



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2071

Appeal PA-020054-1

Ministry of Tourism, Culture and Recreation



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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*) from a member of the media for access to the following:

- **Any and all documents pertaining to proposals under consideration within the last two years to redevelop/redesign Ontario Place.**
- **Any and all documents pertaining to plans to redesign the east island at Ontario place. This could include proposals and plans to move children's attractions from the east island to the west and to open a casino.**
- **Any and all documents pertaining to provincial funding provided to Ontario Place within the last year for the purpose of park redevelopment.**

These documents could include draft plans, contracts with consulting firms, blueprints of a re-designed park, minutes of meetings of the Ontario Place board, purchase orders, request for provincial funding and financial statements outlining the cost of redevelopment.

In its response to the request, the Ministry identified 27 responsive records comprising 172 pages. The Ministry granted the requester access in full to six pages, access in part to 23 pages and denied access to the remaining 143 pages, in their entirety, claiming the application of the following exemptions contained in the *Act*:

- Advice or recommendations - section 13(1);
- Economic and other interests – sections 18(1)(c), (d) and (f);
- Proposed plans, policies or projects of an institution – section 18(1)(g);
- Solicitor-client privilege – section 19.

The Ministry also indicated that some of the records may contain information which falls outside the ambit of the *Act* as a result of the operation of section 65(6) of the *Act* and advised the requester that a fee of \$35.80 was payable for the processing of the appeal.

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 this matter", thereby raising the possible application of the "public interest override" in section 23 of the *Act*.

During the mediation stage of the appeal process, the appellant confirmed that the fee, the information exempted under section 65(6) of the *Act*, and certain non-responsive information identified by the Ministry are no longer at issue in this appeal. Accordingly, Record 9 was removed from the scope of the appeal. The appellant also confirmed that she was no longer seeking access to Records 15, 17, 18, 22, and 23.

I decided to seek the representations of the Ministry, initially, as it bears the onus of demonstrating the application of the exemptions claimed to the records at issue. The Ministry made representations, the non-confidential portions of which were shared with the appellant to assist her in making her submissions. The appellant provided me with representations which, while not specifically claiming the application of the “public interest override” in section 23, refer to “the public’s right to information” about the subject matter of the records. The appellant’s representations were provided in their entirety to the Ministry, who then made submissions by way of reply on the question of whether section 23 applies in the circumstances of this appeal.

RECORDS:

The records remaining at issue consist of Records 1-8, 10-14, 16, 19, 20, 21, 24, 25, 26 and 27, in whole or in part, as described in the Index of Records provided by the Ministry to this office and the appellant.

DISCUSSION:

The Ministry has applied the discretionary exemptions in sections 18(1)(c), (d), (f) and (g) to all of the records. Although section 13(1) was originally applied to Records 1, 10, 11, 21 and 25, the Ministry has not made any submissions in support of this exemption claim. It has also claimed and provided representations with respect to the application of section 19 to a portion of Record 26. I will first review the exemptions claimed and the tests enunciated by the Commissioner’s office with respect to each before reviewing their application to the individual records at issue.

ADVICE OR RECOMMENDATIONS

Section 13(1) of the *Act* states:

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.

Tests Under Section 13(1)

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 [Orders 24, P-1363 and P-1690].

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

ECONOMIC AND OTHER INTERESTS/PROPOSED PLANS, PROJECTS AND POLICIES OF AN INSTITUTION

Sections 18(1)(c), (d), (f) and (g) of the *Act* provide:

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;**
- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;**
- (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;**

Tests Under Section 18(1)

Could reasonably be expected to

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.)].

Section 18(1)(c)

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of 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).

Section 18(1)(d)

To establish a valid exemption claim under section 18(1)(d), the institution must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario (Orders P-219, P-641 and P-1114).

Section 18(1)(f)

In order to qualify for exemption under subsection 18(1)(f) of the *Act*, the institution must establish that a record satisfies each element of a three part test:

1. the record must contain a plan or plans, and
2. the plan or plans must relate to:
 - i) the management of personnel or
 - ii) the administration of an institution, and
3. the plan or plans must not yet have been put into operation or made public.

