



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-1957**

**Appeal PA-000407-1**

**Ministry of Community and Social Services**



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## **BACKGROUND:**

In November of 1999, the Family Responsibility Office (FRO) issued a Request For Proposals (RFP #99/00-0127) to select a minimum of three private sector organizations to perform collection services for past-due child and spousal support payments. A total of 10 responses were received, and a short-list of five bidders was selected for further consideration. These five bidders were invited to attend an interview and to present their proposals. Following these interviews/presentations and consideration by the selection committee, three successful bidders were chosen.

## **NATURE OF THE APPEAL:**

The Ministry of the Attorney General (MAG) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records relating to RFP #99/00-0127:

- (a) records which describe the outcome of the evaluation process, including point scores, prior to the interviews conducted;
- (b) records which describe the final evaluation results, including point scores, based on decisions emanating from the interviews;
- (c) any reports submitted to senior management regarding the evaluation process and the evaluation of each proposal.

MAG, who was at that time responsible for the operation of FRO, identified 122 pages of responsive records, and provided the requester with access to three pages and partial access to four others. MAG relied on one or more of the following exemption claims as the basis for denying access to the remaining 115 pages or partial pages:

- section 13(1) - advice and recommendations
- section 17(1) - third party commercial information
- section 19 - solicitor-client privilege

The requester, now the appellant, appealed the decision.

During the processing of this appeal, responsibility for FRO was transferred from MAG to the Ministry of Community and Social Services (the Ministry).

During mediation, the appellant withdrew page 46 (interview schedule) and pages 106-121 (review of references) from the scope of the appeal. No other issues were resolved at the Mediation stage, and the file was transferred to the Adjudication stage.

I sent a Notice of Inquiry initially to the Ministry and 10 organizations whose interests might be affected by the outcome of this appeal (the affected parties). The Ministry and five affected parties submitted representations in response. None of these affected parties consented to disclosure of any information about them contained in the records.

I then sent the Notice to the appellant, along with a complete copy of the Ministry's representations and the non-confidential portions of representations from four affected parties. The appellant contacted this office and confirmed that he would not be making representations.

I have since received representations from two other affected parties. One of them does not consent to disclosure of any of its information, and the other consents to partial disclosure of information relating to it. None of the information covered by the consent falls within the scope of this appeal.

## **RECORDS:**

After receiving the Notice of Inquiry, the Ministry issued a revised decision to the appellant, granting access to pages 25-29 and 73 in full and partial access to pages 1-4. The Ministry also stated that certain records were no longer at issue. The appellant subsequently confirmed that he is no longer seeking access to pages 5-39, or to the undisclosed portions of pages 1-4. Pages 47, 50, 55, 56, 58 and 59 are duplicates, which I have also removed from the scope of the appeal.

The records that remain at issue are:

Pages 41-45	Review of Presentations (in full)
Pages 48 - 68	Interview Evaluation Worksheets (in full) (excluding duplicates)
Pages 69 - 72	Interview Conclusion (in full)
Pages 74 - 83	Interview Process (in full)
Page 84	Agency Interview Summary (in part)
Pages 85 - 88	Briefing Note (in full)
Pages 89 - 90	Procurement Summaries (in part)
Page 91	Note to File (in full)
Pages 92 - 93	Memorandum (in full)
Pages 94 - 95	Deputy Minister's Briefing Note (in full)
Pages 98 - 105	Evaluation Worksheets (in full)
Page 122	Internal Memorandum dated July 14, 2000 (in full)

## DISCUSSION:

### THIRD PARTY INFORMATION

#### Introduction

The Ministry claims section 17(1)(a) of the *Act* as the basis for denying access to the following pages of records: 41–45, 48–49, 51–54, 57, 60–72, 74–83, the undisclosed parts of page 84, pages 91–94, parts of page 95, and pages 98–105.

The Ministry withdrew this exemption claim for page 122 in its revised decision letter. Because section 17(1) is a mandatory exemption claim, I have reviewed page 122 independently, and find that it does not contain any of the types of information listed in section 17(1) of the *Act*, so I won't consider it further here.

