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

ORDER PO-2381

Appeal PA-040221-1

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NATURE OF THE APPEAL:

The Ontario Realty Corporation (ORC) is designated by Ontario Regulation 460 as an institution subject to the *Freedom of Information and Protection of Privacy Act* (the *Act*).

The ORC received a request under the *Act* for the following information:

> A copy of the **Planning Study** referred to in the attached letter from [a named lawyer at a named law firm] for the ORC. This Planning Study was to be commissioned by the ORC in 2003, for the purpose of identifying all of the alternatives available to the ORC in respect to these lands [referring to an attached legal description of a property]. [Emphasis in original].

The ORC identified as responsive to the request a seven-page planning study prepared by a planning consultant for the ORC, including four attachments. It issued a decision denying access to the entire planning study (the study) pursuant to the exemptions from the duty of disclosure found in sections 13 (1) (advice and recommendations), 18(1)(a), (c), (d), and (e) (economic and other interests of government), and 19 (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed the ORC's decision to deny access to the requested record. Also, the appellant stated his concern that the decision-maker was the President and Chief Executive Officer of the ORC, as he believes that this individual has a conflict of interest which renders him unable to make an impartial decision.

During the mediation stage of this appeal, the mediator had conversations with the appellant and the ORC. The appellant narrowed his request "to include only that part of the planning study which addressed the study's finding as to whether the described property is, or is not, landlocked". The mediator reviewed the record with the ORC, which confirmed that in its opinion the entire study including the attachments relates to the study's findings as to whether the property is landlocked. The appellant advised that in addition to the contents of the study he is seeking the name of its author. The mediator advised the ORC of this request. The ORC did not offer to disclose the name of the study's author.

The appellant confirmed during mediation that he is still concerned that the decision-maker had a conflict of interest when making this decision.

The ORC advised the mediator that it was no longer relying on the exemption in section 13(1) of the *Act* as a basis for refusing access to the record. Therefore, the remaining issues are whether the exemptions in section 18 (economic and other interests) and 19 (solicitor-client privilege) apply to the record at issue, and whether the decision-maker who refused access was biased, or, alternatively, whether there is a reasonable apprehension of bias.

As no further mediation was possible, the appeal entered the adjudication stage. I issued a Notice of Inquiry setting out the facts and issues in this appeal, which was sent to the ORC with an invitation to provide representations. The representations of the ORC were provided to the appellant with a Notice of Inquiry, and the appellant was invited to provide representations. The

appellant provided representations on January 4 and January 6, 2005. On January 11, 2005, the appellant asked that his appeal be put on hold to permit him to obtain and submit some additional evidence. On February 28, March 8, and March 21, 2005, the appellant provided additional representations. I did not consider it necessary to invite the ORC to reply to any of these representations.

DISCUSSION:

CONFLICT OF INTEREST/BIAS

Would an informed person, viewing the matter realistically and practically, think that it is more likely than not that the decision-maker who made the access decision in this case would not decide the matter fairly?

The person who made the decision to deny access to the study is the President and Chief Executive Officer (the CEO) of the ORC. The appellant alleges that that there is an issue of bias and/or conflict of interest in relation to the decision-making process that took place within the institution in relation to the decision made in this case. In his letter appealing the decision, the appellant states:

> Request has been denied by [the CEO] who has a conflict with this application. Should have stepped aside.

Analysis and findings

A decision-maker must not be biased as "no one shall be a judge in his own cause". In other words, an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure. A breach of this fundamental rule of fairness will cause a statutory delegate, such as a delegated head under the *Act*, to lose jurisdiction. [Order M-1091].

There is a right to an unbiased adjudication in administrative decision-making. It is not necessary to prove an "actual bias". The test most commonly applied by the courts is whether there exists a "reasonable apprehension of bias". The test for reasonable bias enunciated by the Supreme Court of Canada is "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?" [Order MO-1519]

However, the requirement for impartiality in the actions of an administrator is not the same as for an adjudicator. To treat an administrator the same as an adjudicator "overlooks the contextual nature of the content of the duty of impartiality which, like that of all of the rules of procedural fairness, may vary in order to reflect the context of a decision-maker's activities and the nature of its functions". The obligations of such a decision-maker "are not equivalent to the impartiality that is required of a judge or an administrative decision-maker whose primary function is

adjudication." *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* (2003), 231 DLR (4th) 577 at paragraphs 31 and 34 (SCC).

