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

ORDER PO-2404

Appeal PA-030230-1

Ontario Municipal Employees Retirement Board

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NATURE OF THE APPEAL:

The requester made a request to the Ontario Municipal Employees Retirement Board (the Board) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. A list of the private equity / venture capital partnerships in which OMERS is an investor;

2. For each partnership, a record of the total commitment, contributions, and distributions to date, and a record of the most recent available estimated value of OMERS remaining interest in the partnership and;

3. For each partnership, a record of the estimated return (IRR) earned to date. [Note: although not explained in the appellant's request, IRR stands for "internal rate of return"].

The Board issued a decision to the requester, denying access to the information at issue, relying on the exemptions at sections 17 (third party information) and 18 (economic and other interests) of the *Act*. These exemptions from the duty to disclose under the *Act* are described and explained below.

The requester (now the appellant) appealed the Board's decision to deny access.

During mediation, the parties removed part 3 of the appellant's request from the scope of the appeal. The appellant is no longer seeking the estimated return for each partnership.

Mediation did not resolve this appeal, and the appeal entered the inquiry stage. Adjudicator Shirley Senoff sent a Notice of Inquiry setting out the facts and issues in the appeal to the Board, initially, and the Board provided representations. Adjudicator Senoff then sent a Notice of Inquiry to the appellant together with the non-confidential portions of the Board's representations. Adjudicator Senoff received representations from the appellant. She decided that these representations raised issues to which the Board should be given an opportunity to reply. She provided a copy of the appellant's representations to the Board and received reply representations from the Board.

The appeal was subsequently transferred to me. After reviewing the file, I decided to invite representations from each of the 46 private funds in which the Board has investments (the affected parties), according to a list of such funds provided by the Board. I sent a modified Notice of Inquiry to each of the affected parties, together with a summary of the representations of the Board and the appellant. I invited them to provide representations. I received representations from eight of the affected parties. I subsequently provided copies of the non-confidential portions of the representations of the affected parties to the appellant and invited his reply. My letter to the appellant also asked for clarification of his request. When the deadline in my letter passed without a response from the appellant, this office sent him an email asking if he intended to reply, to which he has not responded.

RECORD:

The record is a one-page spreadsheet consisting of information as of December 31, 2002 under the following column headings:

- Name of Investments – Limited Partnership
- Capital Commitment
- Currency
- Capital Contribution
- Capital Distribution
- Valuation (12/31/2002)

DISCUSSION:

Background

To provide context for the discussion of the issues raised by the parties, some explanation of the nature of the Board and its relationship with the private partnerships in which it invests may be helpful.

The Ontario Municipal Employees Retirement System (OMERS) is established under the Ontario Municipal Employees Retirement System Act. OMERS is a pension plan for employees of municipal governments throughout Ontario. It receives contributions from those employees and their employers and invests them on behalf of its members. The profits from these investments are deposited into the Ontario Municipal Employees Pension Fund and the fund uses these profits to pay pension benefits to its members, their widows, widowers, surviving same-sex partners, and children.

The governing body of OMERS is the Ontario Municipal Employees Retirement Board (the Board), which is designated as an institution under the *Act*.

OMERS employs a staff of investment professionals, including portfolio managers, investment analysts, merchant bankers, venture capitalists, and real estate developers.

OMERS invests in both publicly-traded companies and private equity or venture capital partnerships. These private equity partnerships, or "funds" as they are often referred to, identify investment opportunities in private companies. The funds will develop a portfolio of companies requiring investment capital or loans (the portfolio companies). The funds then invest their own money in those companies, and also seek out additional investors. The mechanism for participation of additional investors is the formation of a limited partnership, consisting of the fund that discovered the investment opportunity as the general partner and other investors as limited partners. Private equity partnerships generally provide for participation by limited partners on the basis of invitation by the partnership and not by open subscription.

The general partner not only selects the private companies in which to invest and decides which other investors will be allowed to participate as limited partners, but also manages the investment and keeps the limited partners informed of the financial performance of the fund. The general partner sets the terms for the participation of limited partners in the fund, and each of the partners signs a contract setting out the rights and responsibilities of the general and limited partners. The companies that receive loans or capital from these funds are private companies that do not offer securities or investment opportunities to the public at large. As a result, they are generally not required to disclose financial information or the identities of their investors to the public.