Page 89 is not mentioned in the Ministry's representations, although section 17(1) was originally claimed by MAG as the basis for denying access to the names of two affected parties contained in the record. This same information has been provided to the appellant through the disclosure of page 73, and on that basis I find that it does not qualify for exemption, and the withheld portions of page 89 should be disclosed to the appellant.

Section 17(1)(a) of the *Act* reads:

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,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

For a record to qualify for exemption under sections 17(1)(a), the Ministry and/or the affected parties resisting disclosure 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 institution 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-373, M-29 and M-37)

The Court of Appeal for Ontario, in upholding my Order P-373 stated:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words “**detailed and convincing**” do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner’s function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

*(Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.))*

### **Requirement #1: Type of Information**

The Ministry and the affected parties submit that the information contained in the records is technical and/or commercial information. The Ministry states:

**Pages 41-45, 48-49, 51-54, 57, 60-72, 74-83, part of 84, part of 95 and 98-105 in this appeal are technical and/or commercial in nature**

Like the information contained in the records described in Orders P-222 and PO-1818, the information in pages 41-45, 48-49, 51-54, 57, 60-72, 74-83, part of 84, part of 95 and 98-105 inclusively in this appeal are technical and/or commercial in nature. During the interviews, the candidates were expected to describe their proposed approach to file management, commission structure, and recovery rate, while demonstrating a bona fide understanding of FRO business. The interview presentations contained information about the candidates’ unique approach to meeting the needs of FRO. Therefore, these records reflect information relating to the candidates’ proposed operation or maintenance of a

structure [or] process” relating to the “buying, selling or exchange of a service” (definitions of “technical” and “commercial” information in Order PO-1818).

**Pages 91–94 are technical and/or commercial in nature**

With regard to the information in pages 91–94, it is respectfully submitted that it is also commercial and/or technical in nature as it relates directly to the exchange of services in response to RFP 99/00-0127. The information contained in these records reflects a strategy employed by one of the candidates or references to that strategy in order to become a successful bidder. This strategy was implemented by the affected party and is unique unto them. It is a result of careful thought and creativity. Disclosure of this information would surely reveal to competitors commercial and/or technical information that could assist in securing a successful bid in a similar competition.

The Ministry relies on Order PO-1818, where Adjudicator Donald Hale found proposals submitted by various organizations qualified as commercial information.

The term “commercial information” in section 17(1) has been defined in many previous orders of this Office to mean information that relates solely to the buying, selling or exchange of merchandise or services (Order P-493). For, example, in Order PO-1753, I found that records prepared by a company in response to the Ministry of the Environment’s RFP relating to its Drive Clean Program contained commercial information. I based my finding on the fact that the businesses that submitted bids prepared them for the sole purpose of entering into a commercial venture with the Ministry (see also Orders PO-1894, PO-1932, MO-1368 and MO-1462).

***Group 1 records: page 41-45, 48-49, 51-54, 57, 60–72, 74–83, part of 84, part of 95 and 98–105***

Pages 48–49, 51–54, 57, 60–68 and 98-105 are evaluation worksheets or handwritten notes taken by various evaluators during the interview/presentation portion of the selection process in RFP #99/00-0127. They all reflect information provided by the various bidders at this stage of the process. Pages 41-45, 74-83 and 69-72 are typewritten summaries of the interviews/presentations that appear to have been created by three different evaluators. Pages 41-45 also include handwritten notations of the evaluator. Page 84 is an interview summary, part of which has been disclosed to the appellant. Page 95 is the second page of a two-page briefing note prepared for the Deputy Minister of Management Board Secretariat. One portion of this page deals with the interview/presentation portion of the selection process. I find that all of these Group 1 records relate to the process of selecting bidders to provide services to FRO through the typical RFP process employed by various ministries and agencies of the Ontario government.

