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

ORDER PO-2064

Appeal PA-010335-1

Ministry of Consumer and Business Services

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NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Consumer and Business Services (the Ministry) for access to:

> All records (including correspondence), memos, letters, memorandums of understanding, etc dated from 1991 to the present, in the possession of [the Ministry], referencing the following issues:
>
> 1. The disposition of income and/or capital gains related to pre-need assurance funds.
>
> 2. The interpretation of "income" (referred to in section 27(2) of the *Cemeteries Act*, R.S.O. 1990, c. C.4 and section 36(5) of the *Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4 and/or "capital gains" (realized on monies held in pre-need assurance funds established by cemeteries pursuant to the requirements of section 36 of the *Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4, and its predecessor legislation and/or the relationship between the definitions of "income" and "capital gains".

The Ministry identified 68 records responsive to the request, and advised the appellant that it was granting partial access to them. The Ministry advised that it was relying on the exemptions at sections 13 (advice to government), 15 (relations with other governments), 17 (third party commercial information) 18 (valuable government information), 19 (solicitor-client privilege) and 21 (personal privacy) of the *Act* to deny access to records or portions of records.

The appellant then appealed the Ministry's decision to this office.

During the mediation stage of the appeal, the appellant confirmed that she was not seeking access to certain records. As a result, only 45 records (or portions of records) remain at issue.

I sent a Notice of Inquiry setting out the issues in the appeal to the Ministry and five affected parties. The Ministry and one affected party provided representations in response. I then sent the non-confidential portions of the Ministry's representations to the appellant, but received no representations in response.

RECORDS:

The records at issue in this appeal include internal Ministry memoranda and e-mails, correspondence to and from the Ministry, and correspondence between outside parties. The records are described in more detail in the appendix to this order.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Introduction

The Ministry claims that 33 records, specifically, Records 1-5, 9-13, 15-21, 35, 37, 43-45, 48-51, 54, 60-63, 65 and 67 are exempt under section 19 of the *Act*. That section 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. The Ministry claims that both heads of privilege apply.

Solicitor-client communication privilege

Introduction

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each

> stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Records 1-5, 11-13, 15-21, 35, 37, 43-45, 48-51, 54, 60-61, 65

With regard to these 28 records, the Ministry submits:

> In the context of this appeal, it is important to note why some of the privileged records were generated.
>
> On June 7, 2000, or thereabouts, a letter was received from a law firm on behalf of a registrant under the *Cemeteries Act (Revised)* ("CAR") requesting the Ministry's position regarding the treatment of certain trust fund requirements under the CAR ("trust fund accounting issues"). The letter was a follow-up to a meeting between a registrant and representatives of the Ministry on May 2, 2000.
>
> Receipt of the letter began a chain of discussions via email between the client group (the Registrar of Cemeteries and his assistants) and lawyers in the legal services branch of the Ministry regarding how best to respond to letter and the registrant's position regarding the issues raises at the meeting and documented in the letter.

The Ministry goes on to provide detailed representations on each of the records, explaining why they constitute confidential communications between a lawyer and client for the purpose of giving or receiving legal advice. By way of example, the Ministry submits with respect to Record 21:

> **Record 21**, dated May 02, 2002, is from a registrar of the Cemeteries Registration Unit to a manager of the Marketplace Standards and Services Branch ("MSSB"). This email begins a continuum of communication between the relevant program area, the branch responsible for managing the program area, and a lawyer in the legal services branch of the Ministry.
>
> The email summarizes the meeting and issues discussed; it also discusses, among other things, the Ministry's historical position in relation to the issue, includes a précis of the legal advice that formed the basis of the Ministry's position as well as the content of a legal opinion on the issue. The email also discusses the

> possibility of seeking the legal expertise of other branches of government, such as the Public Guardian and Trustee ("PGT") regarding the issue.
>
> . . . [T]he solicitor client communication head of privilege protects the email for the following reasons: First, the email was sent in confidence by the manager of the program area to the next reporting level in the Ministry's hierarchy. It is entitled "Heads Up", which is informally, an expression of a potentially important or serious matter. Second, all parties concerned considered the content of the email confidential. Third, a lawyer of legal services branch was copied on the email to him advise of the summarized content of the meeting and accuracy of the legal advice rendered and, if necessary, to allow the lawyer to "intervene" in the email discussion by providing additional legal advice and/or providing advice in relation to what should prudently and sensibly be done in the relevant legal context.

The Ministry's representations with respect to the remaining 27 records in this group are very similar and quite lengthy, and I do not believe it is necessary to repeat them here.