The context in which the CEO made his decision on the appellant's request is can be described as follows. At the time the access decision was made, the ORC (which the CEO represents not only as the decision-maker under the *Act*, but also as its President and Chief Executive Officer) was engaged in a dispute with the appellant over whether it was legal for the ORC to refuse the appellant's offer to purchase the land to which the study relates. Before making his decision to deny access, the CEO had himself taken certain actions designed to further the disposition of the land in question on favourable terms to the ORC. These actions are set out on pages 3 and 4 of the appellant's January 4, 2005 representations as evidence of the CEO's alleged conflict of interest.

On page 1 of his representations dated January 6, 2005, the appellant cites certain other actions taken by the CEO in the context of determining the disposition of the land in question as additional evidence of conflict of interest. He states:

> Surely [the CEO's] unprecedented personal involvement clearly indicates that a conflict of interest exists. [The CEO] has gone well beyond the norm… . The 'Guidelines and Procedures For Real Estate and Sales' rules were put in place to protect the people of Ontario provide an accountability framework for the disposition of real estate assets on behalf of the Province of Ontario. Nowhere in the guidelines does it condone as acceptable, the personal involvement of the President and Chief Executive Officer.

The thrust of the appellant's argument appears to be that the extensive involvement of the CEO in determining the disposition of lands over which the ORC and in exploring alternatives to selling the land to the appellant's company together with the fact that appellant and the ORC are in a legal dispute make the CEO unable or unlikely to make an impartial decision on the appellant's access request.

In response, the ORC makes the following submissions, among others:

> The appellant in this case has pointed to the fact that he is engaged in litigation against ORC and the access decision was made by [the CEO]. The appellant appears to rely on these two facts alone to substantiate his allegation that [the CEO] was somehow biased in his decision-making.
>
> The appellant made his access request to ORC in June 2004. [The CEO], as head of ORC, was obligated by section 26 of the *Act* to provide the appellant with a written response as to whether or not access to the requested information will be granted. [The CEO] discharged this duty, notifying the appellant by letter dated July 23, 4004 that the request had been denied and citing the sections of the *Act* upon which ORC relied in protecting the information.
>
> …[The CEO] is not a party to the litigation between the appellant and ORC.

> …[The CEO] had no pecuniary interest in or relation to the record. The record contained information that would affect the economic interests of the ORC and the Government of Ontario, but [the CEO] had no personal or special interest in the record.
>
> In making the decision complained of, [the CEO] did not rely solely on his own assessment of the request, but sought the advice of internal and external legal counsel.

I believe these representations misconstrue the appellant's position. It appears to me that the appellant's concern is not just that the ORC is in litigation with him, but also the extent to which the CEO is personally involved in attempting to find alternatives to selling the land to the appellant at the price the appellant has offered.

However, in my view, the fact that the CEO has been personally involved in resolving the question of the disposition of these lands in his capacity as a senior official of the ORC, including participating in exploring options other than sale to the appellant's company, combined with the fact that the ORC and the appellant are in litigation over the appropriate disposition of these lands, is not sufficient to disqualify the CEO from exercising the statutory function of deciding access requests under the *Act*. These facts do not establish a conflict of interest or a reasonable apprehension of bias.

In carrying out his functions under the *Act*, the CEO was not required to be impartial in the way that would be expected of an independent adjudicator. As set out in the *Imperial Oil* decision, the contextual nature of the content of the duty of impartiality, like that of all the rules of procedural fairness, may vary to reflect the content of a decision-maker's activities and the nature of his functions. The CEO was required to carry out certain functions and, in doing so, to comply with the procedural fairness obligations set out in the *Act* and to comply with other legislation governing the ORC. He was also required to exercise his discretion in good faith, taking into account all relevant considerations and disregarding irrelevant ones. I cannot conclude from the evidence before me that he did otherwise.

