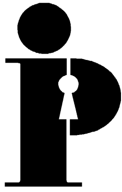

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2112

Appeal PA-020055-1

Ministry of Tourism, Culture and Recreation

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

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

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

NATURE OF THE APPEAL:

The Ministry of Tourism, Culture and Recreation, now the Ministry of Tourism and Recreation (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

- A copy of the contract between Ontario Place and [a named company] for the provision of food services. I believe it was signed in 1998 or 1999.
- Any documentation pertaining to [the named company's] decision to pull out of Ontario Place this past summer.
- Any documentation relating [to] the reimbursement of [the named company] by Ontario Place for monies invested in the amusement park.

In its response, the Ministry advised the requester that it was undertaking a search for responsive records, and that it would notify the requester of the results of the search and its decision on access. The Ministry also stated that it was "likely" the records would contain information relating to the company named in the request (the affected party) that is exempt under section 17 of the *Act* (third party information), and that it would be required to notify that party of the request pursuant to section 28.

At the same time, the Ministry notified the affected party of the request and sought its views on disclosure of certain responsive records the Ministry had located. In particular, the Ministry sought the affected party's views on the applicability of section 17 to these records, copies of which the Ministry provided to the affected party. In turn, the affected party provided the Ministry with submissions on disclosure, indicating that it consented to disclosure of some of the records, but not to others, on the basis of the exemption at section 19 (solicitor-client privilege) of the *Act*. Later, the affected party made additional submissions to the Ministry on the applicability of section 19, as well as section 17.

The Ministry then wrote to the requester advising that it had located 13 responsive records consisting of 126 pages. The Ministry granted the requester access to Records 2 and 3 in full, and Records 1 and 13 in part, and denied access to Records 4, 5, 6, 7, 8, 9, 10, 11, and 12 in their entirety. The Ministry relied on the application of the exemptions at sections 17 and 19 (described above), as well as sections 13 (advice or recommendations) and 18 (economic interests of government). The Ministry included an index of the responsive records with its decision letter.

The requester, now the appellant, appealed the decision of the Ministry stating, "I believe this information is in the public interest and would appreciate your consideration on the matter." As a result, the "public interest override" provision in section 23 of the *Act* was added as an issue in the appeal.

During the mediation stage of the appeal, the appellant confirmed that she was not seeking the information identified as non-responsive on page 5 of Record 13. The appellant also confirmed that Record 1, pages 3-5 of Record 5 and Record 6 could be removed from the scope of this appeal. In addition, the Ministry clarified that it was relying on sections 17(1)(a) and (c) and 18(1)(a), (c), (d), (e) and (g) of the *Act*.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry and the affected party. Both made representations in response. I then provided the appellant with the non-confidential portions of the Ministry's representations only, along with the Notice of Inquiry. The appellant provided representations in response. The appellant's representations address the application of the section 23 "public interest override" only. I then shared these representations with the Ministry, and invited it to provide reply representations on the application of section 23. The Ministry submitted reply representations on that issue.

RECORDS:

The records remaining at issue in this appeal are described as follows:

Record Number	Description	Withheld in full or in part	Exemption claimed
4	Letter from the affected party to Ontario Place Corporation (OPC) dated August 31, 2000 giving notice of termination of a licensing agreement	Withheld in full	17, 18, 19
5 (Pages 1-2 only)	Letter from OPC to the affected party dated August 31, 2000 responding to the notice of termination	Withheld in full	17, 18, 19
7	Letter from OPC to the Minister of Tourism dated September 8, 2000 re: notice of termination	Withheld in full	17, 18, 19
8	"Report on the Review of the Termination of the Licence Agreement" between OPC, the affected party and another named company (a subsidiary of the affected party) prepared by the Internal Audit Division of Management Board Secretariat dated October 2000	Withheld in full	13, 17, 18, 19
9	Letter from the Deputy Minister of Tourism, Culture and Recreation to the affected party dated May 16, 2001 re: settlement	Withheld in full	17, 18, 19
10	Minutes of Settlement and Mutual Release between OPC and the affected party dated April, 2001	Withheld in full	17, 18, 19
11	Acknowledgements from OPC and the affected party dated May 18, 2001 re: payment	Withheld in full	17, 18, 19
12	Letter from the affected party to OPC dated May 18, 2001 re: notice of claim dated March 14, 2001	Withheld in full	17, 18, 19