Similarly, the funds and their limited partners are not generally required by law to disclose to the public financial performance data relating to the partnership or to any individual investment, nor are they required to disclose the identities of the companies in which the partnership has invested or of the limited partners.

The limited partnership agreement usually specifies what information about the financial performance of the fund and of the individual investments of the fund the general partner is required to give to the limited partners. The agreement often requires the limited partners to keep much, if not all, of this financial information confidential.

Thus, in the absence of a requirement under the *Act* or some other legislation or agreement, the Board would not be required to divulge information identifying the private equity funds in which it participates or revealing the financial performance of the funds.

Does the discretionary exemption at section 18(1)(c) apply to the record?

In the Notice of Inquiry sent to the Board, Adjudicator Senoff noted that the Board appeared to be relying on sections 18(1)(a) and (c). She asked the Board to make representations on those sections and any others in section 18 upon which it may be relying. In its representations, the Board relies only on section 18(1)(c).

General principles

Section 18(1)(c) states:

> 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;

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) provides the following description of 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(b), (c), (d) or (g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. 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.)].

Section 18(1)(c)

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].

Representations, Analysis and Findings

A. The names of funds in which OMERS is an investor

The appellant asked for the names of all the private equity partnerships in which OMERS is an investor. In its representations, OMERS claimed that disclosure of the names of the funds in which it invests could reasonably be expected to cause it economic harm for the following reasons:

> Disclosure of the names of the partnerships would reveal OMERS' investment strategy in the private equity sector and would disclose to the private equity market the distribution and allocation of OMERS' private equity investments including, specifically, its choice of fund types, geographies, fund sizes and fund vintages (the year the fund is established). As a larger investor, OMERS' investment activity constitutes valuable information to limited partnerships who are seeking investors. Disclosure of the partnership names would provide entities seeking investment from OMERS with commercial intelligence concerning where OMERS has invested, where any gaps in its investment coverage remain and the

> areas in which it is likely to be seeking investment opportunities. OMERS would be disadvantaged in discussions with partnerships seeking investment from OMERS, or in which OMERS is seeking to invest, as these partnerships would have knowledge of which types of partnerships OMERS wishes to invest in and OMERS would lose control over the disclosure of this information to others.

I agree that the degree of knowledge of OMERS' investment activity that would be revealed by disclosing the names of funds in which OMERS has invested would be "valuable information to limited partnerships who are seeking investors". It would allow them to make a more informed decision whether to devote their resources to approaching OMERS. However, it does not follow from the fact that this knowledge is beneficial to these limited partnerships that its disclosure would be a disadvantage to OMERS.

In relation to those who are seeking out OMERS, it is unclear to me from the material provided to me how the scenarios that OMERS has described will cause it harm. It appears to me to be to OMERS' advantage to be sought out by funds that offer opportunities that fit within its investment strategies and potentially fill gaps in its investment coverage, and for funds that are not a good fit to look elsewhere rather than take up OMERS' time. An analogy might be made to a charitable foundation that donates to certain kinds of causes and not to others. It is to the advantage of that foundation to reduce the number of inappropriate requests for funding that it must process and to improve the quality of applications it receives by providing information to potential applicants about its areas of interest and the kinds of organizations it funds.

Where it is OMERS that is seeking out investment opportunities, it is unclear from OMERS' representations how the fact that partnerships that it approaches will know which types of partnerships OMERS wishes to invest in will disadvantage OMERS in discussions with those partnerships.

As discussed below in relation to the second part of the test for exemption under section 17(1), I have also noted that the names of funds in which OMERS participates is often a matter of public knowledge.

In addition to considering the submissions of OMERS on this issue, I reviewed the representations received from funds in which OMERS is a partner as well as the agreements between OMERS and its partners that OMERS provided. While the agreements prohibit OMERS from revealing certain financial information, none of them states that OMERS may not reveal its participation in the fund and one of the agreements explicitly states that disclosure of OMERS' participation is not included in the information to be kept confidential.