As the Ministry notes in its representations, Adjudicator Hale dealt with a similar issue in Order PO-1818, where he found:

..the methodologies for meeting the Ministry’s needs which are set forth in each proposal by the affected parties also qualifies as commercial information as they

describe, often in great detail, precisely how the work is to be performed. In my view, this information is commercially valuable and unique to each of the affected parties. While each proposal is responsive to the same request from the Ministry, they take very different approaches to meeting the requirements of the RFP. The manner in which the work is to be performed is central to each of the proposals. This information distinguishes one proposal from another and, in most cases, is clearly the result of very careful study and preparation. I find that this information may be properly characterized as commercial information for the purposes of sections 17(1)(a) and (c).

Adjudicator Hale's conclusions are consistent with many past orders of this Office (e.g. Orders PO-1637 and MO-1450), and I too find that the information contained in the Group 1 records relates to the buying and selling of services, specifically various collection services offered for sale by the affected parties and considered for purchase by FRO, thereby falling within the definition of "commercial information" in section 17(1) of the *Act*.

***Group 2 records: pages 91-95***

Pages 91-95 are different in nature, and all relate to events that took place after the selection process for RFP #99/00-0127 had been completed, and in response to a complaint received from one of the unsuccessful bidders. Page 91 is a Note to File prepared by a contract management consultant from Management Board Secretariat, who appears to have been the person receiving the complaint. Pages 92-93 consist of a memorandum from this consultant to the Director of FRO outlining some steps taken in response to the complaint, and pages 94-95 are an unsigned briefing note prepared by the consultant to her Director and Deputy Minister on the same topic.

Although the Group 2 records are tangentially related to the RFP process, in my view, with the exception of specific information about one of the bidder's submissions contained on page 95, the rest of the information contained in the Group 2 records is not commercial in nature. These records describe the RFP process itself and steps taken by the consultant and others to respond to the complaint, but do not contain information relating to the actual services offered by any of the bidders and considered for purchase by FRO. I also find that the Group 2 records do not contain any of the other types of information listed in section 17(1).

Therefore, I find that the Group 1 records, including certain portions of page 95, satisfy the first requirement of the section 17(1) exemption claim, but that the Group 2 records do not. Because all three parts of the exemption claim must be established for each record, I find that pages 91-94, and the remaining portions of page 95 do not qualify for exemption under section 17(1) of the *Act*.

**Requirement #2: Supplied in Confidence**

In order to satisfy the second requirement, the Ministry and/or the affected parties must show that the information was supplied to the Ministry, either implicitly or explicitly in confidence. Information contained in a record not actually submitted to an institution will nonetheless be considered to have been "supplied" for the purposes of section 17(1) if its disclosure would

permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-179, P-203, PO-1802 and PO-1816).

### *Supplied*

The Ministry makes the following representations regarding page 95 and the Group 1 records:

In this appeal, it is respectfully submitted that the information contained in pages 41–45, 48–49, 51–54, 57, 60–72, 74–83, part of 84, part of 95 and 98–105 inclusive was indeed “supplied” to the Ministry within the meaning of section 17 of the *Act*. The evaluators’ notes were drafted during or soon after the interviews and they encompass the candidates’ proposed plans and approach to meet the needs of the FRO. Disclosing the evaluators’ notes would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry.

I accept this submission, in part.

On my review of the records, pages 48-49, 51-54, 57, 60-68 and 98-105 contain information that appears to have been drawn directly from the interviews and presentations made by the five short-listed potential suppliers. Although not submitted directly by these affected parties, I find that disclosure of the information contained in these records would permit the drawing of accurate inferences as to the information actually supplied to FRO during the course of the various interviews and presentations. Accordingly, this information is properly considered to have been “supplied” for the purposes of the section 17(1) exemption claim.

As far as pages 41-45, 69-72, 74-83, the undisclosed portions of page 84, and the portions of page 95 that contain commercial information are concerned, with the exception of certain specific commission rate figures contained on pages 70, 71, 75, 77, 79, 81 and 83, which appears to be information actually supplied by the various affected party bidders, I find that the rest of the information on these pages consists of evaluations and assessments of the various interviews/presentations made by members of the selection panel. None of the information in these records was supplied by the affected parties nor, in my view, would disclosure of this information permit the drawing of accurate inferences as to information supplied during the interviews/presentations. Accordingly, I find that the information on pages 41-45, 69-72 and 74-83 (with exceptions as noted), the undisclosed portion of page 84 and the portions of page 95 that contain commercial information were not “supplied” for the purpose of section 17(1), and these records therefore do not qualify for exemption under that exemption claim.

