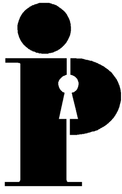

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2461

Appeal PA-040145-2

Ministry of Agriculture, Food and Rural Affairs

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NATURE OF THE APPEAL:

The Ministry of Agriculture, Food and Rural Affairs (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records about pound facilities in the City of Toronto, for the period of June 17, 2003 to February 9, 2004. Specifically, the requester sought access to the following:

1. Records of all pound inspections of all pound facilities in the City of Toronto;

2. Copies of all correspondence relating to the provision of animal care, control and pound services in the City of Toronto;

3. Information on which City of Toronto pounds send animals to research facilities, and complete records of the number of animals requisitioned to be sent to research facilities.

Regarding part 3, the request indicated that it includes "all specifics including but not necessarily limited to dates, age, sex, breed, the eventual use and disposition of pound animals, to which research facilities the animals were sent in each instance, the stated purpose of the research to be carried out and copies of the requisition forms".

The Ministry issued a decision letter in response to the request, granting access to two inspection records related to the York Animal Centre and the South Region Animal Centre pertaining to part 1, and four responsive letters pertaining to part 2. Also under part 2, the Ministry advised the appellant that if any correspondence relating to the provision of animal care, control and pound services in Toronto was received by the Ministry between June 17, 2003 and October 23, 2003, it would be in the custody of the Archives of Ontario. In response to part 3 of the request, the Ministry advised that it does not have custody or control of the records.

The requester (now the appellant) appealed the Ministry's decision and appeal file PA-040145-1 was opened.

During mediation of appeal PA-040145-1, the Ministry forwarded part 2 of the request relating to the Ministry's correspondence for the period between June 17, 2003 and October 23, 2003 to the Archives, which subsequently granted full disclosure of those records.

Issues in relation to parts 1 and 2 of the request were resolved during the mediation of Appeal PA-040145-1. The issue of whether or not the Ministry had custody or control of the records under part 3 of the request went forward to adjudication, which resulted in Order PO-2365, in which Adjudicator Stephanie Haly found that the Ministry did not have custody or control of the records.

A further search by the Ministry during mediation of appeal PA-040145-1 resulted in the location of three other groups of records, the first described as an "Interim Project Manual" and the other two described as "sets of plans" (totaling 35 drawings) for the City of Toronto, Toronto Animal Services. The Ministry notified two affected persons whose interests might be affected by the disclosure of the records and upon receipt of their submissions requesting that the

information not be disclosed, issued a decision letter denying access to the three groups of additional records pursuant to the exemption at section 17(1)(c) (third party information) of the *Act*. The appellant appealed this decision and appeal file PA-040145-2 (the current appeal) was opened to deal with the issue of access to the three groups of additional records.

During the mediation of the current appeal, the Ministry issued a supplementary decision letter, raising the discretionary exemptions provided by sections 14(1)(i) (security) and 15(b) (relations with other governments) of the *Act*, in addition to the previously claimed exemption under section 17(1)(c), for all of the responsive records. The Ministry raised these additional discretionary exemptions during the time permitted for doing so under section 11 of the Commissioner's *Code of Procedure*.

Also during the mediation of this appeal, the Ministry notified three additional parties who might be affected by the disclosure of 14 of the drawings previously identified and issued a further decision letter denying access to the records under the previously claimed exemptions. The Ministry also provided a revised Index of Records reflecting these changes. In the index, the records are divided into six groups.

Further mediation was not possible and the appeal was moved to adjudication.

I began the adjudication process by sending a Notice of Inquiry to the Ministry and five affected parties, inviting them to submit representations. The Ministry provided representations. Two of the five affected parties, namely the City of Toronto and an engineering firm, also provided representations in which they objected to disclosure. The City's representations addressed all the claimed exemptions, while those of the engineering firm only refer to section 17(1)(c). The remaining three affected parties did not wish to make representations.

I then sent the Notice of Inquiry to the appellant, enclosing the non-confidential portions of the representations received, and received representations in reply.