13 (except for non-responsive portion on page 5)	"[Affected party] Settlement with [OPC]: Issues Management Strategy" dated from April 17, 2001 to June 14, 2001	Disclosed in part	13, 17, 18, 19

DISCUSSION:

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 19 to apply, the Ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue.

Litigation Privilege

Introduction

The Ministry and the affected party claim that the records at issue fall within the scope of litigation privilege.

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).]

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
>> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was

> produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief [see *General Accident*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

In Order MO-1337-I, the Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation [privilege] under the *Nickmar* test and should be tested under "dominant purpose".

Does settlement privilege form a part of litigation privilege?

Both the Ministry and the affected party argue that the records reflect the settlement of an action that was initiated by the affected party against Ontario Place Corporation (OPC). They submit that for this reason, they are subject to settlement privilege and, therefore, litigation privilege.

The affected party relies on the decisions in *Sun Life Trust Co. v. Dewshi* (1993), 17 C.P.C. (3d) 220 (Ont. Gen. Div.) and *Moyes v. Fortune Financial Corp.* (2002), 22 C.P.C. (5th) 154 (Ont. S.C.J.) in support of this argument. The affected party takes the position that records disclosing settlement discussions or agreements are privileged and "inadmissible in any subsequent proceeding".

The Ministry takes a similar position to that of the affected party, arguing that common law settlement privilege, and therefore litigation privilege, applies to all of the records at issue.

Due to confidentiality concerns, I am unable to discuss in any greater detail the representations of both the Ministry and the affected party.

The initial question that arises from these submissions is whether or not records that may be subject to settlement privilege at common law are, by definition, subject to litigation privilege under section 19.

In my view, settlement privilege (also known as "without prejudice privilege") exists for different reasons from, and does not form a part of, litigation privilege.

In Order PO-2006, Senior Adjudicator David Goodis discussed the purpose of litigation privilege as follows:

> Justice Carthy, speaking for the majority in *General Accident Assurance Co. v. Chrusz* [45 O.R. (3d) 321 (C.A.)], explained the purpose of litigation privilege (as distinct from solicitor-client communication privilege):
>
> > The origins and character of litigation privilege are well described by Sopinka, Lederman and Bryant in *The Law of Evidence in Canada* (Toronto: Butterworths, 1992), at p. 653:
> >
> > > . . . [The origin of litigation privilege] had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any

> obligation to make prior disclosure of the material acquired in preparation of the case . . .

> R.J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence, L.S.U.C. Special Lectures* (Toronto: De Boo, 1984) at p. 163. He stated at pp. 164-65:

>> . . . [T]he rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice …

>> Litigation privilege, on the other hand, is geared directly to the process of litigation . . . Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

> It can be seen from these excerpts . . . that there is nothing sacrosanct about this form of privilege. It is not rooted, as is solicitor-client privilege, in the necessity of confidentiality in a relationship. It is a practicable means of assuring counsel what Sharpe calls a "zone of privacy" and what is termed in the United States, protection of the solicitor's work product: see *Hickman v. Taylor*, 329 U.S. 495 (1946).

In *Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co.* (1990), 74 O.R. (2d) 637, the Divisional Court articulated the purpose of this privilege as follows:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to

> determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel. See Kevin M. Claremont, "Surveying Work Product" (1983), 68 Cornell L.R. 760, pp. 784-88.