In my view, the Ministry has provided detailed and persuasive representations to establish that all of Records 1-5, 11-13, 15-21, 35, 37, 43-45, 48-51, 54, 60-61 and 65 are confidential communications among Ministry lawyers and their clients, made for the purpose of giving or receiving legal advice on the trust fund accounting issue. As such, these records are subject to solicitor-client communication privilege under section 19 of the *Act*.

Records 9, 10, 62, 63, 67

Records 9, 62, 63 and 67 are communications between Ministry counsel and counsel with the Public Guardian and Trustee (PGT) (Records 9, 62 and 63), and between Ministry counsel and counsel with the Ministry of Finance (Record 67). Record 10 is an e-mail from Ministry counsel to himself.

The Ministry submits the following with respect to these records:

> **Record 10**, dated August 1, 2000. This email is from a lawyer in the legal services branch to himself. It is in the form of a draft letter in response to the letter received from the law firm. It also contains a handwritten marginal note.
>
> . . . [T]he record is privileged in its entirety as it forms part of a lawyers working papers directly related to giving legal advice to the clients in response to the trust fund accounting issues.
>
> **Record 9**, dated August 3, 2000. This record is a covering memorandum from the legal services branch to the PGT.

> The purpose of this memorandum was to officially seek the expertise of the PGT in relation to the issues raised in the trust fund accounting issues. As noted above, part of the Ministry's response to the issues raised mention the need to seek the expertise of the PGT.
>
> . . . [T]he record is privileged in its entirety as it was made by a lawyer to another lawyer at the PGT for the purpose of seeking legal advice on behalf of the client.
>
> **Record 62**, dated August 3, 2000. This record is a covering memorandum and draft letter that appears in record 10.
>
> For the reasons given with respect to the submissions in relation to records 9 and 10, record 62 is privileged in its entirety.
>
> **Record 63**, dated August 3, 2000. This record is identical to record 62 except that it also contains a hand written marginal note from the legal director of the legal services branch to the lawyer who authored records 9 and 10.
>
> The purpose of the notes is to request certain changes to record 9. As such, the notes of the lawyer's supervisor must be taken to form part of the lawyer's working papers that are directly related to formulating legal advice. Therefore, it is respectfully submitted that the record is privileged in its entirety.

I am satisfied, both on the basis of the Ministry's representations and the record itself, that Record 10 forms part of Ministry's counsel's working papers and, pursuant to *Susan Hosiery Ltd.*, it is subject to solicitor-client communication privilege.

Records 9, 62, 63 and 67 are communications between Ministry counsel and counsel with two other institutions under the *Act*, the Ministry of Finance and the PGT. Generally speaking, communications with parties outside the solicitor-client relationship do not qualify for solicitor-client communication privilege (see, for example, my Order MO-1338, involving a communication between a municipality and a non-government organization). More specifically, in some circumstances, communications between two institutions under the *Act* have been found not to qualify for privilege under section 19. In Order PO-1846-F, Adjudicator Laurel Cropley was asked to decide whether letters between counsel from Ontario Hydro and counsel for the Ministry of Energy, Science and Technology were privileged. Adjudicator Cropley found that they were not:

> In my view, the mere fact that both Ontario Hydro and the Ministry are "institutions" under the *Act* is not determinative of this issue. The jurisdiction of the *Act* covers a wide variety of institutions, including ministries, agencies, commissions, tribunals and other Crown corporations with widely diverse functions, mandates and arguably, interests. To maintain that a solicitor-client relationship can be established between institutions simply because they fall

within the purview of the *Act* is a stretch of the principle of indivisibility of government far beyond what a reasonable interpretation would allow.

In approaching this issue, I find that a decision of the Saskatchewan Court of Queen's Bench in *Regina (City) Police Service v. McKay*, [1999] S.J. No. 906 (Q.B.), regarding Crown disclosure of records held by the Chief of Police, is instructive. The Court states at paragraph 17:

> These cases suggest that the proper analysis to determine whether a department is part of the Crown for the purpose of disclosure, focuses on the nature of the body and the nature of the records generated by that body. Where the analysis shows a close relationship between the body and the Attorney General, the body will be considered part of the Crown. Otherwise, the body is independent and its records attract third party status.

The questions I asked of Ontario Hydro are directed at discerning the relationship between it and the Ministry. In responding, Ontario Hydro does not appear to base its position that there exists a solicitor-client relationship as between itself and the Ministry *per se*, but on the fact that it is an agent of the Crown, thus bringing it within the principles of "indivisibility of government".