In my view, it is significant that most of the funds in which OMERS participates did not submit representations. While the representations of the affected parties that did respond primarily address harm to their interests rather than those of OMERS, I have reviewed these representations keeping in mind the possibility that harm to the affected parties from disclosure might result in harm to OMERS. One of the affected parties objected to disclosure of the fact that OMERS participates, but did not explain why disclosure of this information alone could

reasonably be expected to harm its interests. Two of the affected parties explicitly consented to disclosure of this information. The others did not explicitly address the question of harm from disclosure of this information.

I find that I have not been provided with detailed and convincing evidence that the harm contemplated by section 18 could reasonably be expected as a result of disclosure of the names of the private partnerships in which OMERS has invested.

B. Financial information

In addition to refusing to disclose the names of the funds in which it participates, OMERS refused to disclose certain financial information. OMERS claims that information revealing the amount of OMERS' financial commitment to the partnership, the amount of contributions made by OMERS to the date of the request, the distributions received by OMERS to the date of the request, and the estimated value of OMERS' interest in the partnership at the date of the request would harm OMERS' economic interests.

OMERS alleges this harm would occur in two ways. The first way is as described below:

> Disclosure of this level of financial detail concerning OMERS' investment in the partnership would equip other partnerships seeking investment from OMERS, or partnerships assessing OMERS as a potential investor, with a full picture of OMERS' investment activity in the private sector. OMERS would be hampered in its negotiations with other partnerships regarding commitment levels and the level and pace of contributions it is willing to make… . Private equity partnerships seeking investors would also gain valuable financial intelligence concerning the distributions OMERS has received from other partnerships and the performance indicators that the valuation of OMERS' interest in the partnerships would provide.

The second way OMERS alleges disclosure would result in harm to its economic interests is as follows:

> OMERS is subject to confidentiality obligations with respect to financial information of the partnerships that restrict OMERS from disclosing the commitments to the partnership, contributions received by the partnership, distributions to limited partners and performance indicators such as IRRs and the valuation of OMERS' interest as a limited partner. Confidentiality of partnership financial information is a long-standing practice in private equity investing and is a strong expectation in the exchange of information between general partners and the limited partner of privacy equity partnerships. Disclosure of the information in item 2 would put OMERS in breach of the confidentiality provisions of at least 33 of the 50 partnerships in which it has invested. …

> In addition to these confidentiality provisions, long-standing industry non-disclosure practices create strong expectations in private equity investing by limited partners and general partners that partnership financial information will remain confidential.
>
> In some other cases, partnerships have advised OMERS that the partnership will not provide OMERS with partnership financial information or information about investment targets of the partnership if OMERS is required to publicly disclose financial information concerning the partnership or OMERS' participation in it. Disclosure of the requested information would directly result in a significantly impaired investment opportunity in such circumstances and would leave OMERS in a position of receiving little or no performance and analytical information by which to assess the investment, notwithstanding it may be in the course of a commitment period and have ongoing contribution obligations. Disclosure of the requested financial data may well result in OMERS having to shift from or forego further investment opportunities in such partnerships if the quality of reporting information to which it becomes entitled deteriorates in this manner. …
>
> Finally, if it is known by private equity partnerships that OMERS is required to disclose financial information regarding its participation in the partnership or the partnership's performance data, OMERS will be prejudiced in its ability to attract proposals from partnerships seeking new investments. Partnerships that do not wish to have such information about their operations publicly disclosed will seek other large investors who are not subject to disclosure requirements, such as the Ontario Teachers Pension Plan. As specific private equity investment opportunities are often available on a limited basis only, large investors often find themselves in competition for subscription or participation opportunities. OMERS' competitive position in attracting investment invitations from private equity partnerships would be prejudiced in relation to large investors that do not disclose such information if it were to be required to disclose the requested financial information about its private equity investments.

I will deal with the second set of representations first.

OMERS supported these allegations by providing examples of confidentiality provisions in private equity investment agreements to which OMERS is a party. Having reviewed these provisions, I agree that they support OMERS' submissions set out above. Many of these confidentiality provisions are so broadly worded that they appear to prohibit OMERS from disclosing any of the requested financial information although they do not refer to it specifically.