> These authorities support the proposition that litigation privilege is meant to protect the adversarial process by preventing counsel for a party from being compelled to prematurely produce documents to an opposing party or its counsel.

By contrast, settlement privilege exists for the purpose of encouraging parties to settle their disputes without recourse to litigation. As stated by Sopinka *et al.* in *The Law of Evidence in Canada* (above, at page 719):

> It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or if an action has been commenced, encouraged to effect a compromise without a resort to trial. In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming . . .

Sopinka *et al.* set out the conditions that must be present for the privilege to be recognized (at p. 722):

> (a) a litigious dispute must be in existence or within contemplation;
>
> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
>
> (c) the purpose of the communication must be to attempt to effect a settlement.

Generally speaking, settlement privilege ceases to apply once an unconditional and complete settlement has been achieved (see, for example, *Begg v. East Hants (Municipality)* (1986), 33 D.L.R. (4th) 239 (N.S.C.A.).

There are several exceptions to settlement privilege. Prior to discussing these exceptions, Sopinka *et al.* explain the basis for them, and shed more light on the rationale for settlement privilege (at page 728):

> . . . The exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.

In *Mueller Canada Inc. v. State Contractors Inc.* (1989), 71 O.R. (2d) 397 (H.C.J.), Doherty J. (as he then was) adopts the passage from Sopinka *et al.* at page 728 and states:

> The reference to establishing "liability or a weak case" must refer to liability in relation to matters which are the subject of the settlement . . . Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production . . .

Similarly, in the leading decision in *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737, the House of Lords stated:

> The "without prejudice" rule is a rule governing admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigation them to a finish . . .
>
> . . . [T]he underlying purpose of the rule . . . is to protect a litigant from being embarrassed by an admission made purely in an attempt to achieve settlement.

I note also that Sopinka *et al.* discuss litigation privilege and settlement privilege in two separate and distinct sections of the text. The former is discussed under the heading "Confidential Communications within Special Relationships – Solicitor and Client – Materials Obtained and Prepared in Anticipation of Litigation", while the latter is explained under the separate heading "Communications in Furtherance of Settlement".

In summation, litigation privilege is meant to protect the adversarial process, by preventing counsel for a party from being compelled to prematurely disclose "the fruits of his work" (*i.e.*, research, investigations and thought processes) to an opposing party or its counsel. By

definition, the documents in question are not known to the other side or to the world at large, and the rule establishes a "zone of privacy" around the party.

On the other hand, settlement privilege, a rule of admissibility of evidence, is meant to encourage settlement of disputes. It does so by precluding the admission into evidence of certain settlement communications, where the communication is being introduced to establish it as evidence of liability or a weak cause of action, or to "embarrass" the other party before the court. Although by definition both sides are aware of the contents of the settlement communication, the rule states that it cannot be put before the judge.

Put in the context of the *Act*, there is a strong policy rationale for interpreting the phrase "solicitor-client privilege" as including the two common law concepts of "solicitor-client communication privilege" and "litigation privilege". In both cases, disclosure to a party outside the solicitor-client relationship is deemed to cause some type of harm: in the former case, harm to the public interest in allowing individuals to consult privately and openly with their solicitors; in the latter case, harm to the adversarial system of justice.

However, there can be no comparable harm from disclosure in the case of settlement privilege. That privilege is designed to prevent a party from putting certain communications into evidence in a proceeding before a court or tribunal. A determination of whether the *Act* requires disclosure of the material is in no way determinative of the issue of admissibility before a court or tribunal, an issue that would be determined by a decision-maker in that other forum.

I find support for the view that settlement privilege is separate and distinct from litigation privilege in the recent decision in *Statice Collections Ltd. v. Kam*, [2002] O.J. No. 4538 (Master). The plaintiff in that case argued that certain correspondence leading to the settlement of a dispute between it and a third party were subject to settlement privilege. Master Egan, applying the principles in *Meuller*, held that in light of the particular pleadings, these records were not subject to litigation privilege. The Master then turns to the "additional argument" of the plaintiff that the documents are covered by litigation privilege, and states:

> . . . [I]t is difficult to understand how settlement documents with a third party were created for the dominant purpose of assisting the plaintiff in litigation with the defendants.