. . . . .

In *The System of Government in Ontario* (George C. Bell and Andrew D. Pascoe, c. 1988, Wall & Thompson, Inc.) the authors describe "Schedule II agencies" as:

> . . . self-supporting, fully operational Crown corporations, such as Ontario Hydro and the Ontario Lottery Corporation, which operate at arm's length from the government.

Section 4 of the [*Power Corporation Act*] provides that the business and affairs of Ontario Hydro are under the direction and control of its board of directors.

In my view, based on the above, there is an established basis for concluding, contrary to Ontario Hydro's position, that it is not an agent of the Crown either at common law or by statute. Moreover, as noted by Bell and Pascoe, Ontario Hydro was established to operate at arm's length from the government.

Although the Ministry sought Ontario Hydro's views (through its counsel) on the issue of inclusion under Freedom of Information legislation, there is nothing in either the representations or the records themselves that would suggest that they share the same interests in the matter. Indeed, it is possible that their perspectives and interests in this issue are quite different. In my view, as an "arm's length" corporation, Ontario Hydro is nothing more than an interested party, from the government's perspective, in determining whether to include its successor companies under the Act. In my view, the solicitor-client privilege exemption is

> designed to protect the interests of a government institution in obtaining legal advice generally, and having legal representation in the context of litigation, not the interests of other interested parties. Accordingly, I find that Ontario Hydro has not established that it or its legal advisors had a solicitor-client relationship with the Ministry such that its communications are protected under section 19 of the *Act*.

In my view, Order PO-1846-F is distinguishable from this case. Record 67 is a communication between counsel for two ministries of the Crown, and there is nothing before me to indicate that there is any kind of "arm's length" relationship between the ministries to suggest that the Ministry of Finance should be considered a "third party". Regarding the communications with the PGT (Records 9, 62 and 63), it appears that the Ministry sought the PGT's specialized advice and expertise on the proposed legislation. These circumstances suggest that the PGT and the Ministry were communicating with one another as representatives of the Crown, rather than as arm's length or independent parties (although in some circumstances, which are not applicable here, it may be that the PGT has a role independent of the Crown; see sections 1 and 5 of the *Public Guardian and Trustee Act*). Further, I am satisfied that these communications were made for the purpose of giving or receiving legal advice on the trust fund accounting issue, and were treated as confidential as between the Ministry and the Ministry of Finance, and the Ministry and the PGT. Accordingly, I conclude that Records 9, 62, 63 and 67 qualify for solicitor-client privilege.

I note that in its representations on the section 17 issue, with regard to Record 22, the Ministry states that it ". . . has already asserted privilege in relation to the part of [Record 22] consisting of the hand written notes." The Ministry in fact makes no submissions on the applicability of section 19, and at no point prior to making its representations did the Ministry claim that section 19 applied to this record. In the absence of any representations either on the applicability of the exemption to the handwritten portion of section 19, or on the reasons why the exemption was claimed at a late stage in the process (beyond the 35-day period set out in section 11.01 of the *Code of Procedure*), I find that section 19 does not apply to any portion of Record 22.

Conclusion

I find that all of the records for which section 19 was claimed (Records 1-5, 9-13, 15-21, 35, 37, 43-45, 48-51, 54, 60-63, 65 and 67) fall within the scope of this exemption.

In the circumstances, it is not necessary for me to consider the application of litigation privilege to the records at issue.

ADVICE OR RECOMMENDATIONS

The Ministry claims that Records 36 and 41 qualify for exemption under section 13 of the *Act*, which 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 Ministry originally claimed that section 13 also applies to Record 66, but now takes the position that this record is not exempt and may be disclosed. I will order the Ministry to disclose Record 66 to the appellant, in the event that it has not already done so.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it ". . . purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making." Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Order 24, quoted in Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

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.); 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.); PO-1709, above].