OMERS also provided a copy of a letter that the general partner of a fund in which OMERS is a limited partner sent to OMERS upon learning that OMERS is subject to the *Act*. In this letter, the Chief Financial Officer of the partnership states:

> …if a Limited Partner is subject to the Freedom of Information Act ("FOIA") or similar laws, or is otherwise not able to provide assurance that information provided to them by [the fund] will be protected from public release, [the fund] believes it is in the best interest of the Fund and the portfolio companies to cease providing to such Limited Partner certain information relating to the portfolio companies until such time as it is clear that this information is exempt from disclosure pursuant to FOIA. While the Funds will continue to provide as much information as is practicable, those Limited Partners who may be required to publicly release information provided to them will not, for the time being, receive certain information, including the following:
>
> - Financial information not otherwise publicly available with respect to the performance of the portfolio companies, such as revenues, earnings, operating margins and other proprietary operating statistics and information.
> - Data pertaining to the purchase price, entrance multiple or capitalization or a new investment.
> - The General Partner's valuation of individual portfolio companies.

The letter also advised that the fund maintains two websites, one for its limited partners who are subject to freedom of information laws, and another for the limited partners who are not subject to such laws. The letter stated, "Access to the website that OMERS is currently using will no longer be made available" as a result of the fund becoming aware that this financial information may be subject to disclosure under the *Act*.

Five of the funds that responded to my invitation to submit representations confirmed the representations of OMERS that a requirement to disclose any of the financial information in question would result in less favourable treatment from its existing partners and would also likely result in more limited access to future partnerships. These five funds objected to the disclosure of all the financial information sought by the appellant.

Of the other three funds that responded, one fund stated that it had no objection to OMERS disclosing its commitment to the fund, the currency in which investments are reported, OMERS contribution to the funds, and distributions made by OMERS to the fund. It did object to OMERS disclosing the valuation of OMERS' investment in the fund. Two related funds, which sent a joint submission, stated that they consent to OMERS disclosing OMERS' capital commitment to the funds and OMERS' contributions to the funds to date but objected to the release of the other requested financial information.

The financial information in question falls into two categories: (1) information about the amount and timing of OMERS' investment and OMERS' investment strategies, and (2) information about the fund's performance and the fund's investment strategies. In discussing the harms that could flow from disclosure, even those funds that objected to disclosure of any of the information focused on harm from disclosure of the fund performance information rather than disclosure of the OMERS investment information. This suggests that OMERS' concerns about

exclusion from fund information and investment opportunities as a result of disclosing the former information may be exaggerated.

Nevertheless, the wording of many of the confidentiality clauses is so broad that disclosure of even the former information may fall afoul of them. In addition, one of the funds that explicitly objected to disclosure of the information about OMERS' investment characterized that information as information about the fund's revenue stream. It stated that:

> Disclosure by OMERS of financial information regarding its participation in [the fund] may put OMERS in breach of the confidentiality provisions of [the fund's] Limited Partnership Agreement. This would disrupt its relations with the fund and force us as the fund's general partner to reconsider the level of disclosure provided to OMERS in relation to its investment in the fund. …
>
> In addition, we shall be forced to reconsider whether we will be prepared to offer future investment opportunities to OMERS given the requirements for disclosure of fund information that its participation as a limited partner would generate.

In response to the submissions of OMERS, the appellant stated that the most objective test of this claim is to examine what information similar institutions disclose. He argued that if similar institutions voluntarily disclose this information, this would prove that such disclosure cannot reasonably be expected to result in economic harm to them. He alleged that, "The prevailing trend among public institutions investing in private equity is to disclose the requested information". The appellant then gave several examples of both private equity funds and investors in private equity funds in Canada and the United States that provide the public with some or all of the information that he has requested. In reply, OMERS distinguished its situation from each of the situations cited by the appellant. For example, the appellant claims that "CPP Investment Board, an institution with approximately four times the amount invested in private equity compared with OMERS, publishes a quarterly summary of exactly the information requested". OMERS replies that this pension fund and the amounts it invests are much larger than OMERS and its investments. The appellant claims that the Ontario Teachers Pension Plan publishes a list of private equity funds in which it invests in its annual report. OMERS replies that this Plan discloses only the names of funds in which it has invested over $50,000,000.