Accordingly, the Master rejects the additional argument and orders disclosure. In my view, this judgment underscores the differing nature of the two privileges.

The affected party relies on the decision in *Sun Life Trust Co.* as authority for the proposition that settlement privilege forms a part of litigation privilege. Justice Simmons does use the term "litigation privilege" to describe settlement privilege. However, the issue of the relationship between the two privileges was not before the court and therefore constitutes *obiter dicta*. Moreover, the implication that settlement privilege forms a part of litigation privilege is in direct conflict with other authorities as described above.

The affected party also relies on the recent decision of Justice Nordheimer in *Moyes*, in which he refers to *Sun Life Trust Co.* At no point in his discussion of settlement privilege does Justice Nordheimer use the term "litigation privilege". Therefore, the *Moyes* case does not advance the argument of the affected party or the Ministry.

I note that previous orders of this office have suggested that settlement privilege may form a party of litigation privilege (see Orders 49, M-477, M-712). I would first point out that the Commissioner is not bound by the principle of *stare decisis*, and thus is entitled to depart from earlier interpretations [*Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 D.L.R. (3d) 388 (Man. C.A.)]. To the extent that these previous orders may conflict with my decision in this case, I decline to follow them.

For these reasons, I conclude that the records which the Ministry and the affected party claim are subject to settlement privilege are not, for that reason alone, subject to litigation privilege under section 19.

Additionally, I note that Records 4, 5, 7, 8 and 13 do not on their face and in the circumstances appear to be communications made for the purpose of effecting a settlement of the dispute. Moreover, the dispute has been settled and there is nothing to suggest that the settlement is anything other than "unconditional and complete". Therefore, in my view, none of the records would qualify for settlement privilege even if it were within the scope of the section 19 exemption.

Do the records meet the test for litigation privilege?

As indicated above, for litigation privilege to apply, the records must have been created for the dominant purpose of existing or reasonably contemplated litigation, or they must have "found their way" into the lawyer's brief under the *Nickmar* test. Also, as indicated above, the purpose of litigation privilege is to protect the adversarial process, by preventing counsel for a party from being compelled to prematurely disclose "the fruits of his work" (*i.e.*, research, investigations and thought processes) to an opposing party or its counsel. By definition, the documents in question are not known to the other side or to the world at large, and the rule establishes a "zone of privacy" around the party.

I accept that at some point in time litigation was contemplated and was ultimately commenced by way of a notice of action issued by the affected party and served on the Ministry and/or OPC on March 14, 2001. However, Records 4, 5, 9, 10, 11 and 12 are communications between the opposing parties in the contemplated litigation. Therefore, they cannot qualify for litigation privilege since the "zone of privacy" rationale cannot exist.

The remaining records to which litigation privilege could apply are Records 7, 8 and 13. In my view, the Ministry has failed to establish that the dominant purpose of the preparation of these records was for use in the contemplated litigation. Record 13 clearly was created for the purpose of developing a communications strategy for the Ministry in regards to the dispute and ultimate

settlement. Record 7 appears to have been created by the OPC for the purpose of keeping the Minister informed of the matter and, in the absence of specific representations from the Ministry on this point, I am unable to conclude that it was created for any other purpose, in particular for use in contemplated litigation. Similarly, Record 8 appears to have been created primarily for the purpose of verifying the amount of the termination payment owing to the affected party under the contract. Again, in the absence of representations to explain the purpose of the creation of this record, I am not in a position to conclude that it was prepared for the dominant purpose of contemplated litigation.

In addition, for similar reasons, I find that the records were not prepared by or for Crown counsel in contemplation of, or for use in, litigation.