[Order P-229]

Plan or plans

In Order P-348, Commissioner Tom Wright considered the question of what constitutes a "plan" for the purposes of section 18(1)(f). He stated:

The eighth edition of The Concise Oxford Dictionary defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". In my view, the record cannot properly be considered a "plan". It contains certain recommendations which, if adopted and implemented by the institution, might involve the formulation of a detailed plan, but the record itself is not a plan or a proposed plan.

Section 18(1)(g)

In order to qualify for exemption under subsection 18(1)(g) of the *Act*, an institution must establish that a 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.

Each element of this two part test must be satisfied. [Order P-229]

In Order P-726, former Assistant Commissioner Glasberg considered the application of section 18(1)(g) to two reports which constituted a business review of the provincial parks system. In this order, former Assistant 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 not 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.

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the *Act* states:

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.

The Ministry has claimed the application of section 19 to a portion of Record 26 on the basis that it represents a confidential communication between a solicitor and client.

Test under the Solicitor-Client Communications Component of 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].

THE REPRESENTATIONS OF THE PARTIES

The Appellant’s Submissions

The appellant’s representations are general in nature and make reference to the fact that since Ontario Place is a publicly-owned facility, the public has a right to know how it is being managed. The appellant submits that “[P]roblems with conflicts of interest and questionable spending of taxpayer dollars can be avoided with full transparency.”

The Ministry’s Submissions

Much of the representations of the Ministry refer directly to the contents of the records. For this reason, I withheld this information from the appellant at the representations stage of the appeal

and must do so again in this order. I will, however, refer to the non-confidential portions of the Ministry's submissions in order to set out the substance of the arguments it put forward.

Sections 18(1)(c) and (d)

The Ministry begins its submissions on the application of these exemptions by stating that "disclosure would be to the detriment of both the economic interests and the competitive position of the Ontario Place Corporation (OPC)." It goes on to argue that:

The OPC's objective is to become an economically self-sufficient operation. In the past, the province has funded the OPC by way of funding grants made through the ministry. In order to meet the goal of self-sufficiency the OPC has been considering ways to become more efficient and more competitive with lesser reliance on provincial government funding.

The OPC is one of the province's premier destinations. It is, however, a relatively small player in the amusement park industry. It must compete with larger, private operations. Unlike its competitors, OPC must abide by its legislative mandate and the policies and goals of the ministry and the government of Ontario.

The disclosure of the records at this time would be to the detriment of the OPC. It could reasonably be expected to undermine its plans to become economically self-sufficient and its ability to compete fairly by giving its competitors an even greater advantage.

Disclosure would provide competitors of the OPC with early notice of the OPC's future direction. This provides them with a jump-start on the competition. It provides them with this information free of charge while OPC must invest time and resources towards its development.

There are implications for the ministry and the province as well. The ability of the OPC to attain financial self-sufficiency will directly impact on the funding that the ministry and province must direct to it. On the other hand, financial success would mean that the OPC would no longer be a financial liability to the province.

Sections 18(1)(f) and (g)

The Ministry submits that Record 1 is clearly a plan within the meaning of section 18(1)(f). It also submits that the remaining records contain information which falls within the definition of a "pending policy decision" as a decision regarding the redevelopment of Ontario Place has been made but has "not yet been announced." The Ministry also refers to several decisions of the Commissioner's office, Orders M-182 and P-726, in support of its position.

Section 19

The Ministry argues that an unnumbered paragraph in Record 26 is “subject to solicitor client privilege as it reflects a communication from a solicitor in the ministry’s legal branch”.