The findings of the California Superior Court in a case similar to this one support the appellant's position. In *Coalition of University Employees v. Regents of the University of California*, 2003 WL 22717384, the Court addressed the arguments that disclosure of the University of California pension fund's internal rate of return (IRR) from investment in private equity funds would result in these funds providing less information to the pension fund, not inviting it to participate in future investments, or forcing it to divest its existing positions. The Court dismissed much of the evidence in support of these allegations as "conclusory". The Court gave greater weight to the fact that of the 94 funds in which the pension plan invests, less than 25% supported the pension plan's position; of those funds that provided evidence, many objected only to release of "portfolio company information", not of IRRs; and some fund managers who do object to the

disclosure admit that the same information has recently been disclosed by other partners and they did nothing.

The Court also stated:

> Most importantly, the record as a whole demonstrates that other public pension plans have produced IRR information without the dire consequences predicted by Respondent – indeed, that perhaps the dire predictions are false. CalPERS, apparently the nation's largest public pension fund, discloses IRRs, as do the California State Teachers Retirement System, the University of Texas Investment Management Company, the University of Michigan, the University of Illinois, the Washington State public pension fund, and the City and County of San Francisco Retirement System. All have released IRRs, all apparently without any of the consequences Respondent predicts. Particularly persuasive is the evidence about Sequoia, admittedly a top venture fund, which recently accepted an $8 million investment from the University of Michigan, *after that University publicly released IRR information.* …None of Respondent's "the sky will fall" concern has manifested. Which is perhaps not surprising, at least in the current economic climate. [Emphasis in original].

Although the California decision deals with IRRs rather than the kinds of information at issue in this appeal, it appears to me from the representations of OMERS and the funds that the information that OMERS and some funds wish to keep confidential is less sensitive than IRRs. Therefore, the findings of the Court appear to be relevant to disclosure of that information.

In contrast to the evidence before the California court, an article tendered by the appellant in support of his position acknowledges the reality of the kinds of concerns raised by OMERS. In an article entitled, "FOIA? GOIA! (Freedom of Information Act? Get Over it Already)", Gerry Langeler, who is described as General Partner, OVP Venture Partners, writes:

> …FOIA is forcing the disclosure of individual partnership performance and terms as never before.
>
> In response, we've recently seen a top venture fund demand that a few of its long-term LPs (limited-partner investors) withdraw from an existing partnership. Another quality VC closed a new fund specifically excluding any LPs thought to be subject to the FOIA statute.

In regard to OMERS' second set of arguments, namely, that disclosure of the financial information requested will result in access to less financial information from its existing general partners and in fewer invitations to subscribe or invest in future partnerships, I find it significant that most of the private equity funds in which OMERS participates did not respond to my invitation to provide representations. This suggests that these funds may not be concerned about harm to them from disclosure, and therefore may not "retaliate" against OMERS. I also find it significant that some of the funds that did respond consented to OMERS disclosing some of the

financial information requested. Clearly, there is a possibility that the harm feared by OMERS and threatened by some of its partners may not materialize in many cases. For one thing, the behaviour of OMERS' current and potential partners will depend on whether the available supply of capital for their portfolios exceeds demand or *vice versa*. If capital is readily available, they will be in a better position to dictate the terms of partnership than if capital is in short supply. As the California Superior Court recognized, the economic climate at any given time will affect whether funds will take the kinds of actions feared by OMERS.

It appears from the evidence and arguments that some funds are likely to react negatively to disclosure of information about distributions from the fund and the estimated value of OMERS' interest in the fund at any given time, but not to disclosure of OMERS' total commitment to the fund or its contributions at any particular date.

However, there is also sufficient evidence to support a finding that other funds may react negatively to disclosure of any of this information. It is impossible to predict from the material before me which funds might react negatively in the manner described by OMERS or which kinds of disclosure might trigger such reactions.

As a result, I am satisfied that in at least a few cases, these negative reactions, namely, existing funds reducing OMERS' access to financial information and funds refusing future opportunities to participate, could reasonably be expected to result from disclosure. I also find that these particular outcomes could reasonably be expected to prejudice OMERS' economic interests by limiting the information that OMERS will have about the performance of its investments and could reasonably be expected to prejudice OMERS' competitive position in relation to other large investors seeking participation in the same funds as OMERS. The evidence that these are reasonable expectations is detailed and convincing.