### *In Confidence*

In order to establish that the records were supplied either explicitly or implicitly in confidence, the Ministry and/or affected parties must demonstrate that an expectation of confidentiality existed at the time the records were submitted, and that this expectation was reasonable and had an objective basis (Order M-169). All factors are considered in determining whether an expectation of confidentiality is reasonable, including whether the information was:



- (1) Communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the Ministry.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

(Order P-561)

The Ministry makes reference to Order PO-1818, and goes on to submit:

The situation in the instant appeal is the same. The affected parties in this appeal had a reasonable expectation that the Ministry would treat the information they provided with confidentiality. This expectation arose implicitly. Article 7.10 of this RFP, 99/00-0127, provides that "all information submitted by Bidder(s) pursuant to this RFP will become subject to the *Act*, and as such may be subject to disclosure in accordance with the provisions of that *Act*" (copy of the RFP attached). Such a clause also appeared in response to proposal P-Pet-99-008 [the RFP in Order PO-1818]. The Adjudicator, in that appeal, decided that a clause alerting affected parties to the fact that their proposals would be subject to the access provisions in the *Act* would "not have the effect of removing the expectation of confidentiality on the part of both the Ministry and the affected parties" [Order PO-1818].

...

It is respectfully submitted that as in the situation outlined in Order PO-1818, the affected parties in the instant appeal reasonably expected, when submitting their proposals, that the Ministry would treat the information in confidence. Article 7.10 of the RFP does not curtail this reasonable expectation. Article 7.10 confirms that the *Act* will apply; this obviously means requests may be made but information supplied by the bidders would be subject to being severed in accordance with the *Act*.

Companies certainly do not provide work proposals to the Ministry in order to have their technical and or commercial information disseminated to the public. The affected parties, in providing information about their work plans do so in attempts to obtain work contracts. There is an implicit expectation of confidentiality with regards to this information.

The submissions received from the affected parties support the Ministry's position. Two of them note that if they knew in advance that summaries or notes about their proposals were going to be disclosed, they would not have responded to the RFP. One affected party made the following representations regarding dissemination of the information.

We can also advise that the information was supplied absolutely in confidence. This was not only the expectation of [the affected party] but is obvious from the circumstances surrounding the RFP process and the subsequent proceedings as described above. The information provided to the government is closely held within [the affected party] and would not be provided to even a small minority of employees within the company and certainly not to anyone outside of the company except in a bid process situation.

It should be noted that the appellant knows the identities of the three successful and the two unsuccessful short-listed bidders, through the disclosure of various records in response to his request.

While it would appear that FRO provided no explicit assurance of confidentiality when the affected parties submitted their proposals, I find that there was an implicit expectation that information provided by the affected parties in their proposals would be treated confidentially. The parties appear to have communicated their expectations of confidentiality at the time the information was provided, and the affected parties point out that the bid proposals were treated as sensitive and confidential information by them in the context of their business dealings with FRO. I further find that the information contained in the bids and provided in the interviews/presentations would appear not to be otherwise available from sources to which the public has access, and that this information was prepared for the purpose of obtaining a contract for services with FRO, which is a purpose that would not entail disclosure to the public.

Therefore, I find that the information contained on pages 48-49, 51-54, 57, 60-68 and 98-105, as well as the specific commission rate figures contained on pages 70, 71, 75, 77, 79, 81 and 83, were supplied to FRO by the five affected parties in confidence, thereby satisfying the second requirement of the section 17(1)(a) exemption.