FINDINGS

Record 1

Record 1 is a 50-page document entitled “Long Range Plan” and marked as “confidential”. This record describes certain proposals put forward with respect to the future operation of Ontario Place. I am unable to describe the contents of this document with any specificity as to do so would render the subject matter of the appeal moot. Based on my review of Record 1, I am satisfied that it qualifies for exemption under section 18(1)(f). I find that the record is sufficiently detailed so as to qualify as a plan within the definition of that term adopted by former Commissioner Wright in Order P-348. Further, I find that this record contains a “plan” for the administration of the Ontario Place facility and that this plan has yet to be put into operation or made public. As all three parts of the test for section 18(1)(f) set out in Order P-229 have been met, Record 1 is exempt under this section.

Records 2 and 3

Record 2 consists of the minutes of a Strategic Planning/Board Meeting of Ontario Place Corporation held on August 13, 2001. Some of the items under discussion at this meeting relate to the subject matter of the request that has given rise to this appeal. Other portions of Record 2 contain information which is not responsive to the request. My discussion will only address those portions of Record 2 identified by the Ministry as responsive to the request. The responsive portions of Record 2 make reference to several suggestions under consideration regarding potential uses to be made in the future for the Ontario Place facility.

Record 3 is a two-page set of minutes taken in the course of a teleconference meeting of the Ontario Place Corporation’s Board of Directors held on August 31, 2001 in preparation for its in-person meeting of September 8, 2001. The teleconference included a presentation by a consultant setting out his views with respect to the future direction which the Ontario Place facility might take.

In my view, these suggestions do not meet the requirements of a “plan” as defined in Order P-348 as they are not sufficiently detailed. As was the case with the record under consideration in Order P-348, the August 13 and 31, 2001 minutes which comprise Records 2 and 3 contain certain recommendations which, if adopted and implemented by the OPC, might involve the formulation of a detailed plan, but the record itself does not contain a plan or a proposed plan. Accordingly, section 18(1)(f) has no application to Records 2 and 3.

Similarly, Records 2 and 3 do not qualify for exemption under section 18(1)(g) as they do not contain information relating to proposed plans, policies or projects of the OPC.

Rather, Records 2 and 3 simply describe some suggestions for the future use of the Ontario Place facility.

Insofar as the application of sections 18(1)(c) and (d) are concerned, I am not satisfied, based on the submissions of the Ministry referred to above, as well as its confidential representations, that the disclosure of the contents of Records 2 and 3 could reasonably be expected to prejudice the economic interests or competitive position of the OPC. The suggestions contained in Records 2 and 3 are not sufficiently detailed to give rise to the prospect of harms to the OPC's economic interests or its competitive position, should this information be disclosed. Similarly, I find that the disclosure of the contents of Records 2 and 3 could not reasonably be expected to be injurious to the financial interests of the Government of Ontario or to injure its ability to manage the economy of Ontario. I find that I have not been provided with the kind of "detailed and convincing" evidence required to establish the application of these exemptions to the information in these records.

Record 4

Record 4 is the minutes of the OPC's Board of Directors meeting of September 8, 2001. The responsive portions of this record contain detailed information regarding the discussions of the Board on that date on the subject of the future direction of Ontario Place. The records reflect a number of options and suggested courses of action, along with more succinct information relating to the Board's long-term goals for the facility. In my view, the disclosure of the information contained in this record could reasonably be expected to prejudice the economic interests and competitive position of Ontario Place Corporation. The Ministry has provided me with detailed and convincing evidence of the nature of the prejudice which could reasonably be expected to result from the disclosure of the information in Record 4. As a result, I am satisfied that it qualifies for exemption under section 18(1)(c).

Records 5 and 6

Records 5 and 6 are identical letters sent to the Deputy Minister of Tourism, Culture and Recreation by the General Manager of Ontario Place dated September 8, 2001. Access was denied to only a portion of the letter. The undisclosed portion of Records 5 and 6 makes reference to one of the issues discussed at the Board's meeting on that date. The reference is not detailed and does not include the kind of specificity as the discussion in Record 4. I find that I have not been provided with the kind of "detailed and convincing" evidence required for me to uphold the application of the exemptions claimed for these records, sections 18(1)(c), (d), (f) or (g). The disclosure of this information could not reasonably be likely to result in the harms contemplated by sections 18(1)(c) or (d) and the information is not sufficiently detailed to be considered a "plan", policy or project within the meaning of sections 18(1)(f) or (g).