I find that the appellant has not established that the decision-maker on his access request had a conflict of interest or was biased, or that there was a reasonable apprehension of bias.

SOLICITOR-CLIENT PRIVILEGE

Does the discretionary exemption at section 19 apply to the records?

General principles

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 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Analysis

In its representations, the OSC does not rely upon common law solicitor-client communication privilege, but rather states that the statutory solicitor-client communication privilege under the second branch of section 19 applies to the record. I will therefore discuss the elements of solicitor-client privilege under the heading "Statutory Solicitor-Client Privilege" below.

Litigation privilege

Introduction

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test 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 [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)].

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

> The test really consists of three elements, each of which must be met. First, it must have been *produced* with contemplated litigation in mind. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation – in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be *reasonable* – meaning that there is a reasonable contemplation of litigation.

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Dominant Purpose

The OSC does not actually allege that the planning study was created in contemplation or for the dominant purpose of litigation. Rather, it states:

> In defence of the action brought against ORC by the appellant, ORC has pleaded that it aborted the failed sale process with the intention of pursuing a planning study to determine its development and disposition alternatives for the property. The study also addresses some of the key allegations made against ORC by the appellant in the action and may, at the appropriate time, be presented as an expert report pursuant to the *Rules of Civil Procedure*. General Counsel has provided direction to its litigation counsel with respect to the lawsuit based, in part, on the contents of that report.

The ORC then states that, "having been prepared, in part, *for that purpose*, [emphasis added] it constitutes litigation work product". However, the only purpose given in the above passage for preparing the planning study was "to determine [ORC's] development and disposition alternatives for the property."

The mere facts that the ORC subsequently pleaded that it earlier intended to obtain a planning study and that the study relates to allegations made in a lawsuit initiated after the study was done are not persuasive evidence that any litigation was contemplated when the study was done. In fact, the statement that the purpose of the study related to disposition alternatives provides substantial evidence to the contrary.

Further evidence that the study was not commissioned for the purpose of litigation is in a June 11, 2003 letter from the ORC to the appellant's counsel, setting out the purpose of commissioning the study:

> Having determined that it is not possible to sell the land in its entirety at a price that is acceptable to it, ORC has decided to conduct further analysis into the potential for access to its property.

My inference that the study was not in contemplation of or for the purpose of litigation is reinforced by the failure of ORC to provide me with any information about the date when the litigation commenced or when it first had an inkling that there might be litigation.

The ORC does not rely on the fact that one of the titles of one of the two officials to whom the study was addressed was "General Counsel" as evidence of contemplated litigation. Rather this is raised under the heading "Statutory solicitor-client privilege". However, it should be apparent from my comments under that heading that I do not consider this sufficient to establish that the study was prepared in contemplation or for the dominant purpose of litigation.

I find, therefore, that the record was not prepared in contemplation of or for the dominant purpose of litigation.

Selective Inclusion in the Lawyer's Litigation Brief

In previous orders, this office has found that the "the 'dominant purpose' test set out in *General Accident* is not met does not preclude the potential application of litigation privilege to certain kinds of records that were not created for the purpose of litigation but have 'found their way' into the lawyer's brief." In Interim Order MO-1337 and other orders, this office has adopted the statement of the test for litigation privilege in *Nickmar* (cited above):

> …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 Interim Order MO-1337, Assistant Commissioner Tom Mitchinson stated:

> 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* [*Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (Ont. C.A.)] 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".

In this regard, the ORC states:

> The study…addresses some of the key allegations made against ORC by the appellant in the action and may, at the appropriate time, be presented as an expert report pursuant to the *Rules of Civil Procedure*. General Counsel has provided direction to its litigation counsel with respect to the law suit based, in part, on the contents of that report.

I agree with the finding of Adjudicator Bernard Morrow in Order MO-1900-R that:

> Generally speaking, this aspect of litigation privilege [i.e. the rule in *Nickmar*] is applicable to a collection of documents to which a lawyer's expertise was applied. The mere fact that a record appears or may appear in a lawyer's brief for litigation is not sufficient.

