



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-1975

Appeals PA-000289-1 and PA-010055-1

Ministry of Transportation



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BACKGROUND

The records at issue in these appeals relate to the sale of the Highway 407 Express Toll Route (Highway 407) by the government of Ontario (the government) to the private sector. Before proceeding to discuss the nature of these appeals, I feel it would be helpful to provide the following background information, which is contained in the May 24, 2000 prospectus (a public document) of the 407 International Inc., the new owner of Highway 407:

407 International Inc. (the “Company”) was incorporated on March 17, 1999 under the *Business Corporations Act* (Ontario) (“OBCA”), on the initiative of SNC-Lavalin Inc.... and Cintra Concesiones de Infraestructuras de Transporte, S.A. ..., for the purpose of submitting a bid to the Government of the Province of Ontario (the “Province”) for the purchase from the province of all of the issued and outstanding shares of 407 ETR Concession Company Limited (the “Concessionaire”). ... This bid was accepted and the purchase was completed on May 5, 1999. ...

The Concessionaire was established by the Province in 1993 as a Crown agency under the name Ontario Transportation Capital Corporation (“OTCC”) to oversee the design, construction, operation, maintenance, management and financing of Highway 407. On April 6, 1999, OTCC was continued by the Province as a share capital corporation under the OBCA under the name 407 ETR Concession Company Limited and entered into a 99-year concession and ground lease agreement (the “Concession Agreement”) with the Province. Together with the *407 Act*, this agreement establishes the Concessionaire’s principal rights and obligations with respect to Highway 407. ...

...

The principle business of the Company is the ownership of the Concessionaire and, through the Concessionaire, the operation, maintenance and management of Highway 407 Central and the construction, operation, maintenance and management of the Highway 407 Central Deferred Interchanges, 407 West Extension and 407 East Partial Extension.

...

The decision to sell OTCC and thereby privatize Highway 407 was announced by the Province on February 20, 1998. The Province subsequently enacted the *407 Act* to authorize and facilitate the privatization. Under the provisions of the *407 Act*, OTCC and the Province entered into the Concession Agreement which, in combination with the *407 Act*, authorizes the Concessionaire to establish, collect and enforce payment of tolls and obliges the Concessionaire to manage, maintain, repair and toll Highway 407 as well as construct certain extensions and expansions thereto. ...

The Company participated in the competitive bid process established by the Province for the sale of Highway 407 and the design and construction of the

Highway 407 Central Deferred Interchanges, 407 West Extension and 407 East Partial Extension. Following the Company's selection as the successful bidder, on April 12, 1999 the Province, the Company [and three other companies] being referred to herein collectively as the "Equity Participants", entered into a share purchase agreement (the "Share Purchase Agreement") pursuant to which, on May 5, 1999, the Company acquired all of the issued and outstanding shares of the Concessionaire for a purchase price of \$3.113 billion. ...

NATURE OF THE APPEALS

The Ministry of Transportation (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

- [1] The "Request for Proposals" used for soliciting the sale of highway 407.
- [2] Any documents used by the selection committee in dealing with the initial bidders (we understand there were a total of 4 bidders).
- [3] Any documents used by selection committee in dealing with the final bidders (we understand there were a total of 2 bidders at this stage).
- [4] Any documents that represent the final proposal by the selected bidder.
- [5] Any documents regarding the deal that was reached between the government and the winning consortium of [named company] and its subsidiary [named companies].
- [6] Any documents regarding the decisions of Cabinet on the selection process.
- [7] Any documents regarding toll revenues, both actual and projected, related to both the periods before the highway was privatized and after the highway was sold.
- [8] Any documents related to the financial objectives in the sale of the 407.

In his letter of request, the requester advised the Ministry that he also sent a similar request to the Ministry of Finance, Management Board and Cabinet Office.

The Ministry assigned two separate reference numbers to the request. File PPS 00 000 061 was assigned to parts 5 and 7 of the request and these are the only parts at issue in these appeals. The Ministry identified a record entitled the "Share Purchase Agreement" as the record responsive to parts 5 and 7 of the request.

Pursuant to section 28 of the *Act*, the Ministry gave notice to 407 International Inc. and 407 ETR Concession Company Limited (407 ETR), seeking submissions with respect to disclosure of the requested record. 407 ETR responded by objecting to disclosure.

Subsequently, the Ministry issued its decision to the requester advising that partial access to the Share Purchase Agreement will be granted upon payment of a \$165.00 fee. The Ministry also stated that access to some information will be denied pursuant to sections 21 (invasion of

privacy) and 19 (solicitor-client privilege) of the *Act*. The Ministry went on to state the following:

Please note that the Concession and Ground Lease Agreement and its schedules, is a schedule itself to the Share Purchase Agreement. Since the release of the Concession and Ground Lease Agreement is currently before the Information and Privacy Commissioner under a *Freedom of Information and Protection of Privacy Act* appeal, the Ministry of Transportation is not in a position to make a decision with respect to that information until that appeal has been completed.

On the same day, the Ministry wrote to 407 ETR and advised it of its decision to grant access to the responsive record. 407 ETR appealed the Ministry's decision and in turn, this office opened Appeal PA-000289-1. The requester did not appeal the Ministry's decision. Mediation of Appeal PA-000289-1 was not possible and a Report of Mediator was issued to the parties.

Subsequently, the Ministry issued its decision to the requester and 407 ETR concerning the Highway 407 Concession and Ground Lease Agreement granting partial access to this record. Access to certain portions of this agreement were denied pursuant to sections 21(1), 14(1)(e) (endanger life or safety), 14(1)(l) (facilitate commission of unlawful act) and 18(1)(d) and (e) (economic and other interests of Ontario).

On the same day, the Ministry also issued its decision to a number of other parties (the affected parties) who were notified by the Ministry pursuant to section 28 of the *Act* concerning the Highway 407 Concession and Ground Lease Agreement.

Subsequently, the requester appealed the Ministry's decision concerning the Highway 407 Concession and Ground Lease Agreement, and in turn, this office opened appeal PA-010055-1. 407 ETR also appealed the Ministry's decision, and that appeal was incorporated into Appeal PA-000289-1.

This order will address the issues raised in both Appeals PA-000289-1 and PA-010055-1.

A Notice of Inquiry was sent to the Ministry, 407 ETR, 407 International Inc. and the affected parties, initially. In response, only the Ministry and 407 ETR submitted representations.

The Ministry's representations were forwarded to the requester in their entirety, together with the non-confidential portions of 407 ETR's representations. The requester also made submissions, which were then shared with the Ministry and 407 ETR. At the same time, the Ministry's representations were forwarded to 407 ETR and the non-confidential portions of 407 ETR's representations were sent to the Ministry for reply. In turn, both the Ministry and 407 ETR, submitted reply representations.

RECORDS:

The record at issue in both Appeals PA-000289-1 and PA-010055-1 is the Share Purchase Agreement (the SPA), including all of its schedules. Schedule 6.1.3 to the SPA is the Highway 407 Concession and Ground Lease Agreement (the CGLA).

In response to the Notice of Inquiry the Ministry, 407 ETR and the requester clarified their positions with respect to the records at issue in these appeals. The following is a brief summary.

The Ministry's position

In response to the Notice of Inquiry, the Ministry consented to the disclosure of Schedules 6.1.4 and 6.3.4 of the SPA, which were previously withheld pursuant to section 19 of the *Act*. The Ministry also stated that it no longer claims that Schedule 12 to the CGLA contains personal information. Accordingly, the only records to which the Ministry is denying access are as follows:

1. Schedule 4.1(ae) to the SPA, in part, on the basis of section 21 of the *Act*;
2. Schedule 4.1(af) to the SPA, in part, on the basis of section 21 of the *Act*;
3. Schedule 8 to the CGLA, in part, on the basis of section 21 of the *Act*;
4. Diagram contained in Schedule 15 to the CGLA, on the basis of sections 14(1)(e) and/or (l) of the *Act*; and
5. Information regarding fees contained in Schedules 18 and 23 to the CGLA, on the basis of sections 18(1)(d) and (e) of the *Act*.