Record 7

Record 7 is an application for funding made by Ontario Place Corporation to the Ministry of Tourism, Culture and Recreation (as it was then known) dated September 17, 2001. The application contains detailed information regarding the future operation of Ontario Place and the funding required to accomplish the OPC's goals. I find that Record 7 contains plans relating to the administration of Ontario Place which have not yet been put into operation or made public. This document is, accordingly, exempt from disclosure under section 18(1)(f).

Record 8

Record 8 is a two-page letter dated September 22, 2001 from a consultant retained by OPC to the OPC Board's Chair setting out the consultant's views on the capital costs involved in performing certain work at Ontario Place. The letter contains detailed information relating to the scope of the work to be performed and certain issues pertaining to its completion. In my view, the disclosure of the contents of Record 8 could reasonably be expected to prejudice the economic interests and competitive position of the OPC. The information relates directly to the positioning of Ontario Place in the competitive entertainment facility marketplace and discusses certain

strategies which could be used by competitors to the disadvantage of Ontario Place. I find that Record 8 is exempt from disclosure under section 18(1)(c).

Record 10

Record 10 is a set of notes dated September 24, 2001 prepared by the OPC's General Manager for the Deputy Minister of Tourism, Culture and Recreation. In addition to the exemptions claimed under section 18(1), the Ministry has also claimed the application of the advice or recommendations exemption in section 13(1) of the *Act* to portions of Record 10. Much of Record 10 contains information which is not responsive to the appellant's request and I will only address those portions which relate to the request as formulated by the appellant.

I find that the information contained in Page 3 of Record 10 is similar in nature to that which I found exempt in my discussion of Record 7. For the reasons expressed in my discussion of Record 7 above, I find that this information qualifies for exemption under section 18(1)(f). The remaining responsive information on Page 4 of Record 10 is not sufficiently detailed to qualify for exemption under sections 18(1)(c), (d), (f) or (g). It merely refers to one aspect of the OPC's considerations in a general way without any further discussion.

The Ministry has also claimed the application of section 13(1) to the remaining portion of Page 4 of Record 10. I find that this information does not qualify for exemption under section 13(1) as it does not, on its face, contain any advice or recommendations with respect to a recommended course of action. Rather, this excerpt simply relates certain staff concerns about the retention of consultants and the issue of representation on the Oversight Committee being proposed. I find that section 13(1) has no application to this portion of Record 10.

Record 11

Record 11 is an e-mail dated October 4, 2001 from the Deputy Minister of Tourism, Culture and Recreation to the OPC's Board members setting out a communications strategy with respect to the implementation of the Board's decisions on the future operation of Ontario Place. The Ministry has claimed the application of sections 18(1)(c), (d), (f) and (g) for the portion of Page 2 of the record entitled "Background", and section 13(1) to the portion entitled "Strategy".

In my view, the "Background" section sets out in only the most general terms the direction the Board *may* take as a result of its review of the operations of Ontario Place. I find that this information does not qualify for exemption under any of the section 18(1) exemptions claimed. The Ministry has not provided me with sufficiently detailed and convincing evidence to allow me to make such a finding.

I agree, however, that the section entitled "Strategy" contains advice and recommendations pertaining to a specific course of action to be adhered to by OPC Board members regarding contact with those outside the Board on the subject of OPC's plans for the Ontario Place facility. This information is, accordingly, properly exempt from disclosure under section 13(1).

Record 12

Record 12 is a memorandum from the General Manager of Ontario Place to the Deputy Minister of Tourism, Culture and Recreation dated September 10, 2001. Only one sentence in this record is at issue in this appeal. I find that the Ministry has not provided me with sufficient evidence to demonstrate that the disclosure of this information could reasonably be expected to prejudice the economic interests or competitive position of OPC under section 18(1)(c). Similarly, I find that I have not been provided with the kind of detailed and convincing evidence required to establish the application of section 18(1)(d) to this information. Neither does the record contain a plan, or proposed policies or projects of an institution within the meaning of sections 18(1)(f) or (g). As none of the exemptions claimed for the information at issue in Record 12 apply, I will order that it be disclosed to the appellant.