RECORDS AND EXEMPTIONS:

The Ministry claims sections 17(1)(c), 14(1)(i) and 15(b) for all of the records at issue in this appeal. The records are described in the Ministry's final Index of Records as follows:

> Record 1 – Interim Project Manual for the City of Toronto, Toronto Animal Services, South Animal Centre. Originally issued 30 May, 2002; last amended 27 August, 2002.
>
> Record 2 – One set of plans (drawings) for the City of Toronto, Toronto Animal Services, South Animal Centre (Horse Palace Exhibition Place), Project No. 0106, dated August 23, 2002. This record is comprised of 12 drawings.

Record 3 – One set of plans (drawings) for the City of Toronto, Toronto Animal Services, South Animal Centre (Horse Palace Exhibition Place), Project No. 0106, dated June 26, 2002. This record is comprised of 10 drawings.

Record 4 – One set of plans (drawings) for the City of Toronto, Toronto Animal Services, Project No. 0106, consulting engineer's drawings E1 to E5, April 25, 2002. This record is comprised of five drawings.

Record 5 – One set of plans (drawings) for the City of Toronto, Toronto Animal Services, Project No. 2002010, consulting engineer's drawings S1-01 to S1-03; S2-01 & S2-02; and S3-01, June 2002. This record is comprised of six drawings.

Record 6 – One set of plans (drawings) for the City of Toronto, Toronto Animal Services, Project No. 0106, consulting engineer's drawings M1 to M3, May 2002. This record is comprised of three drawings.

DISCUSSION:

SECURITY

Section 14(1)(i) forms part of section 14 of the *Act*, generally known as the "law enforcement" exemption. Section 14(1)(i) states:

> 14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

The law enforcement exemption must be approached in a sensitive manner which recognizes the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div.Ct.)].

Previous orders of this Commission have established that although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection [Order P-900].

The use of the words "could reasonably be expected to" in Section 14(1)(i) requires the institution to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037,

upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry takes the position that disclosure of the records at issue in this appeal could reasonably be expected to endanger the security of a building, namely the Horse Palace, Exhibition Place, which was renovated to provide for pound facilities for the City of Toronto.

The Ministry indicates that the plans and drawings (Records 2 to 6) reveal details of floor plans, layout and specifications for the facility and its various components, as well as materials used in the structure, the locations of windows and doors, and detailed drawings of latches and hinges. The drawings also include details of electric systems, lighting systems, fire alarms, sprinklers and similar equipment installations. The Ministry also indicates that the Project Manual (Record 1) provides product and equipment information as well as structural and mechanical specifications.

The Ministry further states that "the drawings, plans and manual provide a complete picture of the architectural, structural, electrical, mechanical and security systems of the facility." I agree with the Ministry's description of the records and with its assessment that they provide a comprehensive picture of these important systems.

The Ministry submits that the current climate of domestic and international terrorism demands increased vigilance with regard to facility management issues such as security. In such a climate, it is suggested, one of the key steps that must be taken to better protect facilities against attack is to restrict access to information about buildings and their potential systems and operations vulnerabilities.

The Ministry conveys concern about a specific animal rights group, which is said to be engaged in an ongoing campaign characterized by acts of destruction aimed at liberating animals and inflicting economic damage against organizations it sees as exploiting animals. The Ministry suggests that concern exists in Canada and the United States about an escalation in the use of violent tactics by this group.

Next, the Ministry suggests that there is a reasonable connection between this animal rights organization and threats to the security of pounds facilities generally, including the one described in the records at issue in the present appeal. The Ministry tendered several documents in support of this connection, including a manual produced by the organization, which provides instructions for research and planning attacks ranging from vandalism to arson. The Ministry observes that this manual recommends identifying weak links in facility security.

The Ministry adds that evidence regarding this connection has been adduced in previous inquiries, including the one which concluded with Order PO-2197.

The Ministry concludes its representations by providing articles relating to bomb threats and vandalism to which a municipal animal shelter in Los Angeles, and its employees at their homes, has been subjected.

The City's representations support the Ministry's submission that disclosure of the manual and drawings is reasonably and logically connected to a threat or compromise to the security of its animal facilities.

In support of this position, the City points out that the building plans (Records 2 to 6) include foundation and roof framing drawings, floor by floor details such as the locations for specified activities relating to the care of animals in the facility, as well as electrical power points, panels, fire alarms, plumbing and building materials, elevator and gate latch details.