407 ETR's position

In its representations in response to the Notice of Inquiry, 407 ETR consents to the disclosure of certain information within both the SPA and the CGLA. 407 ETR maintains its objection to the disclosure of the following records/portions of records only, on the basis of sections 17(1)(a), (b) and/or (c) and section 21 of the *Act*:

1. Sections 2.2, 2.3, 2.4 and 2.6 of the SPA (in their entirety).
2. Schedule 1.1(bl) to the SPA (the two pages of Notes to the Revised Pro Forma Balance Sheet only)
3. Schedule 1.1(bt) to the SPA (in its entirety). See also Item 12 below where the same agreement is found as Schedule 19 to the CGLA
4. Schedule 4.1(af) to the SPA, in part, specifically:
 - All information (excluding the heading "Schedule 4.1(af) – Employees") on the first two pages of Schedule 4.1 (af) – Employees.
 - The handwritten notation at the top of page 2 of the attachment to Appendix A to Schedule 4.1 (af).
5. Schedule 4.1(o)(ii) to the SPA (all dollar amounts only);

6. Schedule 4.1(ae) to the SPA (in its entirety);
7. Article 2.6 of the CGLA (the reference to the dollar amount as the rent payable per annum only);
8. Article 16 of the CGLA (in its entirety);
9. Schedule 13 to the CGLA (all dollar amounts in section 4.1 only);
10. Schedule 15 of the CGLA (all dollar amounts in Appendices A and B only);
11. Schedule 18 to the CGLA (all dollar amounts in Schedule C only);
12. Schedule 19 to the CGLA (in its entirety). (See also Item 3 above where the same agreement is found as Schedule 1.1(bt) to the SPA)
13. Schedule 22 to the CGLA (in its entirety);
14. Schedule 23 to the CGLA (all dollar amounts throughout the schedule only);

In response to the Ministry's consent to the disclosure of Schedules 6.1.4 and 6.3.4 of the SPA (which were previously withheld by the Ministry pursuant to section 19 of the *Act*), 407 ETR indicated that it denies the Ministry's authority to waive any privilege it has to these "legal opinions", and does not consent to their release.

The requester's position

In response to the Notice of Inquiry, the requester confirmed that he is not pursuing access to the information at issue within Schedules 4.1(ae) and (af) to the SPA and Schedule 8 to the CGLA. Accordingly, this information, as well as section 21 of the *Act*, is no longer at issue. The requester also advised that he is not pursuing access to the information withheld by the Ministry from Schedule 15 to the CGLA pursuant to sections 14(1)(e) and (l), and accordingly, it will also not be considered further.

The requester is pursuing access to all remaining records and/or portions of records to which the Ministry and/or 407 ETR are objecting to disclosure.

DISCUSSION

THIRD PARTY INFORMATION

The Ministry decided that the records do not qualify for exemption under section 17(1) of the *Act*. Therefore, the onus is on 407 ETR as the only party resisting disclosure to establish the application of this exemption.

407 ETR takes the position that sections 17(1)(a), (b) and (c) are applicable to the information contained in the records remaining at issue, as described above. Those sections read:

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;

In order for a record to qualify for exemption under section 17(1)(a), (b) or (c) of the *Act*, each part of the following three-part test must be satisfied:

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) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

Part one: type of information

407 ETR submits that the information at issue is all commercial and/or financial information concerning the financial and commercial performance of 407 ETR's business, that being the construction and operation of a toll highway.

The terms "commercial information" and "financial information" have been defined by this office as follows:

Commercial Information

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.

[Order P-493]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs.

[Orders P-47, P-87, P-113, P-228, P-295 and P-394]

The requester concedes the information at issue constitutes financial and/or commercial information.

Based on my review of the records, I agree that all of the information at issue qualifies as "commercial information" within the meaning of section 17(1). In my view, all of this information relates directly to the operation of the business of 407 ETR and thus relates to the buying, selling or exchange of services. Some parts of the record also include various financial aspects of this business, including historical revenue data, amount of the rent payable per annum and various other costs and fees associated with the operation of the business. I find that these parts of the record also contain "financial information" as that term is used in section 17(1). Therefore, part one of the section 17(1) exemption test has been established for the information at issue.

Part two: supplied in confidence

Supplied

Because the information in a contract is typically the product of a negotiation process between the institution and the affected party, the content of contracts generally will not qualify as having been "supplied" for the purposes of section 17(1) of the *Act*. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been "supplied" it must be the same as that originally provided by the affected party. In addition, information contained in a record would "reveal" information "supplied" by the affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

[See, for example, Orders P-36, P-204, P-251 and P-1105]

407 ETR's representations

In its submission, 407 ETR explains that the portions of the SPA and the CGLA which 407 ETR continues to object to disclosure of break down broadly into two categories:

In some cases (Items 2, 4, 5 and 6 [as described above]), the portions of these agreements in issue contain and, if disclosed, would clearly disclose information provided to the Ontario government by 407 ETR/OTCC [Ontario Transportation Capitol Corporation] in confidence for the limited and specific purpose of being made available, subject to confidentiality agreements, to prospective bidders seeking to acquire Highway 407 from the government and only for their use in connection with that bidding process (the “Information Objections”) ...

In other cases (items 1, 3 and 7-14 [as described above]) 407 ETR objects to the disclosure of specific and limited portions of various agreements which are based on confidential information supplied by 407 ETR/OTCC to the Ontario government in confidence under the circumstances just described and for the same limited purpose described above where disclosure of the portions of the agreement in issue would permit the drawing of accurate inferences concerning the information supplied (the “Agreement Objections”). ...

With respect to the “Information Objections”, 407 ETR states:

The information in issue in Items 2, 5 and 6 was, as 407 ETR understands it, supplied to the Ministry of Finance by 407 ETR (then known as OTCC) for the limited and confidential purpose of permitting the RFP [Request for Proposal] process by which the 407 ETR business was to be privatized to proceed. While 407 ETR is not privy to (and has no means of ascertaining) all the details of the way in which the 407 ETR business was operated before its privatization, it is readily apparent that the information in issue in Items 2, 5 and 6 concerns 407 ETR/OTCC and the only reasonable conclusion to be drawn is that the information was provided by 407 ETR/OTCC to the Ministry of Finance for the stated limited purpose.

407 ETR also states that the above submissions “apply generally with equal force to the Agreement Objections as well”. 407 ETR acknowledges that “[i]n connection with the Agreement Objections, however, 407 ETR must also establish that disclosure of the portions of the various agreements here in issue would permit the drawing of accurate inferences with respect to information supplied to the government which is entitled to protection under section 17”. Although 407 ETR goes on to state that it will address this further issue in the paragraphs that follow, the only further information provided by 407 ETR in this regard is as follows:

The portions of the SPA and the CGLA which 407 ETR seeks to have protected pursuant to the Agreement Objections are all based on information concerning 407 ETR/OTCC and its operations of Highway 407 prior to privatization. That information is financial and/or commercial information of 407 ETR/OTCC. The only reasonable conclusion to be drawn is that that information was supplied to the Ontario government by 407 ETR/OTCC on a confidential basis for the limited purpose of permitting the RFP process by which the 407 business was to be privatized to proceed. (Without limiting the generality of the foregoing, 407 ETR understands that the information central to the development of Item 13 (Schedule

22 to the CGLA) was developed by 407 ETR/OTCC and provided by it to the government for the purpose of developing Schedule 22.)