Record 13

Record 13 is the minutes of a meeting of the OPC's Board of Directors held on October 22, 2001. Again, much of the contents of the record refers to items which are not part of the appellant's request and I will not address the application of the exemptions claimed to this information. The information which is responsive to the request is contained in Page 4 of Record 13 and the Ministry has applied sections 18(1)(c), (d), (f) and (g). The severed portions of Page 4 contain information which is very similar to that in Record 12 as it relates to the approval by the Board of a recommendation made by a consultant regarding the future direction of the Ontario Place facility. For the reasons expressed in my discussion of Record 12, I find that the exemptions in sections 18(1)(c), (d), (f) and (g) do not apply to the undisclosed portion of Record 13 and I will order that this information be disclosed to the appellant.

Record 14

Record 14 is a set of post-minute notes compiled following the Board's October 22, 2001 meeting. Again, the responsive information contained therein is similar to that in Records 12 and 13 and I find that it is not exempt under sections 18(1)(c), (d), (f) and (g).

Record 16

Record 16 is an exchange of e-mails between the Deputy Minister of Tourism, Culture and Recreation and certain program area staff within the Ministry dated October 26 and 29, 2001. These e-mails relate to the retention and payment of a consultant by the OPC. I find that I have not been provided with sufficient evidence to enable me to make a finding that the disclosure of this information could reasonably be expected to result in prejudice to the economic interests of the OPC or to its competitive position under section 18(1)(c) or injury to the financial interests of the Government of Ontario under section 18(1)(d). The records do not contain information relating to a plan or to proposed policies or projects of the institution and do not, accordingly, qualify for exemption under sections 18(1)(f) or (g) either.

Record 19

Record 19 is a letter to the General Manager of Ontario Place from the Deputy Minister of Tourism, Culture and Recreation dated October 31, 2001. The undisclosed portion of this letter contains information similar to that found in Records 12, 13 and 14 which I have determined is not exempt above. For similar reasons, I find that this information is not exempt under sections 18(1)(c), (d), (f) and (g).

Record 20

Record 20 consists of a series of correspondence between OPC and one of its consultants relating to one aspect of the future operation of the Ontario Place facility. I find that the disclosure of these documents could reasonably be expected to prejudice the competitive position of the OPC as contemplated by section 18(1)(c). I find that the records contain very specific information about certain work to be undertaken which could be used by Ontario Place competitors to its disadvantage. The leisure industry is extremely competitive and the disclosure of the information contained in the correspondence which comprises Record 20 could reasonably be expected to prejudice the position of Ontario Place in that environment.

Record 21

Record 21 is a set of minutes of a conference call meeting of the OPC's Oversight Committee held on November 2, 2001. The information in Record 21 which is responsive to the request is contained in Page 1 of the record and consists of the recording of the subject matter of the Committee's discussions with respect to both the views of the Minister of Tourism, Culture and Recreation and the recommendations contained in a consultant's report. In my view, the responsive portion of Record 21 contains information relating to plans for the administration of the Ontario Place facility which have not yet been put into operation or made public. As a result, this portion of Record 21 is properly exempt from disclosure under section 18(1)(f).

Record 24

Record 24 is an eleven-page report from the General Manager of Ontario Place to its Board of Directors dated November 2001. The record contains a detailed business plan and *pro forma* financial statements for the facility for the fiscal year 2001, as well as certain projections for future earnings. I find that the disclosure of the financial statements containing projected income statements which are set out in Pages 7 to 11 of Record 24 could reasonably be expected to prejudice the economic interests and the competitive position of the OPC, within the meaning of section 18(1)(c). The responsive information contained in Pages 1 and 5 of Record 24 is similar in nature to that contained in Records 12, 13 and 14, which I found above did not qualify for exemption under sections 18(1)(c), (d), (f) or (g). I will, accordingly, order that the information in Pages 1 and 5 of Record 24 be disclosed and uphold the Ministry's decision to deny access to the financial statements in Pages 7 to 11.