### **Requirement #3: Reasonable Expectation of Harm**

The words "could reasonably be expected to" appear in the preamble of section 17(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.)). (See also Orders PO-1745 and PO-1747)

To discharge the burden of proof under this third part of the test, the Ministry and/or the affected parties 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 Ministry submits:

In this appeal, disclosure of all the [listed] records could expect to prejudice the competitive position of the affected parties as a competitor could utilize the disclosed proposal structures and content in future RFPs. The records being discussed in this section of the submission contain information about how individual companies attempted to become successful bidders in the RFP. Several government agencies and offices use collection agencies to collect debts. Government contracts are a source of profit for these companies and are actively pursued. The information provided in the records, if disclosed would provide competitors information on how to both satisfy the needs of the FRO in similar RFP's and provide an approach convincing the FRO on same.

The affected parties also argue that their competitive position would be harmed by disclosure of the information. One of them submits:

With respect to the harm that could result in disclosure of the information which [the affected party] provided, this information goes to the heart of its business...This is a three year contract – a relatively short period of time – and the information provided could obviously be used by competitors in future bid situations. However, even beyond the specific issue of collections for the Family Responsibility Office, [the affected party] is constantly engaged in tendering for collections work. To reveal this type of information that [the affected party] supplied in response to the RFP to a competitor would be devastating for [the affected party's ] business.

Another affected party submits:

The collection agency sector competes for public and private sector business on the basis of formal proposals. These proposals are prepared in response to "Requests for Proposals" (RFPs) that identify the area of business practice that are under evaluation by the potential client. In addition to mandatory requirements (e.g. proof of licenses, liability insurance) there are many point-rated selection criteria included in RFPs. ...

The records under consideration evaluated [the affected party] and its competitors on these point-rated criteria; selection criteria that is often used by employers of collection agencies. Should any of the above referenced records be released, [the affected party's] strengths and weaknesses vis-à-vis its competitors will be exposed. Therefore, release of the records will prejudice [the affected party's] competitive position.

In Order PO-1818, Adjudicator Hale found that certain bid documents qualified for exemption under section 17(1)(a) of the *Act*. In reaching that conclusion, he stated:

In my view, the affected parties have provided me with the kind of detailed and convincing evidence which demonstrates that the disclosure of certain portions of their proposals could reasonably be expected to result in significant prejudice to their competitive position and an undue loss to them, along with a corresponding gain to their competitors. As noted above, the business/management consulting industry is extremely competitive. The affected parties who participated in this RFP range in size from large internal accounting firms to small “boutique” consulting organizations. Each has developed its own unique style for responding to RFPs that is the result of significant expenditure of time and resources and the accumulated experience of the firm. In my view, the disclosure of the format used by the affected parties in each of the proposals could reasonably be expected to result in significant prejudice to them. If this information were to be disclosed, a competitor could reasonably be expected to imitate the style, as well as the substance, of the affected parties’ proposals in preparing for future consulting competitions initiated by the Ministry or any other government or private sector RFP.

Having reviewed the records and various representations in this appeal, I have reached a similar conclusion. I find that the Ministry and the affected parties have provided me with the required level of detailed and convincing evidence to establish a reasonable expectation that the competitive positions of the affected parties would be prejudiced by disclosure of the information that forms part of their actual proposals. As previously stated, this information is contained in pages 48-49, 51-54, 57, 60-68 and 98-105, and the specific commission rate figures contained on pages 70, 71, 75, 77, 79, 81 and 83. I accept that the collections business is highly competitive, and that the affected parties in this appeal actively compete for public sector collection work. Details concerning the various proposals are set out in these records, and the arguments put forward by the Ministry and affected parties suggests that the type of information contained or reflected in bid documents, including interview/presentation information gathered in the course of RFP #99/00-0127, could be used by other similar organizations in ways that would jeopardize current or future contract bids by the various affected parties and undermine the integrity of the competitive selection process. For these reasons, in my view, disclosure of the bid-related commercial information could reasonably be expected to result in significant prejudice to the competitive positions of the affected parties, and I find that this information satisfies the “harms” component of the section 17(1)(a) exemption claim.

In summary, I find that pages 48-49, 51-54, 57, 60-68 and 98-105, and the specific commission rate figures contained on pages 70, 71, 75, 77, 79, 81 and 83, qualify for exemption under section 17(1)(a); and that pages 41-45, 69, 72, 74, 76, 78, 80, 82, the undisclosed portions of page 84, the portions of page 95 containing commercial information, and the remaining portions of pages 70, 71, 75, 77, 79, 81 and 83 do not.