Requester's representations

The requester does not make any specific representations with respect to whether the information at issue was "supplied" for the purposes of section 17(1) of the *Act*.

Findings

General

According to the SPA, the OTCC was a corporation without share capital incorporated pursuant to the *Capital Investment Plan Act, 1993*. The *Highway 407 Act* authorized the Crown in right of Ontario, as represented by the Minister without portfolio with responsibility for privatization (the Crown) to continue OTCC under the *Ontario Business Corporations Act* (the *OBCA*) as a corporation with share capital. OTCC was continued as 407 ETR under the *OBCA* by certificate of continuance dated April 6, 1999. The Crown was the registered and beneficial owner of all of the issued and outstanding shares of 407 ETR. Subsequently, the Crown entered into the SPA, dated April 12, 1999, with 407 International Inc. (formerly 1346292 Ontario Inc.) and three other companies (the equity participants), pursuant to which 407 International Inc. acquired all of the issued and outstanding shares of 407 ETR.

Generally speaking, information provided to a provincial government institution by another institution of the same government cannot be considered to have been "supplied" for the purpose of section 17, and that the appropriate exemption to consider in those circumstances would be section 18, which is designed to protect government interests. However, the circumstances here are unusual, in that what was once a government institution, the OTCC, is clearly now a private sector third party, 407 ETR.

The purpose of section 17, as stated by Senior Adjudicator David Goodis in Order PO-1805, is to protect the "informational assets" of businesses or other organizations. If I were to find that section 17 cannot apply because the information was supplied to the Ministry not by 407 ETR, but by its predecessor, the purpose of this exemption would be defeated. At the same time, while section 18 might have been the appropriate exemption to consider had a request been made while OTCC existed, that exemption clearly cannot apply now, since the government no longer has a financial stake in 407 ETR's assets. In my view, the Legislature could not have intended the result that, in these circumstances, an organization's informational assets could not be protected by either section 17 or 18, based simply on the fact that the assets traded hands from the government to a private company. Therefore, given that 407 ETR's interests may be affected by the disclosure of the information at issue in these appeals, I find that it is entitled to avail itself of the protection afforded under section 17, assuming the remaining elements of this exemption are satisfied.

I have reviewed the SPA and have made the following findings with respect to each portion of this record that remains at issue in these appeals.

Information Objections

Schedule 1.1(bl) to the SPA – At issue: Notes to the Revised Pro Forma Balance Sheet (2 pgs)

Schedule 1.1(bl) consists of the Revised Pro Forma Balance Sheet as at December 31, 1998. Based on my review of this schedule, I find that it is reasonable to conclude that the information within the two pages of notes to the Revised Pro Forma Balance Sheet within Schedule 1.1(bl) to the SPA was supplied by the OTCC/407 ETR.

Schedule 4.1(o)(ii) to the SPA – At issue: all dollar amounts

Schedule 4.1(o)(ii) to the SPA is entitled “Historical Revenue Data” and contains 407 ETR’s monthly revenues for the time period of October 1997 to February 1999. I accept 407 ETR’s submission that it is likely that the information within this record would have been supplied by the OTCC/407 ETR.

Schedule 4.1(ae) to the SPA – At issue in its entirety

As described above, Schedule 4.1(ae) to the SPA identifies the litigation claims, as well as possible claims, against the 407 ETR at the time that this agreement was executed. The information includes the date of each claim, the identity of the third party and a brief description of the claim. Based on the information within this record, and the surrounding circumstances, I find that it is reasonable to conclude that this information was supplied by the OTCC/407 ETR.

Agreement Objections

Share Purchase Agreement

407 ETR is objecting to the disclosure of Sections 2.2, 2.3, 2.4 and 2.6 of the SPA in their entirety.

As indicated above, pursuant to the SPA the Vendor (the Crown) agreed to sell all of the issued shares of the Company (the 407 ETR) to the Purchaser (407 International Inc). Article 2 of the SPA deals with the “purchase and sale of purchased shares”. Sections 2.2, 2.3, 2.4 and 2.6 are entitled “Consideration”, “Post Closing Audit”, “Purchase Price Adjustment”, and “Disputes”, respectively. As reflected by these titles, these sections of the SPA outline the consideration to be paid by the Purchaser to the Vendor for the purchased shares, the particulars of the post closing audit and the purchase price adjustment and the manner in which disputes in this regard are to be handled.

There is no evidence before me to suggest that the contents of these clauses were "supplied" by either 407 International Inc. or any of the other three companies (the equity participants). On their face, these clauses appear to be negotiated terms arrived at in the normal course of the negotiation of the agreement. There is also nothing on the face of these sections of the agreement to support 407 ETR’s assertion that these clauses were “based on confidential information supplied by 407 ETR/OTCC to the Ontario government”. Therefore, I find that the

sections of the SPA at issue were prepared as a result of negotiations, however minimal this may have been, and that this information was not "supplied" for the purposes of section 17(1) (see also Orders P-1545, PO-1698 and PO-1646).

Schedule 1.1(bt) to the SPA

Schedule 1.1(bt) to the SPA is entitled "Restrictions on Transfer Agreement". This is an agreement between the Crown, 407 ETR, 407 International Inc. and the three equity participants that was entered into by the parties concurrent with the execution of the SPA. This agreement outlines certain restrictions with respect to the transfer of the ownership of the shares. 407 ETR is objecting to the disclosure of this agreement in its entirety.

Once again, I have not been provided with any information concerning the context in which this agreement was prepared or the extent of discussions that took place before the final terms were agreed to between the parties. There is also nothing on the face of this record to establish that the terms of this agreement are a direct reflection of information given by 407 ETR/OTCC, without contribution by the other parties to this agreement. Similar to the SPA, this agreement appears to be the product of negotiations, and therefore, I find that the information in it was not "supplied" by the OTCC/407 ETR.

Concession and Ground Lease Agreement

The parties to the CGLA, which is dated April 6, 1999, are the Crown and the 407 ETR, referred to in this agreement as the "Concessionaire".

The May 24, 2000 issue of the 407 International Inc. prospectus states the following with respect to the CGLA:

Together with the 407 Act, the Concession Agreement is the key agreement which governs the Concessionaire's rights and obligations with respect to Highway 407 and regulates the relationship between the Province and the Concessionaire. It grants the Concessionaire a 99-year ground lease of the Project Lands owned by the Province which commenced on April 6, 1999 for a nominal rent, which has been prepaid by the Concessionaire in its entirety for those 99 years. It further grants the Concessionaire the exclusive concession to develop, design and build the Highway 407 Central Deferred Interchanges, 407 West Extension and 407 East Partial Extension and obliges the Concessionaire to finance, operate, manage, maintain, rehabilitate and toll the Project in accordance with the provisions of the Concession Agreement.

407 ETR is objecting to the disclosure of the dollar amount within Article 2.6, as well as Article 16 in its entirety.

Similar to my findings with respect to the PSA, based on my review of the CGLA and in absence of any evidence to the contrary, I find that the dollar amount in Article 2.6 of this

agreement, which specifies the rent payable per annum, was not supplied by the OTCC/407 ETR, but rather constitutes a negotiated term of the agreement.

Article 16 of the CGLA deals with insurance that is to be maintained by the 407 ETR. Based on my reasoning above, I find that this portion of the CGLA was not supplied by OTCC/407 ETR, but rather was prepared as a result of negotiations.

Accordingly, I find that the information at issue within Articles 2.6 and 16 was not "supplied" for the purpose of section 17(1).

Schedule 13 to the CGLA

Schedule 13 to the CGLA is entitled "Ministry of Transportation Enforcement Services". 407 ETR is objecting to the disclosure of the dollar amounts specified in section 4.1.