Therefore, I find that the information requested by the appellant, with the exception of the names of the partnerships in which OMERS was participating at the time of the request, is exempt from disclosure under section 18(1)(c).

As a result of this finding, it is unnecessary to determine whether the harms discussed in OMERS' first set of representations, above, could reasonably be expected to result from disclosure of the financial information requested.

THIRD PARTY INFORMATION

Does the mandatory exemption at section 17 apply to the records?

As I have found that the financial information is exempt from disclosure under section 18(1), it is not necessary to consider whether section 17 applies to this information. However, having found that the names of the funds in which OMERS participates are not exempt under section 18(1), I will address whether they are exempt under section 17(1).

OMERS and the funds that responded do not state which subsections of section 17(1) they rely on. It appears that they rely on section 17(1)(a) as their representations refer to prejudice to the competitive positions of the funds. Although they do not explicitly state this, I infer from their representations, since they argue that disclosure would result in the funds providing less information to OMERS in future, that they also intend to rely on section 17(1)(b). They are claiming that disclosure of the names would give their competitors an unfair advantage. If so, this raises a question of whether this advantage would result in an undue gain for their competitors, so section 17(1)(c) potentially applies as well.

Section 17(1): the exemption

Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Representations, Analysis and Findings

Part 1: type of information

OMERS alleges that the information at issue is "commercial and financial information". Three of the responding funds describe the information as "financial information". One of the funds describes it as "proprietary information", which leads me to consider whether the information is a "trade secret".

The meanings of the terms "commercial information", "financial information" and "trade secrets" in section 17(1) have been discussed in prior orders:

> *Commercial information* is 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 [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].
>
> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

OMERS states:

> The information is commercial as disclosing the entities with whom OMERS enters into agreements for investment opportunities; and financial, as disclosing data concerning levels of investment committed to, contributions received and distributions made by these entities, as well as the monetary valuation of OMERS' interest in the partnership.

Neither OMERS nor any of the responding funds explain why the names alone would be commercial or financial information or trade secrets. Their representations generally deal with the information as a whole; that is, the names of funds and the financial information. They do not address why the name alone is commercial or financial information or a trade secret.

In my view, the fact that the names of the funds in which OMERS invests would disclose the entities with whom OMERS enters into agreements does not make the names alone "commercial information". It is not information that relates solely to the buying, selling or exchange of merchandise or services.

Disclosure of the names alone would not disclose "data concerning levels of investment committed to, contributions received and distributions made by these entities, as well as the monetary valuation of OMERS' interest in the partnership". Therefore, this does not make the names "financial information".

Similarly, I am not satisfied that the names of the funds are "trade secrets" of the private equity funds as there is no evidence that these names not generally known in that trade or business. In fact the material before me demonstrates that many of these names are readily available to the public.

Accordingly, I find that OMERS and the affected parties have not established that the names of the partnerships are commercial or financial information or trade secrets. Part 1 of the test for exemption under section 17(1) has not been met. Nevertheless, I will consider whether Part 2 3 of the test has been met.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

There is no evidence that the names of the funds were supplied to OMERS by those funds. The evidence does not address how OMERS obtained this information. OMERS may have learned the names of the funds from the funds themselves or the names may have been supplied to OMERS by its own staff or by others.

Apart from this, in my view, section 17(1) deals only with the information supplied by third parties, and not with the identities of the third parties who supply it.

The section on its face is clear and unambiguous. It states that information supplied by a third party is exempt from disclosure. It does not address the identity of the third parties who supply the information. When the Ontario Legislature intends in the *Act* to protect the identity of persons who supply information, it states this explicitly, as in section 14(1)(d) of the *Act*:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to disclose *the identity of* a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

See also section 38(c). Similarly, section 21 of the *Act* authorizes a head to refuse to disclose an individual's personal information to others in certain circumstances. The *Act* makes it clear that this includes a person's identity by specifically including identity in the definition of "personal information" at s. 2(1)(h).