The Ministry submits:

> **Record 41**, appears to be a draft portion of **Record 36**. Both records are from an accounting firm to the Registrar of Cemeteries. Both records clearly indicate the Ministry has requested comments from the accounting firm on the treatment of trust fund monies under the CAR. Moreover, record 36, clearly indicates that the comments provided by the accounting firm "*will be considered by the Ministry in the developing a policy with respect to the distribution of capital gains under the realized on trust funds held pursuant to the Act* [CAR]" [Ministry's emphasis]. Record 41 makes a similar statement. Additionally, after a review of various perspectives on the issue, the record provides a conclusion and recommendation . . .
>
> . . . . .
>
> . . . [R]ecords 41 and 36 were provided to the Ministry at the request of the Ministry for the purpose of receiving expert advice and recommendations with

> respect to developing a policy around the treatment of trust funds under the CAR . . .[T]he fact that the recommendations were made by an agent employed for that purpose, rather than by an "employee" of the institution does not render section 13 inapplicable to the records . . .
>
> . . . [D]isclosure of the advice and recommendations could inhibit the free flow of such advice and recommendations because should such records be available to requesters, it can be expected that the providers of such advice may not be completely forthright and instead tend to qualify the advice and recommendations to such a degree as to detract from the candour required for a full and frank deliberation of the merits of a proposed policy.

I am persuaded that the final paragraph in Record 36 contains and/or reveals a suggested course of action that would ultimately be accepted or rejected by its recipient during the deliberative process. As such, this portion qualifies for exemption under section 13.

However, I am not satisfied that the remaining portions of Record 36, nor any of Record 41 can be considered advice or recommendations, or that their disclosure would allow one to infer any advice or recommendations given. Both Records 36 and 41 indicate that they set out "considerations" for the Ministry in setting its policy but, apart from the last paragraph in Record 36, they do not consist of or reveal advice or recommendations.

THIRD PARTY INFORMATION

Introduction

The Ministry claims that Records 22 and 39 are exempt under section 17(1) of the *Act*. That section reads, in part:

> 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;

[Section 17(1)(d), which relates to certain information in the employment and labour relations context, clearly does not apply here.]

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the 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).

Representations

The Ministry submits with respect to Record 22:

> **Record 22**, dated May 2, 2000 is a copy of hand written notes and a photocopy of a document titled, Proposal for Regulatory Change. It appears to have been authored by [an affected party].
>
> The proposals contained in the document proposed a particular course of action in relation to the treatment of trust funds under the CAR.
>
> The Respondent has already asserted privilege in relation to the part of the document consisting of the hand written notes. With respect to the remainder of the record the Ministry defers to the representations of the third party. However, the Ministry continues to assert non-disclosure of the remainder of the document . . . pursuant to its representations under sections 18(1)(e) and (g).

Regarding Record 39, the Ministry submits:

> **Record 39**, dated October 5,1992, is a letter from an accounting firm to a registrant under the CAR [an affected party]. A copy of the letter was also sent to the Senior Financial Examiner. The letter details a number of issues in relation to the treatment of trust funds under the CAR.
>
> With respect to Record 39 . . . the record reveals information of another registrant under the CAR and relates to money, its use and distribution. Specifically the record reveals how the registrant will treat interest and capital gains, a cost

> accounting method for allocating interest and income, payment of the trustees fees and adjustments to certain computer programs needed to be able to accommodate the accounting methods adopted.
>
> . . . [T]he record was supplied to the Ministry official in implicit confidence. The reason the record was created was to evidence a meeting wherein the matters were discussed on the issue of the appropriate treatment of trust funds under the CAR. The Financial Examiner was carbon copied on the letter either because the Examiner was in attendance at the meeting, or because it was appropriate to include the Examiner in the proposed course of action. The record has consistently been treated as confidential and access has been denied on that basis. It . . . is unlikely that any person in the Ministry has knowledge of the information in the record, other than this counsel, and the FOI coordinator and the persons responsible to administering the program area.
>
> . . . [R]elease of the record can reasonably be expected to harm the competitive position of the registrant. The issue around the appropriate treatment of trust funds under the CAR has been under some dispute since at least 1992. The record at issue contains a proposed method that may dispose of the problem for the registrant. Consequently, release of the record to the requester could provide the requester with a means of improving the requester's operations. Since resolution of the accounting issue could impact on the profitability of the requester, and since bereavement services are a one-chance affair, release of the record could prejudice the registrant's ability to compete with the requester over the long term.

Neither of the three affected parties to which Records 22 and 39 relate submitted representations.

Part one: type of information

This office has defined the term "financial information" as "information relating to money and its use or distribution" (see Order P-394). Both Records 22 and 39 contain information that falls within the scope of this definition.

Part two: supplied in confidence

On the face of the records, it is apparent that the three affected parties supplied the information contained in Records 22 and 39 to the Ministry.

In order to determine whether a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis (Orders M-169 and P-1605). In the circumstances, despite the lack of representations from the Ministry on Record 22, and the absence of any representations at all from the affected parties, I am prepared to accept that the information provided by the affected parties was supplied in confidence.