Section 4 of this schedule relates to costs of enforcement, specifying that the 407 ETR shall be responsible for the costs of Ministry Enforcement Officers' enforcement activities on Highway 407 based on the formula provided in section 4.1. The dollar amounts specified under this section relate to the following:

- the hourly rate of Ministry Enforcement Officers;
- the "per kilometre" and monthly charge for a cruiser;
- the "per kilometre" and monthly charge for a mini-van; and
- the "per kilometre" and monthly charge for a Mobile Truck Inspection Station.

Based on my review of this record, it appears that the dollar amounts at issue would have been supplied by the Ministry and not the OTCC/407 ETR. It is also possible, however, that this information represents the negotiated amounts that were agreed upon between the parties to this agreement. In either case, I find that this information was not "supplied" for the purposes of section 17.

Schedule 15 to the CGLA – At issue: all dollar amounts in Appendices A and B to Schedule A

Schedule 15 to the CGLA is entitled "Police Services Agreement". Schedule A to this agreement is a document entitled "Policing Requirements for Kings Highway 407". This Schedule specifies that it was prepared by the Municipal Policing Section of the Ontario Provincial Police (the OPP). Appendices A and B to this schedule are entitled "1999 charges for Contract Police Costs" and "Costing Summary", respectively, and contain the estimates of the costs for the policing requirements and police services as described in Schedule A. 407 ETR is objecting to the disclosure of all dollar amounts within these appendices.

Based on my review of this record, I find that given that this schedule was prepared by the OPP, the dollar amounts at issue cannot be said to have been supplied by the OTCC/407 ETR.

Schedule 18 to the CGLA

Schedule 18 to the CGLA is entitled “Authorized Requester Electronic Data Transfer Agreement”. This agreement grants 407 ETR a licence to access and use certain “Information Products” from the Ministry. Schedule C to this Agreement is entitled “Fees” and sets out the “Connectivity Fees” and the base fee for access to the “Information Products” which will be charged by the Ministry. 407 ETR is objecting to the disclosure of all dollar amounts within Schedule C.

Once again, I have not been provided with any evidence to suggest that this information was “supplied” by 407 ETR. To the contrary, in its submissions with respect to sections 18(1)(d) and (e) in these appeals, the Ministry states that the fees within Schedule 18, as well as 23 which is discussed below, were in fact negotiated:

... The negotiation of the fees to be paid by the lessee to the Government of Ontario in such a case was without precedent, and without operational experience. Hence the establishment of the quantum of fees of necessity could only be based on informed estimates, the relative advantage or disadvantage flowing to the various parties being speculative.

In view of the above, I find that the dollar amounts in question were not supplied for the purpose of section 17.

Schedule 19 to the CGLA

My findings above under “Schedule 1.1(bt) to the SPA” are equally applicable to this record, since the two records are identical.

Schedule 22 to the CGLA

Schedule 22 to the CGLA is entitled “Tolling, Congestion, Relief and Expansion Agreement”. The parties to this agreement, dated April 6, 1999, are the Crown and the 407 ETR, referred to in this agreement as the “Concessionaire”. 407 ETR is objecting to the disclosure of this agreement in its entirety.

The 407 International Inc., May 24, 2000, prospectus describes this agreement as follows:

The Tolling Agreement between the Concessionaire [407 ETR] and the Province will remain in effect throughout the term of the concession Agreement and will affect the range and scope of the tolls which may be charged by the Concessionaire. The Tolling Agreement’s primary purpose is to regulate toll levels in relation to traffic flow, allowing for toll increases provided certain traffic thresholds are met. As well, the agreement sets forth the requirement for lane expansions once certain traffic levels are exceeded.

As outlined above, 407 ETR submits that it “understands that the information central to the development of Item 13 (Schedule 22 to the CGLA) was developed by 407 ETR/OTCC and provided by it to the government for the purpose of developing Schedule 22”. 407 ETR also submits that it “is not privy to (and has no means of ascertaining) all the details of the way in which the 407 ETR business was operated before its privatization”.

Given the history of 407 ETR, I accept that it may not have “all the details of the way in which the 407 ETR business was operated before its privatization”. I also recognize that it may not be in a position to provide evidence as to precisely what information would have been supplied by the OTCC/407 ETR to the Ministry in preparation of this agreement. The Ministry’s representations also do not include any information on this issue, other than generally stating the following:

... it is normal operating procedure for information exchanged between government agencies and Ministries to be treated confidentially. The Ministry is unaware of any higher standard of confidentiality accorded to any information supplied by the OTCC to the Ministry or the Ministry of Finance relevant to this Appeal.

Order PO-1974, which is being issued concurrently with this order, deals with two related appeals involving the Ministry of Finance where the records at issue relate to the request for proposals used for soliciting the sale of Highway 407. In its representations in the Ministry of Finance appeals, 407 ETR explains that one of the records at issue (also identified as Schedule 22), entitled the “Final Bidding Draft of the First Amending Agreement to the Highway 407 Concession and Ground Lease Agreement”, “is substantially identical to the existing Schedule 22 of the Concession and Ground Lease Agreement under which 407 ETR currently operates Highway 407 ...”. With respect to this record 407 ETR states that:

... Schedule 22, the protocol for toll rate setting, is Canadian developed intellectual property that if ordered disclosed would be gifted to the international business community. The information relates to the way in which 407 ETR regulates its tolls, deals with congestion pricing and strategies for future growth and expansion of its infrastructure.

In response to 407 ETR’s submissions on the issue of whether the information at issue was “supplied” for the purposes of section 17(1), the Ministry of Finance states the following:

The 407 ETR Concession Company Limited has asserted that the information at issue was “supplied to the Ministry of Finance by 407 ETR (then known as OTCC) for the limited and confidential purpose of permitting the RFP process by which the 407 ETR business was to be privatized to proceed”.

It is this ministry’s understanding that while some information was provided by the OTCC, then an agency of the Ministry of Transportation, information was also developed by Ministry of Transportation employees and advisors to the former Office of Privatization for use during the sale process. Hence, it is the

opinion of this Ministry that the documents were not strictly *supplied* by the Concession Co. [original emphasis]

Furthermore, the “Confidential Information Memorandum”, which was prepared by the Privatization Secretariat in connection with the sale of Highway 407 (portions of which are at issue in the Ministry of Finance appeals) states the following with respect to “tolling, congestion relief, and expansion” at page 26:

Highway 407 provides congestion relief for East-West travel in the GTA [Greater Toronto Area] and will provide further congestion relief when Highway 407 West, Highway 407 East Partial, and Highway 407 East Completion are built. In order to achieve its congestion relief objective, *the Province has designed a protocol for toll rate setting.*

In addition, the Province wishes to ensure that Highway 407 continues to provide congestion relief into the future. Accordingly, *the Province has established pre-defined thresholds that, once reached, will require ConcessionCo [now 407 ETR] to expand the capacity of Highway 407.*

The Tolling, Congestion Relief, and Expansion Agreement is outlined in Appendix 4.3 and will be a schedule to the Concession and Ground Lease Agreement. [emphasis added]

As indicated above 407 ETR argues that “information central to the development of [Schedule 22] was developed by 407 ETR/OTCC and provided by it to the government for the purpose of developing Schedule 22”. 407 ETR does not, however, provide any indication as to what this information would have been, or how disclosure of this record would permit the drawing of accurate inferences with respect to this information. Insofar as 407 ETR is referring generally to the “protocol for toll rate setting”, based on the above, I do not accept that this information was developed solely by the OTCC/407 ETR and supplied to the government.