I find, therefore, that the names of the funds in which OMERS invests are not "information supplied by" the funds, and this information does not meet the first aspect of the second part of the test for exemption under section 17(1). Nevertheless, I will consider the second aspect of this part of the test.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure [Order PO-2043]

Although I have found earlier that there is a reasonable expectation that some of OMERS' partners expect confidentiality and may retaliate if confidentiality provision in its agreements with OMERS are breached, I also indicated that there is little evidence that these confidentiality provisions relate to the disclosure of their names. While I cannot be more specific without providing information that could result in accurate inferences as to the names of some of the funds in which OMERS is invested, the information provided to me indicates that at least some of the names were not communicated to OMERS on the basis that they were confidential and that they were to be kept confidential and were not treated consistently in a manner that indicates a concern for its protection from disclosure by the funds prior to being communicated to the government organization. The evidence indicates that some of these names have been otherwise disclosed or are available from sources to which the public has access.

For these reasons, I am not satisfied that the names were supplied in confidence and the information does not meet the second aspect of part 2 of the test for exemption. Although the information fails Part 1 of the test as well as both aspects of Part 2 of the test, I will nevertheless consider whether it meets Part 3.

Part 3: harms

General principles

To meet this part of the test, the institution and/or the third party 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.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 17(1)(a) and (c): prejudice to competitive position/undue loss or gain

OMERS and the funds have directed their evidence of prejudice to competitive position either to harm from disclosure of the financial information rather than disclosure of the fund names or they have lumped all the types of information at issue together and failed to specify which kind of information the representations relate to. There is no detailed and convincing evidence that disclosure of the names of the funds could reasonably be expected to prejudice significantly the competitive position of the funds or interfere significantly with the contractual or other negotiations of these funds under section 17(1)(a). It follows from this that there is no detailed and convincing evidence that disclosure of the names could reasonably be expected to result in undue loss to the funds or undue gains to competitors under section 17(1)(c).

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

As I have found that the names of the funds are not "information supplied" to OMERS, it follows that I find that disclosure of the names could not result in this information no longer being supplied to OMERS. OMERS and the funds have not identified any information that is similar to the names which would no longer be supplied if the names are disclosed. While they do claim that the financial information would no longer be supplied, the financial information is not similar information to the names.

Accordingly, I find that there is no evidence that disclosure of the names could reasonably be expected to result in similar information no longer being supplied. Part 3 of the test for exemption under section 17(1) has not been met.

Having found that none of the three parts of the test for exemption have been met, I find that the names of the funds in which OMERS participates are not exempt from disclosure under section 17(1).

PUBLIC INTEREST OVERRIDE

Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1)(c) exemption?

The possible application of the public interest override in section 23 was not initially identified as an issue in this appeal. After receiving the representations of OMERS and the appellant, I recognized that the appellant's representations potentially raised this issue. Accordingly, I invited the funds to address this issue in addition to the other issues that OMERS and the appellant had been asked to address. I received representations on this issue from the funds that responded and provided the appellant with the non-confidential portions of the funds' representations. I invited the appellant to reply to the representations from the funds, including those dealing with section 23. As indicated earlier, the appellant did not provide further representations. After considering the representations of the funds, I decided that it was not necessary to seek representations from OMERS on this issue.

Having found that the names of the funds are not exempt from disclosure, it is unnecessary to consider whether section 23 applies to this information. I therefore consider whether section 23 applies to the financial information sought by the appellant.

Section 23 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.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner),* [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Representations, Analysis and Findings

In his letter to OMERS requesting the information, the appellant stated:

> Disclosure has become a topical issue in private equity, with debate covering the full spectrum of views – from those who would seek disclosure of everything, to those who argue that all information should be kept confidential. [The appellant's] position on disclosure is clear:
>
> - performance at the partnership level should be disclosed, as this causes no harm, and will lead to a more efficiently-operating market, to the significant benefit of investors and their beneficiaries;

- detailed information concerning individual portfolio investments within the partnership must be kept confidential, as inappropriate disclosure of this information could cause real commercial damage to the companies concerned.

…We believe that greater transparency is needed in this asset class, and will significantly improve the workings of the market.

In his representations, the appellant reiterates that, "disclosing the requested records has a major public benefit in ensuring greater transparency in the investment of public funds".

Several of the funds also provided representations on whether there is a public interest in disclosure of the financial information.