To conclude, I find that none of the records at issue qualify for litigation privilege, either due to the possible application of settlement privilege or otherwise.

Solicitor-client communication privilege

The Ministry claims that Record 8 is subject to solicitor-client communication privilege under section 19.

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].

Record 8 is an audit report prepared by the Internal Audit Division of Management Board Secretariat in October 2000 for the Ministry. The Ministry submits that Record 8 is exempt under section 19 on the basis that it was produced in relation to the giving of legal advice.

Record 8 is not on its face a communication between a lawyer and a client. In addition, there is nothing before me, other than the Ministry's bare assertion, to indicate that the record formed part of a continuum of communications between a lawyer and client for the purpose of giving or receiving legal advice, or that Record 8 was part of a lawyer's "working papers" under *Susan Hosiery Ltd.* In the circumstances, I find that the Ministry has not met its burden of proving that Record 8 is subject to solicitor-client communication privilege.

Conclusion

None of the records at issue qualifies for exemption under either head of privilege under section 19 of the *Act*.

ADVICE OR RECOMMENDATIONS

The Ministry relies the discretionary exemption at section 13 of the *Act* to withhold Record 8 and certain portions of Record 13 (on pages 3 and 6). Section 13 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.

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 has not made any representations in support of its position that information in Record 8 is subject to section 13. Record 8 consists of a factual review of the amounts that may be owing to the affected party under the contract in question. This record does not contain nor reveal a suggested course of action to be undertaken by either the Ministry or the OPC that may be accepted or rejected by the recipient in the deliberative process. Therefore, section 13 does not apply to Record 8.

Based on my review of Record 13, and the surrounding circumstances, I find that the portions on pages 3 and 6 to which the Ministry has applied section 13 consist of specific advice to the Ministry and/or OPC. The portion on page 3 gives advice as to the manner in which the Ministry and/or the OPC are to proceed in handling the public relations aspects of the settlement of the dispute. In addition, the portion on page 6 reveals advice given to the Ministry and/or OPC by an outside consultant in an earlier report, relating to the operation of Ontario Place. I further find that this information is not subject to any of the exceptions to the exemption in section 13(2). Accordingly, this information in Record 13 qualifies for exemption under section 13.

ECONOMIC OR OTHER INTERESTS

The Ministry has claimed the application of section 18(1)(c) and (d) of the *Act* to all of the records at issue in this appeal. These sections read:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18(1)(c) applies where disclosure of the information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The Ministry begins by referring to its representations under section 19 to the effect that the records are subject to settlement privilege. The Ministry goes on to state:

> If the records were to be disclosed, it could have implications for all other settlements in which the Crown is involved. If settlements were not confidential despite any intention of the parties to the contrary, there would be a disincentive to settling with the Crown. Moreover, it could affect the overall administration of justice by promoting litigation to which the Crown is a party . . . [T]hese consequences could reasonably be expected to be injurious to the financial interests of the Government of Ontario. The effects could reasonably be assumed to potentially be very serious even though it is not possible to quantify these, and … quantification is not required under the *Act*.
>
> For the same reasons, disclosure could reasonably be expected to prejudice the economic interests of the ministry and the OPC, as well as the competitive position of the latter . . . Disclosure of these records would serve to make it more difficult for the OPC to settle any further disputes prior to litigation or during the course of on-going litigation as there would be uncertainty regarding the confidentiality of any settlement. This would serve as a disincentive to early settlement of disputes, and perhaps reduce the willingness for some parties to make concessions that they might otherwise be willing to entertain. This imposes

> a burden on OPC that its competitors, who can be certain of confidentiality, do not have to contend with.
>
> Moreover, it could reasonably be expected that the above would diminish the OPC's ability to become an economically self-sufficient operation and to reduce its reliance on provincial funding. In the past, the province has funded the OPC by way of funding grants made through the ministry. The net effect of disclosure would likely be to maximize the costs of future commercial dealings of the OPC making it that much more difficult for it to achieve economic self-sufficiency.