Part three: reasonable expectation of harm

Past decisions of this office have stated that in order to discharge the burden of proof under the third part 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: see, for example, Order P-373. The Court of Appeal for Ontario has accepted the requirement for "detailed and convincing" evidence, stating, among other things that:

> [s]imilar 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.
>
> [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

In Order PO-1747, I 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.)].

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

In Order PO-1791, Adjudicator Sherry Liang stated the following in the context of a request for unit pricing information contained in tender documents:

> A number of decisions have considered the application of section 17(1) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid

> breakdowns was contained in the records: Orders P-166, P-610 and M-250. Past orders have also upheld the application of section 17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts: Orders P-408, M-288 and M-511.
>
> In general, therefore, there are many cases where the exemption described in section 17(1)(a) has been applied to information which is similar to that at issue here. The difficulty with the case before me, however, lies with the scarcity of evidence on the specifics of this affected party's circumstances. I am left without any guidance, for example, as to whether unit pricing information is viewed as commercially-valuable information in the particular industry in which this affected party operates. As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from [Management Board Secretariat] which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.
>
> In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case.

In my view, Adjudicator Liang's comments are applicable here. Regarding Record 22, in the absence of representations from the affected parties, who are in the best position to provide this information, I am similarly left with little guidance on the issue of reasonable expectation of harm from disclosure of the financial information or any other information in this record. As a result, I am unable to conclude that the harms described in section 17(1)(a), (b) or (c) could reasonably be expected to result from disclosure of Records 22.

With respect to Record 39, the Ministry asserts that disclosure could reasonably be expected to harm the affected party's competitive position as against the appellant. It is difficult for me to see how disclosure of generalized information, which does not appear to relate specifically to the affected party, could harm that party's competitive position. In the absence of representations on this point from the affected party itself, I am not persuaded that there is a reasonable expectation of harm under section 17(1)(a) should that record be disclosed.

Accordingly, I find that Records 22 and 39 are not exempt from disclosure under section 17 of the *Act*.

VALUABLE GOVERNMENT INFORMATION

Introduction

The Ministry claims that Records 22, 30-34, 36, 38 and 41 qualify for exemption under section 18(1)(e) and/or (g) of the *Act*. Those section read;

> A head may refuse to disclose a record that contains,
>
> (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;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Section 18(1)(e): negotiations

The Ministry claims that section 18(1)(e) applies to Records 22 and 30-34. In order to meet the burden of proof under this section, the Ministry must establish the following:

1. the record 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].

The Ministry submits:

> As noted at the beginning of these representations the Ministry is presently preparing proposals for draft legislation. As indicated in the appended letter, a meeting on the proposed legislation will be scheduled later in the summer of 2002.
>
> . . . . .
>
> Record 33 is a summary of "major" issues discussed with a representative of [named organization] in relation to CAR and is addressed to the Assistant Deputy

> Minister. Record 34 responds to some of the issues raised in record 34. Record 32 provides a position with respect to the summary of major issues. Record 31 contains a position with respect to a proposed legislative change. Record 30 questions the need to amend a certain regulation.
>
> . . . [T]he internal Ministry records [Records 30-34] qualify for the exemption as they discuss in detail the Ministry's positions in relation to legislative reform in the bereavement sector and are intended to apply to negotiations with the bereavement sector stakeholders. A meeting to discuss the proposed new legislation is to be scheduled to begin later in the summer where the Ministry, on behalf of the Government of Ontario, is expected to mediate the interests of the sector so at to "foster a level playing field for industry participants" while developing options "strengthened consumer protection".
>
> . . . [T]he Ministry, in its role of protecting and advocating rights for consumers will necessarily be involved in negotiations as that term is generally understood, namely participating in discussions designed to meet the interests of all parties.
>
> . . . . .
>
> The photocopied portion of record 22 . . . [contains] discussions of the current requirements of the CAR regarding the trust accounting issue. As such these records can be expected to "reveal" the intentions of the Ministry, and its deliberations regarding bereavement sector reform.
>
> . . . [T]he External Ministry [record is] exempt from disclosure for the same reasons that the Internal Ministry records are exempt.