Record 25

Record 25 is a set of notes prepared for the Deputy Minister of Tourism, Culture and Recreation intended to brief the Deputy Minister of the issues under discussion at an OPC Board meeting to be held on November 26, 2001. The responsive information contained in Page 1 of Record 25 is similar in nature to that contained in Record 21. I find that, in accordance with my findings with respect to Record 21, this information qualifies for exemption under section 18(1)(f). The remaining responsive portions of Record 25, at Pages 3 and 4, contains information taken from the financial statements in Pages 7 to 11 of Record 24, which I found to be exempt under section 18(1)(c). Again, I find that this information, contained in Pages 3 and 4 of Record 25 is exempt from disclosure under section 18(1)(c).

Record 26

It is unclear from the material before me what portions of Record 26 remain at issue. The Ministry has made representations respecting the application of section 19 to a small portion of the first page of the records comprising Record 26. I will assume that the Ministry intends to apply section 18(1)(c), (d), (f) and (g) to these documents as these exemptions were included in the index provided to the appellant at the mediation stage of the appeal.

The first page of Record 26 consists of an e-mail dated November 9, 2001 from the General Manager of Ontario Place to various Ministry and OPC staff following a meeting of the OPC's Concession Committee. The e-mail was copied to Ministry legal counsel. I find that this communication meets the criteria for a confidential solicitor-client communication as it forms part of the "continuum of communications" between the OPC's General Manager and legal counsel at the Ministry. Page 1 of Record 26 is, accordingly, exempt from disclosure under section 19.

Pages 2 and 3 of Record 26 represent a FAX transmission sheet from an official with the Ministry's Tourism Agency Branch to a Ministry legal counsel to which is attached an e-mail sent by a private sector firm expressing an interest in assuming a role in the operation of part of the Ontario Place facility. In my view, these pages do not qualify for exemption under any of the subsections of section 18(1); nor do they qualify as a "confidential communication" between a solicitor and client respecting a legal issue, within the meaning of the exemption in section 19. I find that these portions of Record 26 are not exempt from disclosure under either sections 18(1) or 19.

Record 27

Record 27 is a 33-page Draft Business Plan for the fiscal year 2002. I find that this document qualifies as a plan "relating to the administration of an institution" as contemplated by section 18(1)(f) but that as of the date of this order, the plans contained therein have now been put into operation. Accordingly, section 18(1)(f) can no longer apply to exempt this record from disclosure. Similarly, I find that section 18(1)(g) has no application to this document as the plan described in the record is no longer "proposed".

I note that Page 33 of Record 27 is a copy of the *pro forma* financial statements contained in Record 24. As I found them to be exempt from disclosure under section 18(1)(c) above, this information continues to qualify for exemption.

Much of the remaining information in Record 27 consists of a review of the accomplishments of the OPC in 2001 and describes the work to be undertaken for the fiscal year 2002. References are also made to the goals for the OPC in 2002 and beyond, without providing any detail as to how this is to be accomplished. I find that these references, contained in Pages 5 and 13, do not qualify for exemption under sections 18(1)(c), (d), (f) or (g).

Pages 30, 31 and 32 of Record 27, however, contain detailed information about the future plans for the Ontario Place facility and are similar to those which I found to be exempt in Record 1. For the reasons outlined in my discussion of that record, I find that these portions of Record 27 are exempt from disclosure under section 18(1)(f).

PUBLIC INTEREST IN THE DISCLOSURE OF THE RECORDS

Introduction

As noted above, the appellant has not specifically claimed the application of section 23 of the *Act* to those records and parts of records to which I have applied the exemptions claimed by the Ministry. In fact, during the mediation of the appeal, the appellant withdrew her reliance on this section explicitly. In her representations, however, the appellant makes clear that, in her view, there exists a public interest in the disclosure of the requested information. For this reason, I will consider whether the “public interest override” provision in section 23 applies to that information which I have found to be exempt.