In my view, it is not reasonable to expect that disclosure of these records will promote litigation to which the Crown is a party, and the harm suggested by the Ministry is too speculative and remote to meet the burden of proof under sections 18(1)(c) or (c).

First, parties to litigation or potential litigation with the government know or ought to know that public entities such as OPC are subject to the *Act* and that records may be disclosed if they are not demonstrated to be exempt. Therefore, the underlying assumption in the Ministry's argument that parties expect that records of this nature would never be disclosed is not valid.

Second, as discussed above, settlement privilege has developed at common law as a rule against admissibility to a court or tribunal, as opposed to an independent rule of confidentiality outside the scope of the admissibility context. Thus, the courts have not recognized any generalized "chilling effect" of disclosure of settlement material, beyond the admissibility context. This undermines the Ministry's argument that disclosure of settlement material, by definition, could reasonably be expected to discourage settlement and promote litigation.

Where settlement material contains information that is otherwise harmful to the interests of the government or a third party, or personal information whose disclosure would be an unjustified invasion of privacy, that information would be protected under the appropriate exemptions (see, for example, my findings below regarding section 17 of the *Act*.)

Finally, parties to disputes enter into settlement agreements, or decide not to, for a wide range of reasons that are likely to be far more compelling than the prospect of possible disclosure of settlement information (again, assuming that any information that is otherwise exempt would not be disclosed). In my view, the prospect of public disclosure of settlement information is not a sufficiently strong disincentive to future settlements to attract the section 18(1)(c) or (d) exemptions.

THIRD PARTY INFORMATION

Introduction

Both the Ministry and the affected party rely on the application of the mandatory exemption in section 17(1) of the *Act* to exempt all of the records from disclosure. Section 17(1) states, 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

For a record to qualify for exemption under sections 17(1)(a) or (c), the Ministry and/or the affected party 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 Ministry 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 subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "**detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have

> been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

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

The Ministry and the affected party submit that the records contain "financial information" for the purposes of section 17(1). This term has been interpreted in past orders to mean:

> . . . 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]

They submit that the dollar values contained in the initial claim submitted by the affected party and the sum upon which the settlement was based represent "financial information" as it relates to money, its use or distribution.

I have reviewed the contents of the records and find that paragraph 3 of Record 4, paragraph 3 of Record 7, pages 4, 5, 6 and 7 of Record 8, paragraph 2 of Record 9, paragraphs 6, 7 and 9 of Record 10, Record 11, the undisclosed information on pages 1, 3, bullet point 5 of page 5, bullet points 2 and 5 of page 6 and the undisclosed information in the top third of page 7 of Record 13 contain information which qualifies as "financial information". This information relates to the quantification of the affected party's claim against the OPC and the amount ultimately agreed upon as a settlement of the dispute. In the circumstances of this appeal, I am satisfied that this information falls within the ambit of "financial information" under section 17(1).

Supplied in Confidence

The affected party submits that section 18 of the Minutes of Settlement (Record 10) reflects the understanding reached by the OPC and itself with respect to the confidential nature of the terms of that agreement. It argues that the information contained in the records was supplied with an expectation, both implicit and explicit, that it would be treated confidentially. The Ministry makes similar submissions on this point.

Because the information in a contract, such as a settlement agreement, is typically the product of a negotiation process between the institution and the affected party, the terms of a contract will generally 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. [Orders P-36, P-204, P-251 and P-1105]

In my view, the financial information contained in the settlement agreement was arrived at as a result of the negotiation of the dispute between the parties. I find that the actual dollar amounts (and the approximate value referred to in some of the records) of the settlement which are contained in Records 7, the Executive Summary at page 4 and the "bottom line" expressed in page 7 of Record 8, the dollar value contained in Record 9, the total amount payable in paragraph 9 on page 2 of Record 10, the dollar values in Record 11 and the amount stated in bullet point 5 of page 5 and bullet point 5 of page 6 of Record 13 were not "supplied" to the Ministry for the purposes of section 17(1). This information cannot, accordingly, be considered to be exempt from disclosure under this exemption.