In my view, the term "negotiations" in section 18(1)(e) is not intended to apply to consultations by the government with third party stakeholders for the purpose of developing legislation. In the circumstances of this appeal, the government is merely seeking comments from interested and knowledgeable parties, to assist it in developing legislation that will accomplish its goal and meet with broad acceptance from such parties and the general public. This is to be contrasted with true "negotiations", in which the government and the third party seek to arrive at a legally binding agreement or contract [see, for example, Orders P-454, P-809, P-1437 (native land claims), P-1238 (settlement of litigation), P-1593 (allocation of forest resources), R-98007 (consulting services)]. This interpretation is supported by the following definitions of the word "negotiation":

> . . . Deliberation and discussion on the terms of a proposed agreement, and includes conciliation and arbitration.
>
> *Dictionary of Canadian Law*, D. Dukelow *et al.* (Toronto: Carswell, 1991) at p. 675
>
> . . . [The] process of submission and consideration of offers until acceptable offer is made and accepted . . . The deliberation, discussion or conference upon the

> terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale or other business transaction.
>
> *Black's Law Dictionary* (6th ed.), J.R. Nolan *et al.* (St. Paul, Minn.: West Publishing Company) at p. 1036

In the legislative context, by definition the government does not enter into an agreement or settlement with third parties. At its highest, both sides may reach an informal "understanding", but this falls well short of a legally recognized agreement.

I find further support for this view in statements by the authors of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage . . .
>
> . . . . .
>
> [T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively (page 321).

With respect to the types of "negotiations" to recognize under this exemption claim, the Williams Commission Report recommended at page 323:

> The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:

> An agency may refuse to disclose:
>
> > A document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.
>
> We favour the adoption of a similar provision in our proposed legislation.

In my view, this lends support to the notion that section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation. Accordingly, I find that section 18(1)(e) does not apply to the records at issue under this exemption.

I note that the Ministry states in its representations that it also withheld Records 36, 38 and 41 under section 18(1)(e). This exemption was not claimed for these records, as indicated in the Ministry's index. In any event, since section 18(1)(e) cannot apply in the context of this appeal, it is not necessary for me to consider whether I should permit the Ministry to rely on this exemption for these additional records at this late stage in the process.

Section 18(1)(g): proposed plans

The Ministry claims that section 18(1)(g) applies to Records 22, 30-34, 36, 38 and 41. In order to meet the burden of proof under this section, the Ministry must establish that the record:

1. contains information including proposed plans, policies or projects; and

2. that disclosure of the information could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or

   (ii) undue financial benefit or loss to a person.

[Order P-229 and Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

In Order P-726, former Assistant Commissioner Glasberg considered the application of section 18(1)(g) to two reports that together constituted a business review of the provincial parks system. In this order, former Commissioner Glasberg stated:

> I will turn first to the second part of the [section 18(1)(g)] test. In Order M-182, Inquiry Officer Holly Big Canoe considered the municipal equivalent of section 18(1)(g) of the *Act*. In this decision, she found that the term "pending policy decision" contained in the second part of the test refers to a situation where a policy decision has been reached, but has not yet been announced. More specifically, the phrase does not refer to a scenario in which a policy matter is still being considered by an institution.
>
> The Ministry disagrees with this interpretation and submits that the appropriate definition of pending policy decision "contemplates a situation that has started but remains unfinished." I have carefully reflected on this argument.
>
> The intent of section 18(1)(g) is to allow an institution to avoid the premature release of a policy decision where that disclosure could reasonably be expected to harm the economic interests of the institution. In my view, it follows that for this section to apply, there must necessarily exist a policy decision which the institution has already made. In the absence of such a determination, the assessment of harm would be an entirely speculative exercise. In addition, the first part of the section 18(1)(g) test makes specific reference to proposed policy decisions. In my view, the nature of this wording also contemplates that the type of decision referred to in the second part of the test will be one that has already been made.
>
> For these reasons, I do no accept the interpretation which the Ministry has advanced and prefer to follow the approach articulated in Order M-182.
>
> To complete this analysis, I must determine whether the disclosure of the information contained in the reports could reasonably be expected to result in undue financial benefit or loss to a person. Following a careful review of the Ministry's representations, I find that I have not been provided with sufficient evidence to establish that such results are likely to occur.
>
> Since the Ministry has failed to establish that either the first or second aspects of the second part of the section 18(1)(g) test have been met, it follows that this exemption does not apply to the information found in the two reports.

