present at the opening of the bids when the affected party's bid price was read out and suggests that the information at issue is information of which he is aware. The ORC, in its reply representations, questions the accuracy of the appellant's assertion that he and his representative were present when the bids were opened. Accepting the fact that either the appellant or his representative attended the presentation of the bids, information relating to the affected party's tender bid would have been disclosed to the appellant.

In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case had provided to the Metropolitan Toronto Police would contradict one of the primary purposes of the *Act*. This is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. Adjudicator Higgins found that withholding information from the individual who had provided it would lead to an absurd result. This approach has been applied in a number of subsequent orders and has been extended to include not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (Orders M-451, M-613, MO-1196, P-1414, P-1457 and PO-1679, among others).

Order MO-1378 involved a similar situation where the issue was access to records which may have been previously disclosed to an appellant and which contained personal information of identifiable individuals. In that order, Senior Adjudicator David Goodis stated:

The appellant claims that the photographs should not be found to be exempt because they have been disclosed in public court proceedings, and because he is in possession of either similar or identical photographs.

In my view, whether or not the appellant is in possession of these or similar photographs, and whether or not they have been disclosed in court proceedings open to the public, the section 14(3)(b) [section 21(3)(b)] presumption may still apply. In similar circumstances, this office stated in Order M-757:

Even though the agent or the appellant had previously received copies of [several listed records] through other processes, I find that the information withheld at this time is still subject to the presumption in section 14(3)(b) [section 21(3)(b)] of the *Act*.

In my view, this approach recognizes one of the two fundamental purposes of the *Act*, the protection of privacy of individuals [see section 1(b)], as well as the particular sensitivity inherent in records compiled in a law enforcement context. The appellant has not persuaded me that I should depart from this approach in the circumstances of this case.

I adopt Senior Adjudicator Goodis' reasoning for the purposes of this appeal and find that disclosure of financial information in a public forum does not preclude the application of the presumption that information describing an individual's finances constitutes an unjustified invasion of personal privacy. Accordingly, I find that the bid price qualifies for exemption under section 21 in spite of the fact that this information was disclosed to the appellant and/or his representative at a public presentation.

Adjudicator Laurel Cropley in Order MO-1323 considered the rationale for the application of the absurd result:

The reasoning in Order M-444 was based on the principle that individuals should have access to records containing **their own personal information** unless there is a compelling reason for non-disclosure. The circumstances of this appeal raise the question whether the "absurd result" may also apply to a record which contains another individual's personal information despite the fact that the record does not contain the appellant's personal information.

....Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where

the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

In all cases, the “absurd result” has been applied **only** where the record contains the appellant’s personal information. ...In my view, to expand the application of the “absurd result” in personal information appeals beyond the clearest of cases risks contradicting an equally fundamental principle of the *Act*, the protection of personal privacy. In general, I find that the fact that a record does not contain the appellant’s personal information weighs significantly against the application of the “absurd result” to the record. However, as I indicated above, all of the circumstances must be considered in determining whether this is one of those “clear cases” in which the absurdity outweighs the privacy protection principles.

I concur with this reasoning. Based on the evidence and the submissions of the parties, I find that this is not one of those “clear cases” where the protection of personal privacy is outweighed by the principle of absurd result in a situation where the record does not contain the appellant’s personal information.

PUBLIC INTEREST IN DISCLOSURE

The appellant, in his representations submits that, “there is an overriding public interest in ensuring that the ORC dispose of the land (and other lands) in a fair manner and consist (sic) with the rules of the tender”. 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]

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.)].

Assistant Commissioner Mitchinson discussed what constitutes public interest in final order PO-1804 that related to his earlier order PO-1786-I. These orders dealt with similar information to information in this appeal. In that order he stated:

There can be no dispute that there is a public interest in ensuring that the sale of land by the ORC on behalf of the citizens of the province is conducted in a legal and defensible manner. In my view, the disposal of public property which, as the appellant points out, is valued in the billions of dollars, is inherently a matter of public interest. The land registration system in Ontario, and indeed in all Canadian jurisdictions, recognizes the need for public accountability in the sale of all land through the statutory registration requirements administered by the

government; this need for accountability in the public interest, can only be magnified in the case of public property.

I agree with Assistant Commissioner Mitchinson's conclusion that information about the sale of land by the ORC is inherently a matter of public interest. I therefore find that there is a public interest in the disclosure of the information at issue in this appeal. However, the first requirement of the exemption in section 23 is that there is a "*compelling* public interest" in disclosure of the records.

In Order P-984, former Adjudicator Holly Big Canoe discussed this requirement as follows:

"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 a **compelling public interest** in disclosure, the information contained in the 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.

In responding to the section 23 issue, the ORC submits that:

.. there must be a cautious approach in assessing whether there is a "compelling public interest" in the disclosure of the records sought in this case. This is a case where an unsuccessful bidder is seeking to obtain records of the successful bidder. On its face, it can be inferred that the unsuccessful bidder is disappointed that he could not purchase the property at issue. This, however, does not raise a broader public issue.

.. It is important to note that the ORC's policies regarding the sale of land are public. Details relating to the tender process and the successful bidder and purchase price are publicly available.

The appellant has presented no evidence which supports his assertion that there has been a failure to follow ORC policies or that a public interest issue is raised. On the contrary, it is clear from reading the appellant's representations that this issue is of interest to the appellant only because the appellant was the unsuccessful bidder for the purchase of a piece of property.

The ORC is of the view that the appellant's interest in making this request is a narrow and personal one, an attempt by an unsuccessful bidder to obtain a winning bidder's records. The appellant, on the other hand, submits that his request reflects a broader concern, to ensure that the sale of public land is conducted fairly.

Assistant Commissioner Mitchinson in Final Order PO-1804 found that there was a compelling public interest in the disclosure of the personal information of individual purchasers in records

pertaining to properties sold by the ORC. The personal information at issue included the name of the purchaser, the location of the property and the purchase price. While Order PO-1804 was being adjudicated, extraordinary circumstances existed that affected its outcome. At that time, there had been considerable public debate over several months in the media and in the Legislature involving the sale of property by the ORC, the ORC had undertaken a forensic audit into all its property sales over a fifteen year period in response to allegations of irregularity in the sale of certain properties, and the Ontario Provincial Police had commenced a criminal investigation into allegations of improper conduct by former employees of the ORC. Together these events worked to create "strong interest or attention" on the part of the public in issues related to the sale of land by the ORC.

In contrast, there currently is no broad, intense public attention being paid to the activities of the ORC as there was at the time of Final Order PO-1804. Further, this request relates only to a single transaction, one in which only the appellant appears to have a strong interest in. I am satisfied that the interest in these records is more in the nature of a private rather than a public interest. As a result, I am not persuaded that there is a compelling public interest in the disclosure of these records. Therefore, section 23 does not apply.

ORDER:

I uphold the ORC's decision to withhold Records 1 and 4.

Original signed by:
Dawn Maruno
Adjudicator

November 8 2001