In Order MO-1337-I, former Assistant Commissioner Mitchinson declined to apply this aspect of litigation privilege because of the lack of evidence that skill or expertise had been applied by the lawyer, stating:

> … the City's representations do not indicate whether requests for these particular records or types of records were made by in-house or outside counsel, or if they were provided by various City employees in response to a blanket request for all information created around the various issues and events at the subject property. … Nor does the City address the issue of whether lawyers selectively copied records or exercised skill and knowledge in deciding which ones to include in the litigation brief. In fact there is no evidence that the lawyers played any part in determining which documents were photocopied and placed in their brief.

Accordingly, in assessing this aspect of litigation privilege, the fact that a document is potentially useful to counsel as evidence or that in-house counsel considered a document in providing direction to litigation counsel does not, in itself, make an otherwise unprivileged document subject to litigation privilege. The ORC does not provide any information as to the specific legal or factual issues in the law suit, what the allegations against the ORC are, what its position is in regard to those allegations, which contents of the report it considers relevant to these allegations, or even the nature of the cause of action, that would assist me to assess the credibility of the above assertions.

Even more significantly, the above assertions do not contain any allegation, much less establish, that in-house or external counsel exercised any particular skill or knowledge in obtaining a copy of this record or taking it into consideration in the litigation. In my view, therefore, the ORC has not demonstrated that the rule in *Nickmar* applies, and it is therefore not subject to litigation privilege on that basis.

Further support for this conclusion arises from the fact that I am not in possession of any evidence to demonstrate that the copy of the record sought by the appellant or provided by the ORC to this office came from the litigation counsel's files. I agree with Adjudicator Morrow's view in Order MO-1900-R that, in the context of the application of section 19 of the *Act*, this aspect of litigation privilege applies only to copies of a document that are actually in the lawyer's brief. If an official of an institution receives a record that is not privileged and forwards a copy to counsel for use in litigation, this does not make the original document in the hands of the official subject to privilege.

I find that the study is not subject to litigation privilege.

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice." The ORC claims that this form of privilege applies to the study.

Analysis

The ORC's representations on this aspect of privilege are:

> The planning study was prepared at the behest of, and sent directly to, the Executive Vice President and General Counsel of ORC, as well as the General Manager, Planning Services. The findings and conclusions in the study were necessary for Crown counsel to analyze and opine on all of ORC's legal alternatives with respect to the property.

Clearly, the study was prepared by an independent consultant, and not by Crown counsel.

There is also no evidence, other than the bald assertion above, that the study was prepared "for Crown counsel for use in giving legal advice." The study was addressed to both the General Manager, Planning Services and an individual who held the titles Executive Vice President and General Counsel. Although one of the two recipients was a lawyer, ORC has not demonstrated or even alleged that the study was requested by or provided to this individual in her legal capacity rather than in her capacity as Executive Vice President. Nor is there any evidence that the role of Executive Vice President, as opposed to General Counsel, includes providing any legal advice.

There is no evidence that anyone at OSC was seeking legal advice at the time the study was commissioned or received or that any was given. The stated purpose of the ORC for commissioning the study does not suggest that this purpose was to permit Crown Counsel to give legal advice; although it appears that the study is intended to help resolve the question of what, if any, road access is available to certain lands, the evidence available to me suggests that this is a planning or factual question rather than a legal question and that ORC was treating this as a planning rather than a legal issue at the time. There is no indication of what the specific legal issue was for which legal advice was allegedly sought. ORC has provided no correspondence or records of discussions with the consultant or contract documents, including the work plan referred to in the study, that might shed light on what was in the Vice President and General Counsel's mind when she commissioned the study.

I find that there is insufficient evidence to support the claim of statutory solicitor-client communication privilege.

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

For the reasons set out above under the heading "Common law litigation privilege", I have found that the record was not prepared for the dominant purpose of contemplated or actual litigation. Therefore, statutory litigation privilege does not apply. In my view, the evidence before me establishes that the purpose for preparing the study was to assist the ORC to identify options for development and disposition of property that it owns. The possibility that it might also be of use in eventual litigation is not sufficient to establish that the record was "prepared…in contemplation of or for use in litigation".