The Ministry submits:

> . . The records detail the Ministry's position in relation an existing policy for bereavement sector reform. While that policy will be subject to negotiation with

> the stakeholder community, the policy decision of reforming the sector has been made.
>
> . . . [D]isclosure of the records at this time can reasonably be expected to result in the premature disclosure of that policy decision. A meeting is to be scheduled in the near future. At that time all stakeholders will be given access to the Ministry's policy proposal for reform of the bereavement sector.
>
> . . . [D]isclosure of the records can reasonably be expected to provide the requester with the opportunity to review the policy proposals in advance of the meeting date and could result in the requester having access to information which could allow it to extract an undue financial benefit from the negotiations on the draft proposals and potentially result in an undue financial loss to other sector stakeholders. Moreover, it can reasonably be expected that the Ministry itself could suffer a loss, in the form of wasted time and effort, if the advantage gained by premature release of the documents causes the negotiations to become strained or stalled over this important legislative initiative.
>
> . . . . .
>
> As the External Ministry records could reveal the intentions of the Ministry, it is respectfully submitted that the access to the records be denied for the same reasons offered in relation to the Internal Ministry Records.

The Ministry acknowledges that the final policy decisions on the precise details of the proposed bereavement sector legislation have not yet been made, and are subject to future "negotiation". Therefore, this is not a case where "a policy decision has been reached, but has not yet been announced." Based on the reasoning in Orders P-726 and PO-1709, I find that part 2(i) of the test under section 18(1)(g) has not been met. Further, the Ministry has not provided me with sufficient evidence or argument to substantiate its claim that disclosure of these records could reasonably be expected to result in "undue financial benefit or loss to a person." The Ministry's claim on this point amounts to little more than a bare assertion.

The Ministry also claims that it is reasonable to expect that the Ministry itself would suffer a loss by disclosure of the records, "in the form of wasted time and effort, if the advantage gained by premature release of the documents causes the negotiations to become strained or stalled over this important legislative initiative." Any such a loss to the Ministry (which I am not persuaded is reasonable) is not captured by part 2(ii), which refers only to financial matters. Rather, this type of harm is encompassed by part 2(i) of the test that, for the reasons set out above, does not apply.

I conclude that section 18(1)(g) does not apply to the records at issue under this section.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims that section 15(b) of the *Act* applies to Record 47. That section reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution . . .

Record 47 is a three-page letter to a third party financial institution from a federal government agency dated May 29, 1991. On October 27, 1993, the financial institution sent a copy of this letter to the Ministry by facsimile. Record 47 consists of the three-page letter and the one-page facsimile cover sheet. The federal government, pursuant to an earlier access request, disclosed all of the three-page letter, except for the name and address of the financial institution, and the name of a contact person at the institution.

The Ministry submits:

> A federal government institution has already released most of record 47. However, as the record names a third party, who has not been notified, and the federal government has been invited to make representations on the issue, the Ministry is prepared to defer to those representations.

The federal government was notified and has advised this office that it takes no position on the disclosure of Record 47.

Record 47 clearly was not provided to the Ministry by the federal government. Accordingly, section 15(b) does not apply to the withheld portions of this record.

PERSONAL INFORMATION

The Ministry claims that the withheld portions of Record 47 consist of "personal information", which is exempt under section 21 of the *Act*. The section 21 personal privacy exemption applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*. That term is defined, in part, to mean recorded information about an identifiable individual.

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

The Ministry makes no specific submissions on whether or not the information withheld from Record 47 constitutes personal information.

As indicated above, the withheld portions of Record 47 consist of the name and address of a financial institution, and the name of a contact person at that institution. It is clear from the record itself and the surrounding circumstances that this information is not about an individual,

and that the individual's name appears in a purely professional context. Accordingly, the information at issue does not constitute personal information, and therefore it is not exempt under section 21.

ORDER:

1. I uphold the Ministry's decision to withhold Records 1-5, 9-13, 15-21, 35, 37, 43-45, 48-51, 54, 60-63, 65 and 67 in full.

2. I uphold the Ministry's decision to withhold the final paragraph in Record 36.

3. I order the Ministry to disclose Records 22, 30-34, 36, 38-41 and 47 in full, and Record 36 in part (all except the final paragraph) no later than **December 11, 2002**, but not earlier than **December 4, 2002**.

In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with copies of the materials disclosed to the requester.