Section 23 of the *Act* states:

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.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note)].

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 (Order P-984).

In deciding whether any public interest in disclosure is compelling, the following comments of former Adjudicator Higgins in Order P-1398 are an appropriate starting point:

Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

Only if a compelling public interest is established, must it then be balanced against the purpose of any exemptions that have been found to apply, in this case, sections 18(1)(c) and (f). 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).

The Ministry's Representations

The Ministry strongly objects to the inclusion of the application of section 23 as an issue in this appeal, arguing that the appellant removed this from consideration at the mediation stage of the appeal and should not be entitled to raise the issue at the inquiry stage. The Ministry also points out that records found to be subject to the exemption in section 19 of the *Act* cannot fall within the ambit of section 23.

With respect to the question of whether there is a "compelling" public interest in the disclosure of the records, the Ministry submits that:

The claim for public interest is arguable at best in this case. While newspaper articles may reflect a public interest in the subject matter in some instances (Order M-1074), that is not apparent in the present case. The articles attached by the appellant in support of her position [in her representations] do not relate to the subject matter of this appeal for the most part, and the few that do are dated from 1999. The media status of the requester does not in and of itself constitute evidence of the public interest: see Order M-773.

With respect to the question of whether the public interest clearly outweighs that purpose of the exemption, the Ministry submits that:

The purpose of section 18 is to protect certain economic interests of the Government of Ontario from harm upon disclosure. By establishing these exemptions, the legislator has acknowledged the need for some non-disclosure in order to carry out the business of the institution. There is a public interest in non-disclosure that must be considered: Order PO-2033-I. Here the economic issues at stake are compelling, or no less compelling than the public interest element, and there is simply no basis to suggest that they are outweighed by the interest in disclosure.

The Ministry also points out that Ontario Place Corporation is subject to other elements of an "accountability framework" of which the *Act* is only one part; its activities are also subject to scrutiny by the Provincial Auditor and the oversight of the Ministry of Tourism and Recreation

by way of an annual report to the Lieutenant Governor. The Ministry also submits that the OPC is also subject to the accountability mechanisms provided for in the administrative policies of the Government of Ontario in the *Agency Establishment and Accountability Directive* prepared by Management Board of Cabinet.

Is there a compelling public interest in disclosure?

The appellant has provided me with a large number of newspaper articles. The majority of them are irrelevant to the issues under consideration in this appeal. A few, dating back to 1999, raise concerns with the manner in which OPC tendered a contract for the provision of food services. None of the articles provided to me address in any substantive way the issues under consideration in the records before me.

In Order P-241, former Commissioner Tom Wright observed that:

The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant.

In the present case, I find that the appellant has not provided me with any evidence to indicate that there exists a public interest, compelling or otherwise, in the subject matter of the records at issue in this appeal. Beyond a general assertion about the public's right to know about the operation of a publicly-owned corporation, and some unsubstantiated and admittedly incorrect information about the individuals serving on the OPC's Board of Directors, the appellant has not provided me with any information which might assist me in making a finding that a public interest in the disclosure of the records exists.

As a result, I find that there does not exist the requisite public interest in the disclosure of the records to bring it within the ambit of the public interest override provision in section 23.

ORDER:

1. I order the Ministry to disclose to the appellant Records 2, 3, 5, 6, page 4 of Record 10, the Background section of Record 11, 12, 13, 14, 16, 19, pages 1 and 5 of Record 24, pages 1, 3 and 4 of Record 25, pages 2 and 3 of Record 26 and all of Record 27, with the exception of pages 30 to 33, by providing her with copies no later than **December 12, 2002**.

2. **I uphold the Ministry's decision to deny access to Records 1, 4, 7, 8, page 3 of Record 10, the Strategy section of Record 11, 21, pages 7 to 11 of Record 24, page 1 of Record 26 and pages 30 to 33 of Record 27.**

3. **In order to verify compliance with the terms of this Order I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Order Provision 1.**

Original signed by: _____
Donald Hale
Adjudicator

November 21, 2002