I find therefore that the exemption in section 19 of the *Act* does not apply to the record.

ECONOMIC AND OTHER INTERESTS

Do the discretionary exemptions at sections 18(a), (c), (d) or (e) apply to the record?

The ORC claims that the exemptions at sections 18(a), (c), (d) or (e) apply to the record.

General principles

Section 18(1) states, in part:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (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;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams

Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 18 (c), or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified harm. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

I will begin with a discussion of section 18(1)(c) as my findings on this exemption limit the need to consider the other s. 18(1) exemptions.

Section 18(1)(c): prejudice to economic interests

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

Background

In its representations on the s. 18(1)(a) exemption, the ORC provides the following context, which is also useful in considering the other s. 18 exemptions. The ORC states that the record in question is a planning study prepared by a firm retained by ORC, which is the agency responsible for managing certain land as agent for the owner, the Ontario Government. In 2002, the ORC invited two abutting landowners, one of which was the appellant, to submit offers to purchase this property. The ORC refused one of the offers on the grounds that the invitation was to purchase the entire property and that offer related to only a small portion of the property.

The other offer, submitted by the appellant, reflected a discounted value taking into account that the land was, as the ORC described it, "landlocked"; that is, it had no road access. The ORC was not prepared to sell the land for the sum offered and refused the appellant's offer as well.

The ORC states that it then retained a firm to conduct the planning study. The ORC states that the study sets out findings and conclusions with respect to the status of adjacent lands, the status of a pond on the property, access issues, the amount of developable land and permitted uses and densities. The ORC states that the conclusions in the planning study have been sought for the purpose of determining how to maximize the value of the property, which may be realized in an eventual sale. The information contained in the planning study relates to the options available to the ORC, including selling the property. The ORC also points out that the appellant has commenced litigation against the ORC with respect to his failed bid to acquire the property.

Analysis

The representations of ORC as to why section 18(1)(c) applies are as follows:

> [T]he planning study details confidential findings and conclusions regarding the status and use of the property. One of the options ORC is considering is to dispose of the property. If disposal is the preferred option, then ORC is required to sell at the highest possible price in accordance with its mandate to maximize value to the Crown when disposing of assets. The disclosure of this information would prejudice ORC's economic interests in a potential sale of the land by depriving it of the competitive advantage it has obtained by paying for and obtaining the planning study.
>
> The appellant owns 37 acres of neighbouring property that it is trying to develop.
>
> It will not ultimately be able to obtain planning approvals for that purpose, without providing road access to the ORC lands. The appellant's stated reason for wanting the report (i.e. to establish that the ORC lands are landlocked) is not genuine, since the current status of the land is a matter of fact that can be determined by viewing any map or survey of the affected lands. Rather, the appellant seeks to inform itself of the strategic alternatives available to ORC to obtain road access for its lands, which allows the lands to be developed and thereby enhances the value of the lands. Knowledge and/or possession of this information would enhance the appellant's own competitive advantage in acquiring neighbouring properties or pursuing its own development strategy.

It is clear from the representations of both parties that there is a dispute over the value of the property and those options available to the ORC and others to deal with road access can affect that value as well as the value of neighbouring properties. The study commissioned by the ORC contains information that is of value in determining the potential selling price of the property. The information also would assist a potential purchaser to draw inferences as to whether the ORC has viable alternatives to selling at a given price. Should the ORC decide instead of selling its lands to acquire adjacent lands, the information might benefit the owner of those lands in negotiations with ORC. There appear to be a variety of ways in which knowledge of certain

information in the study could reasonably be expected to benefit someone to the ORC's economic disadvantage.

In regard to other information in the study, I have not been provided with detailed and convincing evidence of the risk of such harm. The ORC has taken the position that there is no information in the study that does not fall within one or more of the exemptions and can therefore be released, because "the entire record addresses issues and provides information that, if disclosed, would harm the economic interests of the Government of Ontario".

The sections of the study are numbered from 1 to 5. The information above section 1 consists of the name of the planning consultants who prepared the study and their contact information, the address of the ORC and the names of the ORC officials to whom the study is addressed, the subject of the study and an introductory statement.