The City also states that the interim project manual (Record 1) contains information about construction materials used, protective materials incorporated in the design, and details of building security and communications systems, including those for fire, telephone and data communication, intercom and surveillance.

In arguing that disclosure of the records could reasonably be expected to threaten the security of the facility, the City refers to past orders of this office which accepted the connection between disclosure of documents and their availability to groups involved in the animal rights movement that may elect to use vandalism to promote their cause [Orders 169, P-252, P-557, P-1392, P-1537].

In the context of a culture increasingly influenced by awareness of the threats to security, the City states that "[i]t is considered to be prudent to restrict access to information that could possibly be used to assist in an attack". The City further submits that the detailed information in the records would allow for a determination of which part of the building or security system would be most vulnerable and where the most damage could be inflicted, including the best points of attack and retreat.

The City also submits that "… the expectation of such harm occurring is reasonable. One only has to log onto the internet to find media articles relating to attacks on animal facilities occurring worldwide as well as information on illegal activities issued by extremists groups themselves."

In their representations, both the Ministry and the City provide specific examples of the activities of some of the extreme factions of the animal rights movement which use violent and illegal methods to promote their cause. These activities include harassment, death threats and bombings. They also point to specific acts which have occurred over the past several years, some quite recently, involving research facilities.

In the context of these arguments, it is important to note that neither the Ministry nor the City suggests that the appellant would use the records for these purposes. As the Ministry points out, disclosure of the records to the appellant is, in effect, disclosure to the world. In the context of a request for general records under Part II of the *Act*, this is consistent with the position taken in

previous orders such as those cited by the Ministry (Orders P-169, P-252, P-1537, MO-1719). In Order P-1537, former Assistant Commissioner Tom Mitchinson dealt with a request for "… records identified as "Animals Used for Research/Teaching/Testing in a Research Facility" for all Ontario research facilities using animals …". The parties opposing disclosure in that case had argued that "the expectation that harm would result is not based on the identity of the appellant, but rather on the fact that the records, if disclosed, would be in the public domain …". The former Assistant Commissioner accepted that argument, and stated:

> My decision is not based on the identity of the appellant, but rather on the principle that disclosure of the records must be viewed as disclosure to the public generally. If disclosed, the information in the records would be potentially available to all individuals and groups involved in the animal rights movement, including those who may elect to use acts of harassment and violence to promote their cause.

I agree with these conclusions. This appeal relates to the consequences of disclosure of these records into the public domain, and although these concerns do not relate to the appellant, the Ministry and the City's references to the possibility of the records falling in to the hands of animal rights activists or others who may pose a security risk are relevant to the potential application of this exemption. The question I must decide is whether the information and arguments presented by the Ministry and the City are sufficiently "detailed and convincing" to justify the application of the exemption.

In its representations, the appellant suggests that this line of argument and the Ministry's tendering of documentation related to acts of violence and damage by animal extremists is contrived to capitalize on "the current public climate of fear about terrorism". The appellant suggests that this tactic has been adopted by the Ministry to cover up what is asserted to be wrongdoing and neglect as regards the care, control and sheltering of animals under the Ministry's regulatory authority.

I have reviewed the records and considered the arguments advanced by the parties. In my view, bearing in mind the difficulty of predicting future events in a law enforcement context (see *Ontario (Attorney General) v. Fineberg*, cited above) the Ministry and the City have provided detailed and convincing evidence to support a conclusion that disclosure of most of the information in the records at issue could reasonably be expected to threaten the security of a building. I therefore find that this information is exempt under section 14(1)(i).

This finding applies to the drawings (Records 2-6) in their entirety. It also applies to most of the Project Manual (Record 1), excluding the portions found at pages 00010 through 0702, inclusive, which consist of the contents of the manual, definitions and general conditions. These pages of the manual do not describe the facilities, systems, materials or construction methods in any detail, and in my view, disclosure of this part of the manual could not reasonably be expected to prejudice the security of a building.

Therefore, I find that all of Record 1 except pages 00010 through 0702, inclusive, and Records 2-6 in their entirety, are exempt from disclosure pursuant to section 14(1)(i) of the *Act*.