## ADVICE AND RECOMMENDATIONS

The Ministry claims section 13(1) of the *Act* as the basis for denying access to pages 92-93, 122, and the undisclosed portion of page 90. The Ministry withdrew this exemption claim for page 91 in its representations.

Section 13(1) reads:

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

The “advice or recommendations” exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making or policy-making (Orders 94 and M-847). In addition, information in records which would “reveal” the advice or recommendations is also exempt from disclosure under section 13(1), even though it is not itself advisory in nature, if disclosure of that information would permit the drawing of accurate inferences as to the nature of the advice and recommendations (Orders P-233, M-280 and P-1054).

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

The Ministry submits:

### **Page 90 (Final Paragraph)**

Page 90 is a Procurement Summary that was prepared by Management Board Secretariat, Strategic Procurement Branch, for the Director, Family Responsibility Office.

There are five sentences within the paragraph at issue (the final paragraph) of the Procurement Summary. The first sentence expressly sets out the specific advice. The following three sentences provide the necessary information to flesh out the issue for the decision-maker to assist her in deciding the proper course of action to take, and refer specifically to a government decision-making process relating to the actual business of the Ministry. The last sentence expressly provides both a recommendation and advice.

As is apparent in the paragraph at issue, the advice and the recommendation contained therein was made freely and frankly, related to a suggested course of action which would ultimately be accepted or rejected by the recipient regarding the RFP 99/00-0127 Enhanced Collection Agencies Project, and was made specifically for the purpose of assisting the decision-maker in deciding the proper course of action. Since this information was provided for internal use, and for the purpose of assisting in the deliberative process of government, decision-making, the release of this record would seriously hinder the free flow of advice or recommendations provided to assist a recipient in any future deliberative process of decision-making within the Ministry.

### **Pages 92 and 93**

Page 92 and 93 form a Memorandum from the Management Board Secretariat, Strategic Procurement Branch, to the Director, Family Responsibility Office.

The body of the Memorandum contains three bullets outlining the specific advice provided for the purpose of assisting the decision-maker in deciding the proper course of action. The following sentence (the last sentence on Page 92) relates to a suggested course of action, which would ultimately be rejected or accepted (recommendation). The fact that the Procurement Representative, in the last paragraph, requests to be advised of the “decision of FRO” bolsters the Ministry’s submission that the records therein contain both advice and recommendation, and accordingly, should not be released. The information provided in the first paragraph (Page 92), and the last two paragraphs (Page 93) of the Memorandum would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation, and reveal the substance of the deliberations, if those paragraphs were to be released. Consequently, these paragraphs further qualify for the exemptions under section 13(1) [nature of advice and recommendation: Orders P-1709, PO-1852, and PO-1823; substance of deliberations: Orders P-529 and P-850].

### **Page 122**

Page 122 forms an Internal Memorandum drafted by the Quality Assurance Manager, Management Board of Cabinet, for the Director, Management Board of Cabinet, Strategic Procurement Branch.

The Memorandum consists of eight bullets, all of which contain information to assist the decision-maker in deciding the proper course of action to take (advice). The information contained in bullet six expressly states both advice and a recommendation, and relates to a suggested course of action which would ultimately be accepted or rejected by its recipient during the deliberative process. In addition, the release of any information that surrounds the recommendation in bullet six would certainly permit the drawing of accurate inferences as to the

nature of the actual recommendation, and reveal the substance of deliberations, if those paragraphs were to be released. Consequently, these paragraphs further qualify for the exemption under section 13(1) [nature of advice and recommendation: Orders P-1709, PO-1852, and PO-1823; substance of deliberations: Orders P-529 and P-850].