I find that the information found to qualify as "financial information" which is contained in paragraph 3 of Record 4, pages 5, 6 and 7 of Record 8, paragraphs 6, 7 and 9 (except the "bottom line" figure) of Record 10, the undisclosed information on pages 1, 3, bullet points 2 and 5 (except the "bottom line" figure) of page 6 and the undisclosed information in the top third of page 7 of Record 13 was supplied to the Ministry by the affected party with a reasonably-held expectation that it would be treated confidentially. Accordingly, the second part of the section 17(1) test has been met with respect to this information.

Harms

The affected party has provided me with confidential representations setting out its views on this aspect of the section 17(1) test. In my view, the disclosure of the supplied information which I found to qualify as "financial information" contained in paragraph 3 of Record 4, pages 5, 6 and 7 of Record 8, paragraphs 6, 7 and 9 (except the "bottom line" figure) of Record 10, the undisclosed information on pages 1, 3, bullet points 2 and 5 (except the "bottom line" figure) of page 6 and the undisclosed information on page 7 of Record 13 could reasonably be expected to result in harm to the competitive position of the affected party. I find that all three parts of the section 17(1) test have been satisfied with respect to this information and it is, accordingly, exempt under that section.

PUBLIC INTEREST IN DISCLOSURE

The appellant takes the position that the information in the records is a matter of public interest as the OPC is a publicly-funded entity. It argues that because the taxpayers of Ontario support Ontario Place, they have a right to know how it is being managed. The appellant indicates that section 23 of the *Act* applies to this information. Section 23 reads:

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

The Ministry objects to the inclusion of this issue in this inquiry as the appellant consented to the removal of the consideration of the public interest override provision in section 23 at the mediation stage of the appeal. Because of my findings below, it is not necessary for me to address this concern.

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as Arousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

In my view, there exists a public interest in the disclosure of the information contained in the records that are responsive to this request. However, I note that I have only upheld the application of the section 17 exemption claimed for those portions of the records containing the financial information supplied by the appellant and two small portions of Record 13 found to be exempt under section 13. The remaining information was found not to be exempt and will be ordered disclosed to the appellant.

In my view, there does not exist the same public interest in the disclosure of those portions of the records that I have found to be exempt under sections 13 and 17. I find that the public interest in the disclosure of information pertaining to the termination of the Ontario Place licensing agreement will be adequately met by the disclosure of the information found not to be exempt under these sections. I do not agree that a public interest exists in the disclosure of the Ministry's strategies for addressing the public reaction to the settlement and the financial

information provided to the OPC by the affected party. As a result, I find that section 23 has no application in this appeal.

ORDER:

1. I order the Ministry to disclose the following records or parts of records:

   - Record 4 (with the exception of the dollar amount in paragraph 3 of page 2);
   - Records 5 and 7 in their entirety;
   - pages 1, 2, 3, 4 and the bottom line figure on page 7 of Record 8;
   - all of Record 9;
   - paragraphs 1 to 5, 8, the bottom line figure from paragraph 9 and paragraphs10 to 21 of Record 10;
   - Records 11 and 12 in their entirety; and
   - all of Record 13 except the undisclosed portions of pages 1 and 3, bullet points 2 and 5 of page 6 and the undisclosed information on page 7

   to the appellant by providing him with copies by **March 24, 2003** but not earlier than **March 18, 2003**.

2. I uphold the Ministry's decision to deny access to the remaining information on the basis that it is exempt under section 13(1) or 17(1) of the *Act*.

3. In order to verify compliance with Order Provision 1, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant.

______________________________ February 17, 2003

Donald Hale
Adjudicator