Original Signed By: November 6, 2002
David Goodis
Senior Adjudicator

APPENDIX

Record Number	Description	Ministry's decision
1	Internal Ministry e-mail dated November 3, 2000	Withheld in full under s. 19
2	Internal Ministry e-mail dated October 26, 2000	Withheld in full under s. 19
3	Internal Ministry e-mail dated October 26, 2000	Withheld in full under s. 19
4	Five internal Ministry e-mails dated September 25 and 26, 2000	Withheld in full under s. 19
5	Four internal Ministry e-mails dated September 25 and 26, 2000	Withheld in full under s. 19
9	Memorandum to the Public Guardian and Trustee from the Ministry dated August 3, 2000	Withheld in full under s. 19
10	Internal Ministry memorandum dated August 1, 2000	Withheld in full under s. 19
11	Three internal Ministry e-mails dated July 25 and 27, 2000	Withheld in full under s. 19
12	Two internal Ministry e-mails dated July 25, 2000	Withheld in full under s. 19
13	Internal Ministry e-mail dated July 25, 2000	Withheld in full under s. 19
15	Three internal Ministry e-mails dated June 16 and 20, 2000	Withheld in full under s. 19
16	Two internal Ministry e-mails dated June 16 and 20, 2000	Withheld in full under s. 19
17	Two internal Ministry e-mails dated June 16, 2000	Withheld in full under s. 19
18	Three internal Ministry e-mails dated June 16, 2000	Withheld in full under s. 19
19	Two internal Ministry e-mails dated June 16, 2000	Withheld in full under s. 19
20	Internal Ministry e-mail dated June 16, 2000	Withheld in full under s. 19
21	Internal Ministry e-mail dated May 2, 2000	Withheld in full under s. 19
22	Handwritten notes dated May 2, 2000, with attached excerpts from submissions of two organizations	Withheld in full under ss. 17(1), 18(1)(e), 18(1)(g)
30	Internal Ministry e-mail dated February 27, 1997	Withheld in full under ss. 18(1)(e), 18(1)(g)
31	Internal Ministry e-mail dated February 27, 1997	Withheld in full under ss. 18(1)(e), 18(1)(g)
31	Internal Ministry e-mail dated February 27, 1997	Withheld in full under ss. 18(1)(e), 18(1)(g)

32	Internal Ministry e-mail dated February 27, 1997	Withheld in full under ss. 18(1)(e), 18(1)(g)
33	Internal Ministry e-mail dated February 26, 1997	Withheld in full under ss. 18(1)(e), 18(1)(g)
34	Internal Ministry e-mail dated February 26, 1997	Withheld in full under ss. 18(1)(e), 18(1)(g)
35	Internal Ministry memorandum dated July 24, 1992	Withheld in full under s. 19
36	Letter to the Ministry from a chartered accountant firm dated September 3, 1992	Withheld in full under ss. 13(1), 18(1)(g)
37	Internal Ministry memorandum dated July 10, 1992	Withheld in full under s. 19
38	Letter to the Ministry from a trust company dated July 2, 1992	Withheld in full under s. 18(1)(g)
39	Letter to a corporation from a chartered accountant firm dated October 5, 1992	Withheld in full under s. 17(1)(a)
41	Chartered accountant firm memorandum dated August 28, 1992	Withheld in full under ss. 13(1), 18(1)(g)
43	Internal Ministry memorandum dated July 24, 1992	Withheld in full under s. 19
44	Internal Ministry memorandum dated August 11, 1992	Withheld in full under s. 19
45	Internal Ministry memorandum dated June 25, 1992	Withheld in full under s. 19
47	Facsimile cover page to the Ministry from a trust company dated October 27, 1993, with attached letter to a trust company from the federal government dated May 29, 1991	Disclosed in part; portions withheld under ss. 15(b) and 21
48	Two internal Ministry e-mails dated September 25 and 26, 2000	Withheld in full under s. 19
49	Internal Ministry e-mail dated September 12, 2000	Withheld in full under s. 19
50	Three internal Ministry e-mails dated June 28, 2000	Withheld in full under s. 19
51	Internal Ministry e-mail dated June 14, 2000	Withheld in full under s. 19
54	Five internal Ministry e-mails dated September 25 and 26, 2000	Withheld in full under s. 19
60	Four internal Ministry e-mails dated August 9, 2000	Withheld in full under s. 19
61	Internal Ministry e-mail dated August 8, 2000	Withheld in full under s. 19

62	Memorandum to the Public Guardian and Trustee from the Ministry dated August 3, 2000, with attached internal Ministry memorandum dated August 1, 2000	Withheld in full under s. 19
63	Memorandum to the Public Guardian and Trustee from the Ministry dated August 3, 2000, with attached internal Ministry memorandum dated August 1, 2000	Withheld in full under s. 19
65	Three internal Ministry e-mails dated July 25 and 27, 2000	Withheld in full under s. 19
66	Letter/facsimile	Withheld in full under s. 13
67	Facsimile cover page to the Ministry from the Ministry of Finance dated June 14, 2000, with attached excerpts from legal textbooks	Withheld in full under s. 19