I will now address application of sections 15(b) and 17(1)(c) of the *Act* to the portions of Record 1 that I have not exempted under section 14(1)(i).

RELATIONS WITH OTHER GOVERNMENTS

Section 15(b) of the *Act* states:

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

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. The purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption 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.)].

The question of whether the reference to "another government" in section 15(b) includes a municipality such as the City, which provided the records to the Ministry in this case, was addressed in Order 69. In that order, former Commissioner Sidney B. Linden found that it does not. The former Commissioner stated:

> In my view, for an exemption under either subsection 15(a) or (b) to apply, I must first determine if a municipality is a government for *the purposes of section 15 of this Act*. An examination of the meaning of the word "municipality" in the context of the *Act* itself is a necessary starting point to making this determination.
>
> In subsection 2(1) of the *Act*, the definition of "institution" encompasses a municipality. In subsection 15(b), the pertinent phrase used is "another government". If a municipality is an institution for the purposes of the *Act*, it would be contrary to the wording of the *Act* to extend the meaning of "another government" to include "municipality" without specific statutory direction. A

plain reading of subsection 15(b), taking into consideration the context of the *Act*, leads me to the conclusion that "another government" means the federal government, another provincial government, or a foreign government.

The institution [the Ministry of Municipal Affairs] relies on several court decisions as authority for the proposition that a municipality is a government. Specific reference is made in the institution's submissions to *McCutcheon v. Toronto* (1983), 147 D.L.R. (3d) 193 (Ont. H.C.) and *McKinney v. University of Guelph* (1987), 46 D.L.R. (4th) 193 (Ont. C.A.).

In my view, reliance on these decisions to determine the meaning of the word "government" in the context of this *Act* is problematic. I have an obligation to rely on the *Act*'s written expression in ascertaining legislative intent in the first instance. As Pierre A. Cote points out in *The Interpretation of Legislation in Canada* (1984 Les Editions Yvon Blais Inc., at p. 443), "there is a danger in taking the meaning given by one judge to a word in a specific context, and transposing it to another enactment for which a different context may suggest a different meaning for the same word."

With this in mind, I note that the legal authorities relied upon by the institution deal with entirely different statutory contexts. In *McCutcheon v. Toronto* and *McKinney v. University of Guelph*, the courts' comments with respect to the status of a "municipality" were made in the context of the application of the *Canadian Charter of Rights and Freedoms*.

The interpretation that a municipality is not a "government" for purposes of the *Freedom of Information and Protection of Privacy Act, 1987* is supported by the legislative history of section 15. Section 15 of the *Act* had its genesis in the recommendations contained in the Report of the Williams Commission - *Public Government for Private People* (The Report of the Commission on Freedom of Information and Individual Privacy/1980 – Queen's Printer of Ontario). It is clear from a review of the Commission's discussion leading to the recommendation of a provision very similar to the present section 15 that the intent of such a provision was to exempt sensitive information that may be generated by "international relations or the relations of the province of Ontario with the governments of other jurisdictions". (See pages 304 to 307, Volume 2, *The Report of the Commission on Freedom of Information and Individual Privacy/1980*).

In the clause-by-clause review of Bill 34 by the Standing Committee on the Legislative Assembly, the comments of the Attorney General with respect to the purpose of the section 15 exemption were unequivocal. The Attorney General stated that the purpose of the exemption was "to protect intergovernmental relations between the provinces or with the feds or with international organizations". The Attorney General explicitly stated that a municipality was

> not intended to be a "government" for the purposes of section 15. (March 23, 1987, Comments made after second reading of the Bill.)
>
> Finally, if a municipality was considered to be a government for the purposes of section 15 of the *Act*, a letter from a local library board, for example, could be placed on the same footing, and qualify for the same exemption as a document received from the government of another nation. This would greatly expand the number of records that could be withheld from the public indefinitely, not just for the duration of a period of negotiations. In my view, this result would be contrary to the spirit and right of access to information as set forth in the *Act*. Clear statutory direction would be necessary to justify such a position, and as I have indicated, I see no such direction in the *Act*.
>
> In view of the above, I am not able to accept the institution's position that a municipality is a government for the purposes of the *Freedom of Information and Protection of Privacy Act, 1987*.