As far as the agreement itself is concerned, similar to my findings with respect to other agreements addressed above, it also appears to be one that was negotiated and not supplied. Although this record contains very detailed and complex provisions relating to the regulation of toll levels in relation to traffic flow, it is not apparent on the face of this agreement that any of the information within it was originally provided by the OTCC/407 ETR or that disclosure of this record would permit the drawing of accurate inferences with respect to this information. Accordingly, I find that the information within this record was not “supplied” within the meaning of section 17(1) of the *Act*.

Schedule 23 to the CGLA

Schedule 23 to the CGLA is entitled “Toll Collection/Enforcement Procedures” which stipulates that the Crown may charge 407 ETR certain fees for services in connection with the collection of outstanding toll charges by the Ministry. It also outlines the cost for the Ministry to provide 407 ETR with certain information concerning commercial vehicles over a certain weight

registered with the Ministry. Finally, this record specifies the service fees for the distribution of transponders by the Ministry over a certain time period. 407 ETR is objecting to the disclosure of all dollar amounts within this record.

Once again, I have not been provided with any evidence to establish that the dollar amounts within this schedule were supplied by the OTCC/407 ETR. To the contrary, as outlined above, the Ministry has indicated in its representations that the fees within this schedule were in fact negotiated between the parties. Therefore, I find that this information was not “supplied” within the meaning of section 17(1).

Summary

I have concluded above that only the information at issue within Schedules 1.1(bt), 4.1(o)(ii) and 4.1(ae) to the SPA was supplied by the OTCC/407 ETR. Accordingly, I will go on to consider part three of the section 17 test in relation to these records.

Since I have determined that the remainder of the information at issue, specifically information under the category of “agreement objections”, was not “supplied” for the purpose of the section 17(1) exemption, the second part of the three-part test for exemption under section 17(1) has not been established. Accordingly, it is not necessary for me to consider whether harm is likely to result from disclosure of this information.

In Order MO-1393, Adjudicator Sherry Liang stated the following with respect to the municipal equivalent of section 17(1):

... I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the “intimate details of our operation (costs and constraints) to our direct competition.” There may indeed be harm to the affected party from the disclosure of the information. Nevertheless, section 10(1) of the *Act* does not shield this information from disclosure unless it is clear that it originated from the affected party and is therefore to be treated as the “informational assets” of the affected party and not of the Town. In these circumstances, the record is not exempt from the *Act*’s purpose of providing access to government information.

I agree with these comments. Accordingly, I find that the requirements for the application of section 17(1) have not been met with respect to the information under the category of “agreement objections” and it does not qualify for exemption under this section of the *Act*.

In Confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the

information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

[Order M-169]

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the institution 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 government organization.
- (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]

407 ETR's representations

407 ETR submits as follows:

All of the information here in issue was provided by 407 ETR/OTCC to the Ontario government in confidence for the limited and specific purpose of being made available, subject to confidentiality agreements, to prospective bidders seeking to acquire Highway 407 from the government and only for their use in connection with the bidding process. This information is confidential commercial and financial information material to the conduct of 407 ETR's business of constructing and operating a toll highway.

...

This information was intended to be kept confidential by the Ministry and to be used only in connection with the privatization of Highway 407. It was, therefore, supplied in confidence as required by section 17(1) of the Act. Furthermore, 407 ETR has at all times kept this information confidential and has not disclosed any of it publicly since privatization. ...

The requester's representations

The requester submits:

According to Order P-561, in determining whether information was supplied in confidence, it is necessary to consider whether the information was not otherwise disclosed or available from sources to which the public has access.

A prospectus for 407 International dated February 3, 2000, which invites potential investors to refer to the Concession Agreement, available upon request to the Secretary of 407 International ... As well, the prospectus was available for inspection at 407 International's head office, during normal business hours. A copy of that prospectus is attached as Appendix A.

Although the third party may consider the records sought to have been confidential, they were made available to several potential investors. These potential investors may very well have chosen to become competitors to the third party.

407 ETR's reply representations

In response to the requester's representations, 407 ETR submits:

The requester stated that the information was available for inspection by the public and enclosed an excerpt from the 407 International Inc. prospectus dated February 3, 2000. 407 ETR points out that the information was not publicly available. The information was only made available to a restricted number of people, being those potential investors that had displayed a genuine interest in making a substantial investment and only after they entered a confidentiality agreement with 407 ETR.

Findings

As outlined above, the information remaining at issue was supplied by OTCC/407 ETR to the government for the purpose of permitting it to undertake the sale of Highway 407. In my view, the OTCC, being a business that was owned by the government, would have had a reasonable expectation that its business information would be treated confidentially, particularly in the circumstances of the sale transaction in question. Although the information at issue may have been made available to several potential investors, I accept 407 ETR's submission that this disclosure was made only to those potential investors who executed confidentiality agreements.

As outlined above, Order PO-1974, which is being issued concurrently with this order, deals with two related appeals involving the Ministry of Finance. One of the records at issue in those appeals is a Request for Expression of Interest (the RFEI) that was issued by the Province of Ontario in connection with the sale of Highway 407. Under the heading of "Use of Information", the RFEI states the following:

This document is provided to you on, and subject to, the terms of a Confidentiality Agreement that has been executed by you. The information received as part of this process may be used only for the purposes set forth in this RFEI and in the Confidentiality Agreement and may not be photocopied, reproduced, or distributed to any other person at any time except strictly in accordance with the terms of these documents.

The RFEI further states:

All Sale-Qualified Bidders must post a C\$ 250,000 deposit ... and sign and cause all Prime Team Members ... to sign an additional prescribed form of confidentiality agreement to:

- receive a copy of the CIM [Confidential Information Memorandum];
- receive a copy of the Design/Build Documents;
- gain entry into the Sale Data Room;
- gain entry into the Design/Build Data Room; and
- be eligible to submit a Sale bid.

In view of the above, I find that the information at issue was prepared for a purpose that would not entail disclosure to the public. I further find that the information at issue would appear not to be otherwise available from sources to which the public has access.

Accordingly, based on the material before me and the particular circumstances of this case, I am satisfied that the information at issue was supplied by the OTCC/407 ETR with a reasonable expectation of confidentiality.

Part 3: Harms

The Commissioner's three-part test for exemption under section 17(1), and statement of what is required to discharge the burden of proof under part three of the test, have been approved by the Court of Appeal for Ontario. That court overturned a decision of the Divisional Court quashing Order P-373, and restored Order P-373. In that decision the court 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.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)].

In order to discharge the burden of proof under part three of the test, the parties resisting disclosure 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 [Orders 36, P-373].

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the phrase "could reasonably be expected to", which appears in the opening words of section 17(1):

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.)].

In my view, 407 ETR must provide detailed and convincing evidence to establish a "reasonable expectation of probable harm" as described in paragraphs (a), (b) and/or (c) of section 17(1).

Section 17(1)(a): Prejudice to competitive position

407 ETR's representations

407 ETR makes the following general representations with respect to the exemption under sections 17(1):

Until the privatization occurs, the government could generally refuse to disclose information of the kind described in the preceding paragraph about its Crown corporation, if it were requested under the Act, on the basis of section 18 of the

Act. Logically, the person acquiring the business should equally be able to prevent disclosure of the same information after privatization on the basis of section 17 of the Act. The same information is in issue. The same business is in issue. All that has changed is the identity of the owner of the business.

If it were otherwise, anyone acquiring a business from the government would be exposed to potentially substantial and unwarranted prejudice. After privatization of the business, anyone interested (for example, competitors) could obtain from the government under the Act highly material and confidential information about the business, its operations, its projections, its customers, that could not have been obtained before the privatization because of section 18. If this were the result under the Act, which 407 ETR submits for the reasons that follow, it is not, there would be substantial impediments facing any privatization of any business by the government. Private sector parties might well not be prepared to even consider acquiring businesses from the government if all confidential business information relating to this business in the control of the government could be obtained under the Act by anyone who asked for it following privatization. Privatization could, therefore, easily become difficult, if not impossible, to complete. The continued ability of the government to effect privatizations where and when the government considers it in the public interest to do so is clearly something that is itself in the public interest.