I do not accept the Ministry's position regarding the undisclosed portion of page 90. The one paragraph at issue appears under the heading "Procurement Notes", and consists essentially of a factual recounting of certain parts of the selection process in RFP #99/00-0127, together with conclusions reached by the consultant who received the complaint concerning the administration of the selection process. The paragraph contains no specific advice or recommendations, and I find that disclosing it would not permit the drawing of accurate inferences as to any actual advice or recommendation given by the consultant in this regard. Therefore, I find that the undisclosed part of page 90 does not qualify for exemption under section 13(1) of the *Act*.

Pages 92 and 93, including the bullet points identified by the Ministry, also contain a factual description of a meeting that took place involving staff from FRO and the Strategic Procurement Branch of Management Board Secretariat. I find that only one sentence at the bottom of page 92 constitutes advice, and that this sentence qualifies for exemption under section 13(1). The rest of the information on the two pages is factual in nature and its disclosure would not reveal any advice or recommendations.

Page 122 is similar to pages 92 and 93. I find that the 6<sup>th</sup> bullet contains advice and recommendation within the meaning of section 13(1). The rest of the information is a factual recounting of a meeting that took place between the author of the internal memorandum and another employee, and does not contain nor would its disclosure reveal any advice or recommendations.

In summary, one sentence at the bottom of page 92 and the 6<sup>th</sup> bullet on page 122 qualify for exemption under section 13(1) of the *Act*. The remaining portions of page 92 and 122, as well as page 93 and the undisclosed part of page 90 do not qualify for exemption and should be disclosed to the appellant.

## **SOLICITOR-CLIENT PRIVILEGE**

MAG originally claimed section 19 of the *Act* as the basis for denying access to pages 85–88 and 94–95.

In its revised decision letter and in the representations submitted during the Adjudication stage of this appeal, the Ministry purports to add section 19 as a new basis for denying access to page 91 and the undisclosed portions of pages 84 and 90.

On December 27, 2000, the Commissioner's office provided MAG with a Confirmation of Appeal, advising that the appellant had appealed MAG's decision to deny access to the requested records. This Confirmation also stated that, based on a policy adopted by the Commissioner's office, MAG would have 35 days from the date of the confirmation to raise any new

discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

As referred to earlier in this order, on April 9, 2001, responsibility for FRO was transferred from MAG to the Ministry. Following this transfer, the Ministry and the Mediator assigned to the appeal had several conversations about the issuance of a new decision letter, but no new decision had been made by the time the appeal was transferred to the Adjudication stage on June 22, 2001.

It was only on June 28, 2001, after I had issued the Notice of Inquiry and almost three months after assuming responsibility for FRO, that the Ministry finally issued its revised decision letter to the appellant, granting access to additional records and raising section 19 as a new exemption claim for pages 84, 90 and 91.

As a delegate of the Commissioner, I have the authority to control the manner in which an appeal 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 discretionary exemptions not originally cited in the original 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 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, given the significant length of time since the original decision letter was issued to the appellant, and the lack of any explanation or justification for raising a new discretionary exemption claim after the appeal had proceeded to the Adjudication stage and a Notice of Inquiry had been issued to the Ministry, I find that accepting a new discretionary exemption claim at this late stage in the appeal would unduly prejudice the appellant, and I am not prepared to consider the section 19 exemption claim for these records. It is not clear that any of these records would qualify for solicitor-client communication privilege in any event. None were prepared by legal counsel, none contain any evidence of confidentiality



on their face, and parts of pages 84 and 90 have already been disclosed to the appellant, raising potential waiver issues.

Therefore I will restrict my discussion of section 19 to pages 85-88 and 94-95 originally claimed by MAG and addressed in the Ministry's submissions.

Section 19 of the *Act* reads:

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

Section 19 encompasses two heads of privilege, as derived from the common law. The only one relied on by the Ministry in this appeal is solicitor-client communication privilege.

### **Solicitor-Client Communication Privilege**

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).

The Supreme Court of Canada has described this privilege 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 9*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-14090.

The Ministry's submissions on pages 85-89 consist of the following:

Pages 85–88 are a briefing note prepared by the Legal Director, FRO, providing a status report and legal advice.