One fund wrote:

> We are highly skeptical of the argument advanced by the appellant that disclosure of the information will serve the public interest by creating "a more efficiently operating market, to the significant benefit of investors and their beneficiaries". We wish to bring to your attention the following points:
>
> (a) The nature of private equity investing is long-term, subjective and requires considerable experience and expertise. Understanding whether a private equity investment is performing well in the early years following fund formation, and is positioned to ultimately deliver superior returns, is not necessarily apparent in the disclosure being sought by the appellant.
>
> (b) The disclosure of granular financial information of each private equity investment would present an incomplete picture, is likely to be misunderstood by the public, or layman, and in all probability would ultimately have a negative impact on the performance of this asset class.
>
> (c) Therefore, rather than creating efficiencies that would benefit OMERS and its beneficiaries, disclosing the information would more likely result in decisions being made to service short-term objectives unrelated to optimizing investor returns, and would ultimately be prejudicial to these beneficiaries.

The funds also argued that:

Disclosure is not in the public interest because it would result in reduced information and investment opportunities for OMERS, a public agency;

Disclosure would require OMERS to disclose information that its competitors who are not subject to freedom of information laws are not required to disclose, putting OMERS at a competitive disadvantage; and

The decision of the legislature not to make a law requiring private equity funds and private companies in their portfolio to disclose financial information despite the fact that equity markets are highly regulated indicates that there is a public interest in not requiring disclosure of the information at issue.

I find the arguments of the funds more persuasive than those of the appellant. I agree with the observation that the Legislature's view of what constitutes the public interest is reflected in its decision not to require private equity funds and their limited partners to disclose the financial information in question. In my view, this is a factor that should be given substantial weight in determining whether there is a public interest in disclosure, and, if so, whether it is compelling.

I am also of the view that the ability of investors to invest more successfully in private equity funds is largely a matter of private, rather than public, interest. There may be a public interest in this outcome as well, but it is not clear to me what it is.

In addition, the money that OMERS invests comes in part from its members, and not solely from public employers. OMERS' success or failure in investing those funds largely affects its members rather than the public. Therefore, the interest in how those funds are invested is substantially that of its members rather than a public interest. However, there is a limited public interest in disclosure of the information arising from the contribution of the public sector employers and from the fact that there may be pressure on public funds to provide pension benefits if the pension plan cannot meet its commitments.

As I have already found, there is a risk that forced disclosure will disadvantage OMERS by allowing its partners to provide less financial information or by reducing opportunities to participate in future partnerships. As OMERS is a public body, this is a public interest in non-disclosure.

In addition, I agree that the evidence supports the conclusion that there is a risk that disclosure will make the operation of the markets less efficient rather than more efficient as the appellant claims, because the information may be misleading.

There is often no single "public interest". Rather, there are often several public interests, some of which conflict. In this case, there is a public interest in non-disclosure of the financial information. To the extent that there may also be a public interest in disclosure, the evidence does not satisfy me that this public interest is compelling or that the public interest in disclosure clearly outweighs the public interest in non-disclosure. I find therefore that section 23 does not apply.

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

Having found that the section 18 exemption applies to the financial information requested, I must consider whether the Board exercised its discretion in deciding to withhold this information, and, if so, whether it erred in exercising its discretion.

General principles

The section 18 exemptions are discretionary, and permit 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)].

Representations, Analysis and Findings

OMERS states:

> As a result of the direct impact on information flow to OMERS and the concomitant deleterious effect on OMERS' ability to manage its private equity investments and to attract other investment opportunities, OMERS has exercised its discretion to apply paragraph 18(1)(c) to the requested information. OMERS submits that its decision to apply the exemption is consistent with the purposes of paragraph 18(1)(c), namely that of protecting the economic interests and competitive position of institutions subject to the *Act*, and that it has not based its decision in this regard on irrelevant or improper considerations.

I find no evidence that OMERS failed to exercise its discretion or exercised its discretion improperly.

ORDER:

1. I order the Board to disclose to the appellant no later than **August 5, 2005**, but no earlier than **July 29** the names of the private equity partnerships in which OMERS had invested as of December 31, 2002. For greater certainty, this is the information in the first column of the record provided to this office, under the heading "Name of Investments-Limited Partnership".

2. I uphold the decision of the Board not to disclose the rest of the record.

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

Original Signed By: June 29, 2005
John Swaigen
Adjudicator