With reference to the harm alleged at section 17(1)(a), 407 ETR submits:

The Ontario government has announced its interest in the construction of additional privately-operated toll highways in Ontario, for example the 407 ETR East Completion Niagara Mid-Peninsula highway, Highway 410/427 extension to Collingwood, Highway 404 north extension to Lake Simcoe, an unnamed highway north of and parallel to Highway 407 ETR and the Gardiner Expressway replacement. As recently as [March 2001], there has also been public discussion of the possibility of the City of Toronto adding four toll lanes to the Don Valley Parkway. 407 ETR is a potential bidder, but by no means the only potential bidder, on additional privately-operated toll highways that may be built in Ontario. Given the various public announcements identified above, there is significant prospect that such highway projects will be undertaken in the reasonably near term.

In any such bidding process, those bidding in competition with 407 ETR could easily make use of the commercial and financial information here in issue to, for example, compete against 407 ETR with valuable information about 407 ETR's business without 407 ETR having any equivalent opportunity to gain access to similar information about its competitor.

Requester's representations

The requester submits:

One scenario suggested by the third party suggests that the release of tolling information would allow competitors to develop competing highways, and schedule their construction to coincide with mandated expansion and construction, leaving 407 ETR vulnerable to competitors.

407 ETR's own Annual Information Form makes this scenario unlikely. Appendix B, which shows page 3 of the Annual Form, describes the process for highway construction as slow and complex, making the rapid construction required to harm the highway's competitive position unlikely.

“The planning process for a major thoroughfare of the scale of 407 may take 20 years or more and the process of assembling contiguous land parcels, obtaining environmental permits and all requisite municipal and provincial approvals may extend this time frame by an additional 10 to 15 years.”

407 ETR seems to indicate that the process for constructing highways is so arduous, that, as an already completed highway, it stands as a financially secure investment with a significant competitive advantage.

407 ETR's reply representations

In response to the requester's submission, 407 ETR states:

The requester questions any prejudice to 407 ETR's competitive position by citing the length of time required to plan and construct Highway 407 ETR. Although 20 or 30 years may elapse from inception to completion of a major thoroughfare of the scale of Highway 407, complexity of planning and construction ought not be confused with the ability to compete with 407 ETR. It is also worth note that 407 ETR is merely 2 years into a 99 year concession term and that Highway 407 ETR may have Eastern and Western extensions beyond what is in the Concession Agreement in relatively short period of time ...

Findings

With respect to 407 ETR's argument that “anyone acquiring a business from the government would be exposed to potentially substantial and unwarranted prejudice”, I have already determined above that the fact that 407 ETR used to be a Crown corporation does not preclude it from availing itself of the protection afforded under the section 17(1) exemption. Having said that, however, I also believe that if an organization chooses to do business with the government, it must be prepared to accept the level of public scrutiny contemplated under the *Act*.

As far as the section 18 argument is concerned, 407 ETR is correct in asserting that this exemption is designed to protect the interests of the government. However, whether or not the information at issue would have been exempt under section 18 prior to the sale of Highway 407 is not determinative of the issues in these appeals. The application of section 18 to information concerning Crown corporations may involve factors and considerations significantly different from those in this case. In my view, section 17(1) of the *Act*, being designed to protect the interests of parties outside the government, is the appropriate exemption to be considered in the context of potential harm to 407 ETR.

Having reviewed all of the representations, together with the information at issue, I am not satisfied that 407 ETR has provided sufficient evidence to demonstrate that disclosure of the information remaining at issue could reasonably be expected to cause the harms described in section 17(1)(a). Although 407 ETR argues that potential competitors “could easily make use of the commercial and financial information here in issue to, for example, compete against 407 ETR with valuable information about 407 ETR’s business”, other than making these general assertions, it does not refer to any specific portions of the records nor does it provide any supporting details in this regard. Furthermore, it is not evident on the face of the records how disclosure of this information could reasonably be expected to significantly prejudice the competitive position or interfere significantly with any future contractual or other negotiations.

Accordingly, I find that section 17(1)(a) is not applicable here.

Section 17(1)(b): Similar information no longer supplied

407 ETR’s representations

407 ETR submits:

If the information in issue in connection with Schedule 22 is ordered disclosed pursuant to the Act, it would also be the case that much information retained by the government following the privatization of many businesses would very likely be obtainable under the Act. As indicated above, this would seriously jeopardize the government’s ability to privatize business.

A possible means of avoiding disclosure under the Act of information in the continuing control of government following privatization of the business of a Crown corporation would be for the Crown corporation not to provide the information to any government institution subject to the Act prior to or in connection with the proposed privatization. Then, the government would not have the information and could not be required to disclose it under the Act following privatization.

But, a necessary consequence of adopting this approach would be that the government would be much less knowledgeable about the business it was privatizing. It would, therefore, be hard-pressed to determine fair market value for the business with the result that it could well sell such business for an amount

substantially less than its fair market value. Such a result would clearly not be in the public interest.

Requester's submission

The requester states:

It has been suggested that the release of information regarding the tolling practices, and other agreements reached between 407 ETR and the Government of Ontario would result in the termination of the practice of sharing information with the Government so that it may evaluate its asset, undermining its ability to attract full value for its investment.

In spite of the financial incentives for the Government to deny itself of this information, it will continue to be the Government's prerogative to request this information of its Crown corporations.

A government which chooses to refuse to request this information of its Crown assets will be making a political decision, and as such will be accountable to the political decisions of the public.

Findings

Similar to the Ministry the OTCC was an institution under the *Act* and as such, its records were also subject to the *Act*. Therefore, as far as any future privatization transactions are concerned, if the Crown corporation in question is already subject to the *Act*, there would be no reason to withhold any information from the Ministry on the basis as argued by 407 ETR.

Even if the Crown corporation was not a designated institution under the *Act*, in my view, it is unlikely that it would withhold relevant information from the government if it was required for the purposes of completing a similar sale transaction in the future. It is also worthy to note that the Ministry does not appear to share 407 ETR's view in this respect. As stated earlier, the Ministry chose not to make any representations with respect to the application of section 17(1). However, I would assume that if the Ministry felt that there was a reasonable expectation of harm, as described by 407 ETR, it would have asserted that section 17(1)(b) is applicable in this case.

Based on the above, I find that a decision in the present appeals to order the disclosure of the information remaining at issue could not reasonably be expected to result in similar information no longer being supplied.

Section 17(1)(c): Undue loss or gain

407 ETR's representations

With respect to the "Information Objections" 407 ETR states generally:

Disclosure of the information here in issue to, for example, those bidding against 407 ETR in anticipated RFP processes for additional privately-operated toll highways in Ontario would give such competitors valuable information about 407 ETR's business, its projections and historical financial information. 407 ETR's competitors have no legitimate basis for obtaining this information and would not, in normal circumstances, be able to obtain such information concerning a private-sector competitor. Undue loss to 407 ETR would be likely to result from disclosure of such information to 407 ETR's competitors and undue gain would accrue to its competitors if they were able to obtain access to such information since such competitors would, thereby, gain access to and acquire a valuable knowledge base concerning 407's ETR's business expertise and its operating procedures, all without 407 ETR having any equivalent opportunity to gain access to similar information about its competitors. The loss to 407 and its shareholders and the gain to its competitors that would result would be particularly "undue" because it would occur merely because 407 ETR/OTCC was previously owned by the government with the result that the government has control of the information in issue.