I have not been provided with sufficient evidence as to why this information could reasonably be expected to result in the harms referred to in section 18(1)(c). The ORC has alleged that the name of the consultant is exempt because it is privileged, which I have found not to be the case in my analysis of section 19, above. I find that this exemption does not apply to the information above section 1 of the study.

The information in section 1 deals with the appellant's property and information allegedly provided to the appellant by a governmental body. This information does not deal with the ORC property, and the ORC has provided no explanation as to why this particular information would be exempt under section 18(1)(c). I find that this exemption does not apply to the information in section 1.

Section 5 of the study deals with the permitted uses and densities of land under the zoning bylaw and official plan. The contents of zoning bylaws and official plans are public, and therefore, I am not satisfied that disclosure of the planner's description of permitted uses and densities would be contrary to section 18(1)(c). Therefore, I find that this exemption does not apply to section 5.

The signature page contains no information the disclosure of which would engage section 18(1)(c). I find that this exemption does not apply to that page.

Attachment A is a very dark photocopy of an aerial photograph of identified land. In the lower left corner below the photograph are some diagonal lines that appear to be words and are mostly illegible. In the absence of any explanation of how this document could harm the economic interests of the ORC, I find that it is not exempt under section 18(1)(c).

For the reasons outlined above, I find that the rest of the record is exempt under section 18(1)(c).

Since I have found that the record is exempt other than the information set out above, I will assess the application of the remaining exemptions only to the information that is not exempt under section 18(1)(c).

Section 18(1)(a): information that belongs to government

The ORC claims the exemption under section 18(1)(a).

For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information

2. belongs to the Government of Ontario or an institution, and

3. has monetary value or potential monetary value.

Part 1: Type of information

The ORC submits that the record contains commercial information.

Commercial information has been described in previous orders as:

> Information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].

The ORC submits that:

> The conclusions contained in the planning study have been sought by ORC for the purpose of determining how to maximize the value of the property, which may be realized in an eventual sale. The information contained in the planning study relates to the options available to ORC including selling of the property, which makes it commercial information for the purposes of section 18(1)(a) of the *Act*.

The appellant does not dispute that the record contains commercial information and I am satisfied that some of the information I have already exempted under section 18(1)(c) falls into this category. However, I am not satisfied that any of the information that I have found not to be exempt under s. 18(1)(c) is "commercial information" as described in previous orders of this office. Accordingly, it is not necessary to determine whether this information "belongs to" the Government or to ORC or has "monetary value" or "potential monitory value".

I find that the information that I have found not to be exempt under section 18(1)(c) is also not exempt under section 18(1)(a).

Section 18(1)(d): injury to financial interests

The ORC also claims that the record is exempt from disclosure under section 18(1)(d).

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398].

ORC's representations on this issue are as follows:

> This section is intended to protect the broader economic interests of Ontarians [Order P-1398]. These interests could reasonably be expected to be injured where ORC, which has a mandate to maximize value to the Crown when disposing of assets, would be required to disclose confidential reports and studies it has commissioned in contemplating how to obtain the highest possible value for its property in a sale. ORC would be at a competitive disadvantage in negotiations with potential buyers, resulting in lower sale values and consequently lower revenue for the Government of Ontario. A requirement for ORC to disclose reports that would not have to be disclosed by private landowners would make the Government of Ontario perpetually disadvantaged in land sale negotiations, which would be injurious to the financial interests of the Government of Ontario and also interfere with its ability to protect the economic interests of Ontarians.

While this may be true of some of the information in the record, I am not satisfied that it applies to any of the information that I have not found exempt under s. 18(1)(a) and (c) as there is no evidence that disclosure of this particular information could reasonably be expected to disadvantage ORC or the Government in this or other land disposition negotiations. I find therefore that the exemption in section 18(1)(d) does not apply to the information that I have found not to be exempt under s. 18(1)(a) and (c).

Section 18(1)(e): positions, plans, procedures, criteria or instructions

The ORC claims the section 18(1)(e) exemption as well.