The briefing note was prepared by the Legal Director, FRO, and approved by the Director for reference to the Assistant Deputy Attorney General. As noted in Order P-1409, “the ‘client’ of lawyers employed by the Ontario government as Crown counsel is the provincial Crown;” by analogy, then, the “client” of the Legal Director employed by FRO is, at its highest level, the Minister responsible for the program. At the time that pages 85 – 88 were produced, the Minister responsible for FRO was the Attorney General. ...

Although no final legal advice was given in these pages, applying the court's reasoning in *Balabel*, such a document would fall within the “continuum of communications” between a solicitor and his client that would be entitled to the protection the common-law rule of solicitor-client privilege. The document was certainly aimed at keeping the client informed, as contemplated in the passage quoted above. ...

It is the Ministry's respectful submission that these pages should be withheld in their entirety. Any facts that are outlined in those pages are, in essence, the subject of the request for legal advice, and cannot be severed.

I accept the Ministry's position. The four-page memo that comprises these pages of records is headed “Solicitor/Client Privilege”, and I find that they clearly constitute a confidential communication between a lawyer (Deputy Director of Legal Services) and his client (Assistant Deputy Attorney General), prepared for the purpose of providing legal advice about issues arising out of the RFP process. Accordingly, I find that pages 85–88 qualify for exemption under the solicitor-client communication privilege component of section 19 of the *Act*.

As far as pages 94-95 are concerned, the Ministry submits:

Finally, pages 94 and 95, a briefing note prepared by a staff member at the Management Board Secretariat, Strategic Procurement Branch, for the Deputy Minister, contain background information linked to legal advice..

...

The Management Board Secretariat acts as a central agency, providing services and creating policies, processes, and standards, for all Ministries of the Ontario Government. The Strategic Procurement Branch (SPB, now known as the Procurement Policy and Information Technology Procurement Branch) assists Ministries specifically with the procurement of services. Therefore, the SPB acted as the Ministry's agent with regard to the RFP process that forms the basis for the documents at issue in this appeal.

Both SPB and FRO legal services provided legal advice that is quoted in the briefing note at pages 94 and 95 of the record; as SPB was acting as the Ministry's agent, such advice was being disseminated among the relevant clients (and agents) of the counsel who provided that advice. As noted above in the discussion of records 85 – 88, government lawyers have as clients their Ministers, in the broadest sense; however, the public servants that work under the Ministers are also the clients of government lawyers.

The briefing note comprising pages 94-95 was prepared by the Management Board Secretariat procurement consultant, not by legal counsel. However, certain portions of the record outline the views and opinions expressed by legal counsel to the consultant. I find that these portions reflect confidential communications between legal counsel (FRO's Deputy Director of Legal Services) and his client (the Deputy Minister of Management Board Secretariat) submitted for the purpose of providing legal advice to the client regarding the RFP process, and therefore qualify for exemption under the solicitor-client communication privilege component of section 19. The rest of the briefing note (with the exception of the part of page 95 I have found qualifies under section 17(1) of the *Act*) does not reveal a communication between a solicitor and a client, and therefore does not qualify for exemption under section 19 of the *Act*.

## **ORDER:**

1. I uphold the Ministry's decision to deny access to pages 48–49, 51–54, 57, 60–68, 85-88 and 98–105; the specific commission rate figures on pages 70, 71, 75, 77, 79, 81 and 83; one sentence at the bottom of page 92; the parts of pages 94 and 95 that qualify for exemption under section 19; and the 6th bullet point on page 122.
2. I order the Ministry to disclose pages 41–45, 69, 72, 74, 76, 78, 80, 82, 84, 89, 90, 91 and 93; and the portions of pages 70, 71, 75, 77, 79, 81, 83, 92, 94, 95 and 122 not covered by Provision 1 of this order. I will attach a highlighted copy of pages 70, 71, 75, 77, 79, 81, 83, 92, 94 and 122 with the copy of this order provided to the Ministry, which identifies the portions that should not be disclosed. Disclosure of records under this provision shall be made by the Ministry to the appellant by **November 19, 2001** but not before **November 8, 2001**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant in accordance with provision 2 of this order.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ October 12, 2001