More specifically, with respect to the two pages of Notes to the Revised Pro Forma Balance Sheet within Schedule 1.1(bl) to the SPA 407 ETR submits:

In addition, section 17(1)(c) applies to the information in Item 2 because disclosure of the Notes to the Pro Forma Balance Sheet would disclose that the current financial statement of 407 ETR now are prepared on a somewhat different accounting basis than that used in 1998 (... Both approaches are acceptable under applicable accounting principles. Disclosure of the change might, however, lead to confusion in the marketplace with the real potential to adversely affect the ability of 407 ETR's parent (407 International Inc.) to raise capital in the market.)

With respect to the dollar amounts within Schedule 4.1(o)(ii) to the SPA, "Historical Revenue Data", 407 ETR submits:

With respect to Item 5, 407 ETR has never publicly released revenue data from the period prior to the privatization of Highway 407 in May, 1999. In addition, 407 ETR publicly releases quarterly revenue information for the period since May, 1999 but not monthly revenues. The manner in which 407 ETR currently calculates its revenues is somewhat different from the way in which 407 ETR/OTCC calculated revenues prior to privatization. Disclosure of the monthly revenue amounts in Item 5 would, therefore, result in the disclosure of financial information that has never previously disclosed, that is more detailed than the information now publicly disclosed and that is calculated on a different basis than the revenue information disclosed by 407 ETR. The likely result of the disclosure of this information would be confusion in the marketplace on the part of those trying to reconcile various financial data concerning 407 ETR prepared on different bases. As a result, the ability of 407 International and/or 407 ETR to raise money in the market could reasonably be expected to be adversely affected.

Confusion in the financial market concerning the revenue generating history of Highway 407 can reasonably be expected to lead to uncertainty in the financial market and such uncertainty generally leads either to a reduced willingness to lend money or a willingness to lend only at a higher price. Either result would have adverse consequences for 407 International and 407 ETR.

With respect to Schedule 4.1(ae) to the SPA, "Litigation", 407 ETR submits:

With respect to Item 6, 407 ETR is concerned that individual members of the public, if they become aware of the various types of claims that have been asserted against it, would be encouraged to commence similar types of claims against 407 ETR. It is particularly concerned that "copycat" claims could be commenced on a frivolous and unsubstantiated basis by some individuals in hopes of achieving the financial benefit of a nuisance settlement. The costs which 407 ETR would be obliged to incur in defending itself against such unmeritorious claims would clearly result in undue loss to 407 ETR for the purposes of section 17 ("undue" because the claims in question are frivolous and without merit).

Requester's representations

The requester states:

However harmful this disclosure may be to the third party, it is difficult to understand how it may be viewed as excessive. As mentioned earlier, it may take upward of 20 years to construct a competing highway for 407 ETR, making the rapid response required by a competitor to capitalize on this information next to impossible.

Furthermore, the information that the third party wishes to protect was made available, as I have mentioned before, to potential investors, who would conceivably be the potential competitors of the third party.

Findings

Based on the material before me, I am not persuaded that disclosure of the notes to the Pro Forma Balance Sheet or the historical revenue data would result in the types of harms as described by 407 ETR. In Order MO-1452, Adjudicator Dora Nipp concluded that the fact that a record may contain information which could be misleading does not alone fit within the harms described in section 10(1)(a) or (c) of the *Municipal Freedom of Information and Protection of Privacy Act*, which are equivalent to sections 17(1)(a) and (c) of the *Act*. Similarly, in this case, I am not persuaded that simply because the 407 ETR now prepares its financial statements on a somewhat different accounting basis than that used in 1998 and calculates its revenues somewhat differently from the way in which 407 ETR/OTCC calculated revenues prior to privatization could reasonably be expected to result in the harms envisioned by section 17(1)(a) or (c) if these records were disclosed.

With respect to Schedule 4.1(ae) to the SPA, "Litigation", I find that 407 ETR's submissions are highly speculative with respect to the possible consequences of disclosure of this record. In my view, 407 ETR has not established a reasonable expectation of harm occurring from disclosure of this information. Accordingly, I find that section 17(1)(c) is not applicable.

In summary, I find that section 17(1) is not applicable to any of the information at issue in these appeals.

ECONOMIC AND OTHER INTERESTS

The Ministry relies on sections 18(1)(d) and (e) to deny access to the fees contained in Schedules 18, Authorized Requester Electronic Data Transfer Agreement and Schedule 23, Toll Collection/Enforcement Procedures. Both these records are schedules to the CGLA.

Sections 18(1)(d) and (e) state:

A head may refuse to disclose a record that contains,

- (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;

As outlined above, in Order PO-1747, Senior Adjudicator 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)(d) and (e) exemption claim, the Ministry 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.

Representations

The Ministry states that the government has announced on numerous occasions that “its plans include the construction of new provincial highways as toll roads and/or upgrading and conversion of existing provincial highways to toll roads, which toll roads may involve electronic toll collection fees and may be subject to private sector participation which will require the negotiation of fees of the nature set forth in the records which are at issue herein”. With respect to the section 18(1)(d) exemption, the Ministry states:

The position of the Government of Ontario is that the disclosure of the fees negotiated in this case would prejudice its ability in the future to negotiate the terms most favourable to Ontario’s revenues, thereby causing injury to its financial interests. The Agreement of which these records are a part was the result of a unique approach by the Government of Ontario, or any other government, to the construction, financing and leasing of a major highway with totally automated toll imposition and collection of user tolls. The negotiation of the fees to be paid by the lessee to the Government of Ontario in such a case was without precedent, and without operational experience. Hence the establishment of the quantum of fees of necessity could only be based on informed estimates, the relative advantage or disadvantage flowing to the various parties being speculative.

The Ministry goes on to state the following with respect to the section 18(1)(e) exemption claim:

The position of the Ministry and of the Government of Ontario is that the positions and criteria which they intend to apply to future negotiations with potential private sector partners or participants in the creation and operation of toll roads will have as a key element the financial arrangements between the parties, of which the nature and quantum of fees to be charged by the Ministry will be of fundamental importance. Disclosure of the arrangements entered into in the pilot project of such magnitude would constrain the Government’s negotiating positions.

The requester on the other hand argues as follows:

I reject the notion that public scrutiny of the negotiated fees would harm the government’s negotiating position.

It is quite possible that a government seeking to sell an asset would find from public scrutiny the mandate to seek a higher asking price. The fact that the deal it negotiated would be subject to public approval could in fact force the government to seek the highest sale price.

As well, as I have and will argue throughout this submission, the sale price obtained from the sale of the asset is only one factor in determining the value

obtained from the sale. If future users of the highway are afterwards subjected to impossibly high toll rates, these rates diminish the value obtained by taxpayers in the sale.

The assumption made by the Ministry in its decision, that public scrutiny of the deal negotiate would harm the sale price, does not take into account the legitimate role of public opinion in influencing government action. The sale of Highway 407 to private interests was a political decision, and as such it is entirely appropriate for the public to be afforded an opportunity to express its views on the sale. If the public wishes to apply pressure on the Government to negotiate a lower sale price to guarantee lower toll rates, or if it wishes any other combination of changes to possible deals, whether it is in the best interests or against the best interests of the Government is immaterial. The public must have an opportunity to offer an informed voice on political decisions.