In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations

3. the negotiations are being carried on currently, or will be carried on in the future, and

> 4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution. [Order PO-2064]

Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations [Order PO-2064].

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

The ORC makes the following submissions on the application of this subsection:

> In this case, the context is preparation for the development, marketing and possible sale of land owned by ORC, which is commercial in nature.
>
> The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034]. The information in the planning study clearly constitutes positions and plans with respect to the status of various issues relating to the property. ORC's objective and mandate is to dispose of the property at the highest possible value, and the planning study addresses various issues relating to the physical features of the property, access, developable land, and permitted uses and densities. The planning study contains information on the legal position of ORC with respect to the property, and provides a plan for further action which will increase the value of the property for eventual sale, in accordance with ORC's mandate. The positions and plans contained in the report are clearly referable to ORC's pre-determined course of action, which may be to sell the property for maximum value.

Again, while this may apply to some of the information in the record, I am not satisfied, that any of the information that I found not to be exempt under sections 18(1)(a), (c) and (d) is "positions, plans, procedures, criteria or instructions". As I indicated earlier, that information consists of matters such as a consultant's name, information about the appellant's property, information allegedly provided to the appellant by a governmental body, permitted uses and density of land, an aerial photograph and a signature. I am not satisfied that section 18(1)(e) applies to any of that information. I find therefore that the exemption in section 18(1)(e) does not apply to the information that is not exempt under sections 8(1)(a), (c) and (d).

Section 18(2): exception to the exemption

Section 18(2) states:

> (2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

(a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or

(b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.

None of the information which I found to be exempt from disclosure falls within this exception.

EXERCISE OF DISCRETION

Did the institution exercise its discretion under section 18? If so, should this office uphold the exercise of discretion?

General principles

The section 18 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Set out below is a list of considerations that ORC submitted are relevant and were considered in exercising discretion to withhold the record:

(a) The exemption from the right of access was limited and specific. ORC denied disclosure of one particular document. It has not sought to deny disclosure of various categories of documents.

(b) The exemptions relied upon seek to protect the economic interests of the Government of Ontario and maintain protection over privileged documents. The release of the record would seriously compromise the ability of ORC to operate and conduct business in the best economic interest of the Government of Ontario.

(c) The requester was not seeking his own personal information.

(d) The requester was an organization [a named corporation] not an individual.

(e) Disclosure would not increase public confidence in the operation of ORC because disclosure of the planning study would seriously impair ORC's ability to maximize the value to the Crown of the sale of assets, which would be viewed negatively by Ontario taxpayers.

(f) The information is very sensitive to the operation and mandate of ORC, and important only to the requester's speculative land holding business, competitive position and potential ability to enhance its corporate and individual profitability.

(g) The information is relatively new, commercially current and relevant to current operational and business decisions within the current market, and only a few months old at the time of the access request. The information is not commercially obsolete.

(h) The practice of ORC has been to deny requests for current commercial information.

(i) Public bodies should generally make information available to the public, but not in a case where the disclosure would harm the economic interests of the Government of Ontario.

(j) The record could not be severed or vetted because the entire record addresses issues and provides information that, if disclosed, would harm the economic interests of the Government of Ontario. In any event, the entire record is privileged.

I do not agree that portions of the record cannot be severed or that the record is privileged. It follows from my conclusion that privilege does not apply that, in my view, the ORC took into account an irrelevant factor in using the fact that privilege applies as a factor in exercising its discretion. Nevertheless, in considering the overall picture, I am satisfied that the ORC has exercised its discretion properly in deciding whether to disclose the information that I have found to be exempt under section 18(1)(c).

ORDER:

1. I uphold the decision of the ORC to withhold the record, except for those portions which I have found not to be exempt, and which are highlighted on a copy of the record to be provided to the ORC with this order.

2. I order the ORC to disclose to the appellant the highlighted portions of the record not later than **May 11, 2005**.

3. To verify compliance with this order, I reserve the right to require the ORC to provide to me a copy of the record disclosed to the appellant.

Original Signed by: April 13, 2005
John Swaigen
Adjudicator