In its reply representations the Ministry refers to a recent announcement by the Minister of Finance wherein he stated that “[w]e are currently determining how best to expand and manage our highways. As part of this exercise, SuperBuild will examine opportunities for the private sector to contribute to our highway system”. The Ministry further submits that subsequent to this announcement the Ministry of Finance/SuperBuild issued RFPs calling on the private sector to complete Highway 407 East. The Ministry also continues to argue that the fees paid by 407 ETR will serve as a critical point of reference to prospective toll highway operators:

Even accepting the requester’s time line for future toll agreement, the Ministry still submits that the fees negotiated with 407 ETR will be relevant to future negotiations of toll highways whether they occur in the near future or after several years. The lease of Highway 407, a highway with totally automated toll imposition and collection, is unprecedented not just in Ontario, but in the world. It is quite reasonable to conclude that the terms and conditions of this agreement, especially the fees negotiated, will be of central interest to the attendant negotiations of future toll highway agreements. Cost comparisons between time periods are common. It would not be difficult for these fees to be adjusted for inflation and used as a benchmark to hamper the Government’s ability to negotiate a more favourable agreement for the public. The fact that the Government holds a monopoly position is immaterial to the injury it could reasonably suffer if it had to bargain constrained by its past negotiated results.

It is also worth remembering that the fees negotiated are in consideration of the administrative costs the Government incurs to facilitate toll collection for 407 ETR. These fees could also be relevant to a multitude of other contexts outside of highway tolling where the Government enters into an agreement with a private party where it will provide administrative services during the term of the agreement.

The Ministry relies on Orders P-1026, P-1022 and M-712 in support of its position that section 18(1)(d) is applicable in the circumstances of this case. The Ministry also points out that the fees

under consideration are not the amounts paid by the private sector for the highway asset, but rather they are fees paid for the Ministry to provide services. The Ministry therefore submits that while each toll highway may be different, the services provided for the purposes of toll enforcement will be similar.

Findings

As described above, Schedule 18 to the CGLA is an Electronic Data Transfer Agreement, pursuant to which the Ministry granted 407 ETR a licence to access and use certain Ministry "information products". The only information at issue within this agreement are the fees outlined in Schedule C, which consist of connectivity fees to access certain information and a base fee for access to the "information products". Schedule 23 to the CGLA is a record entitled "Toll Collection/Enforcement Procedures" which stipulates that the Crown may charge 407 ETR certain fees for services in connection with the collection of outstanding toll charges by the Ministry. It also outlines the cost for the Ministry to provide 407 ETR with certain information concerning commercial vehicles. Finally, this record specifies the service fees for the distribution of transponders by the Ministry.

Section 18(1)(d)

To establish a valid exemption claim under section 18(1)(d), the Ministry 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).

The Ministry is correct in pointing out that Orders P-1026, P-1022 and M-712 found that the economic interests and competitive position of the institution would be prejudiced if the institution could not negotiate the "best possible deal for the province". Further, these orders found that disclosure of the information at issue would inhibit the institution's ability to negotiate the "best possible deal" and applied section 18(1)(c) (prejudice to the economic interest or the competitive position of an institution) of the *Act* to this information.

I am not persuaded, however, based on the representations provided by the Ministry in the present case, that disclosure of the fees in question would inhibit the Ministry's ability to negotiate the "best possible deal". The Ministry has a monopoly not only on the construction of highways, but also on the services it provides associated with its "information products". As such, I agree with the requester that the Ministry is in a strong negotiating position with respect to both the overall sale price of the highway asset, as well as the individual fees to be charged with respect to the services provided for the purpose of toll enforcement.

The fees relating to Highway 407 were likely determined based on a number of different factors such as location, cost of construction, anticipated traffic and potential revenues. In my view, although the services provided by the Ministry for the purposes of toll enforcement may be similar with respect to each toll highway, this does not mean that the unique circumstances relating to each highway would not be taken into consideration when negotiating future fees in

this regard. Moreover, the current economic environment would likely also be a significant factor in any future negotiations.

Furthermore, although the Ministry states that the fees in question "could also be relevant to a multitude of other contexts outside of highway tolling where the Government enters into an agreement with a private party", it provides no further information or explanations in this regard. Based on the material before me, I find that there is insufficient evidence to establish a reasonable expectation of probable harm as described in section 18(1)(d) in the circumstances.

In view of the above, I am not persuaded that disclosure of the information at issue would result in the harm contemplated by section 18(1)(d) and accordingly, I find that it is not applicable in the circumstances.

Section 18(1)(e)

In order to qualify for exemption under section 18(1)(e), the Ministry must establish the following:

1. the records must contain positions, plans, procedures, criteria or instructions; and
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and
3. the negotiations must be carried on currently, or will be carried on in the future; and
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

[Order P-219]

In Orders MO-1199-F and MO-1264 Adjudicator Laurel Cropley stated the following with respect to the municipal equivalent of section 18(1)(e) of the *Act*:

Previous orders of the Commissioner's office have defined "plan" as "... a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Order P-229).

In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding.

Having reviewed the information at issue, namely the dollar amounts, I find that none of it contains positions, plans, procedures, criteria or instructions, as those terms are used in section 18(1)(e), and on that basis alone they do not qualify for exemption under that section of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

Introduction

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: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, it must be established that one or the other, or both, of these heads of privilege apply to the records at issue.

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].

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 P1409)

Waiver of solicitor-client communication privilege

The actions by or on behalf of the institution and/or another party may constitute waiver of solicitor-client communication privilege or litigation privilege. As stated in Order P-1342:

... [C]ommon law solicitor-client privilege can also be lost through a waiver of the privilege by the client. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669. See also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Strictly speaking, since the client is the “holder” of the privilege, only the client can waive it. However, the client’s waiver of the privilege can be implied from the actions of the client’s solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client’s privilege. [J. Sopinka et al., *The Law of Evidence in Canada* at p. 663. See also: *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211 (S.C.C.); *Derby & Co. Ltd. v. Weldon (No. 8)*, [1991] 1 W.L.R. 73 at 87 (C.A.)].

Findings

As stated earlier in this order, the Ministry had previously relied on section 19 of the Act with respect to Schedules 6.1.4 and 6.3.4 to the SPA. In its representations, however, the Ministry consented to the disclosure of these two records. In its reply representations, 407 ETR indicated that it denies the Ministry’s authority to waive any privilege it has to these “legal opinions”, and does not consent to their release. 407 ETR does not provide any further representations in this respect.

Article 6 of the SPA sets out the pre-conditions to closing. Section 6.1.4 of the SPA, stipulates that “[t]he Purchaser shall have received a legal opinion dated the Closing Date from the Vendor’s counsel substantially in the forms set forth in Schedule 6.1.4”. Section 6.3.4 of the

SPA, stipulates that the Vendor shall receive same from the Purchaser's and each of the Equity Participants' counsel in the form set forth in Schedule 6.3.4.

Based on my review of Schedules 6.1.4 and 6.3.4, I find that they cannot be considered a privileged communication between a lawyer and a client made for the purpose of giving or receiving legal advice. As outlined above, the two schedules in question are not the actual legal opinions, but rather set out the form in which the required legal opinions should be set. Even if I were to find that the content of these records was created by the solicitors as part of their working papers relating to the giving of legal advice, the fact that these records formed part of the SPA is clear evidence of an intention to waive privilege on behalf of the clients.

Additionally, the Ministry has also clearly waived privilege in Schedule 6.1.4 by consenting to its disclosure to the requester. As far as Schedule 6.3.4 is concerned, in Order MO-1338, Senior Adjudicator Goodis stated the following:

In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act's* provincial counterpart . . .

Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter. . . .

In this case, there is no evidence before me to establish a "joint interest" between 407 International Inc. and the Crown for the purposes of solicitor-client privilege. Accordingly, I find that the records in question are not exempt under section 19 of the *Act*.

ORDER:

1. I order the Ministry to disclose the records at issue to the requester, no later than **January 14, 2002**, but not earlier than **January 7, 2002**, with the exception of the highlighted information within Schedules 4.1(ae) and (af) to the SPA and Schedules 8 and 15 to the CGLA which should **not** be disclosed, as the requester is no longer seeking access to this information.

2. I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the requester pursuant to Provision 1.

Original signed by:
Irena Pascoe
Adjudicator

December 5, 2001