Both the Ministry and the City argue that this decision should be changed.

The Ministry submits:

> There have been changes to local governments since Order 69 was made. The roles of local governments have expanded since the amalgamation of municipalities in Ontario. Municipalities have taken on activities previously handled by other levels of government. Throughout Canada, there is an interchange of responsibilities between provincial, federal and municipal governments. The City of Toronto has responsibilities at the municipal level that are a provincial obligation in some other provinces.

The Ministry also refers to *Public Government for Private People* (the Williams Commission Report, also referred to in the extract from Order 69, above) which, according to the Ministry, recognizes municipalities as "another government". The Ministry also refers to section 13 of the federal *Access to Information Act*, which expressly exempts information received in confidence from a municipal government.

The City makes arguments similar to those of the Ministry about the changed and expanded role of local governments in support of its submission that Order 69 should no longer be followed. The City also refers to the common perception that municipalities are "governments".

In addition, it refers to an amendment to the definition of "institution" in the *Act* which removed municipal corporations when they became institutions under the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*). In the passage from Order 69 quoted above, former Commissioner Linden had relied on the inclusion of municipalities in the definition.

Based on the wording of section 13 of the federal *Access to Information Act*, the City submits that different results could occur if the same record were provided by a municipality to the provincial and federal governments.

In Order PO-2456, Adjudicator John Swaigen rejected submissions to the effect that the reference to "another government" in section 15(b) should include a municipality. He stated:

> I agree with Commissioner Linden's conclusion that the intent of the Legislature, as evidenced by the Williams Report and the statements of the Attorney General during legislative debates on the *Act*, was that municipalities are not "governments" for the purpose of section 15 of the *Act*. In particular, the statements of the Attorney General make it clear that the Legislature turned its mind to the question of whether municipalities are governments for the purpose of section 15.
>
> When the Legislature passed the *Municipal Freedom of Information and Protection of Privacy Act* in 1991, it included a parallel provision to section 15 of the *Act*. Section 9 of the *Municipal Freedom of Information and Protection of Privacy Act* provides:
>
> > (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
> >
> > (a) the Government of Canada;
> >
> > (b) the Government of Ontario or the government of a province or territory in Canada;
> >
> > (c) the government of a foreign country or state;
> >
> > (d) an agency of a government referred to in clause (a), (b) or (c); or
> >
> > (e) an international organization of states or a body of such an organization.
> >
> > (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.
>
> Under the *Municipal Freedom of Information and Protection of Privacy Act*, it is clear that a municipality cannot claim the "relations with governments" exemption for information it receives from another municipality or municipal

> board. That is, section 9 does not apply to information received from another municipality.
>
> It would be inconsistent with the overall scheme of the two freedom of information statutes if a provincial institution could claim the "relations with other governments" exemption for information received from a municipality when a municipality cannot.
>
> Therefore, the Legislature implicitly reaffirmed its intention that information received from municipalities is not covered by this statutory regime when it passed the *Municipal Freedom of Information and Protection of Privacy Act*, incorporating section 9.

I agree with Adjudicator Swaigen' analysis. Nevertheless, there are a number of arguments before me that are different than those referred to in Order PO-2456.

With regard to the Ministry's arguments about legislative intent based on references to municipalities in the Williams Commission Report, I am persuaded by the statements of the then Attorney General in the Legislature, referenced in Order 69, that the Legislature intended that the phrase "another government" in section 15(b) would not include municipalities.

The fact that section 13 of the federal *Access to Information Act* expressly exempts information received in confidence from a municipal government does not persuade me that section 15(b) should be interpreted in the same way. It is a question of statutory interpretation, and an express reference in a statute of the federal Parliament does not dictate the interpretation of a statute passed by the Ontario legislature, particularly where there are cogent reasons for taking a different view.

While the City is correct that the definition of "institution" in the *Act* was changed after Order 69, and no longer includes a "municipality" (as referenced by former Commissioner Linden in that case), it is significant that section 9 of the municipal *Act*, the exemption dealing with information obtained from governments, conspicuously fails to protect information obtained from other municipalities. In my view, former Commissioner Linden's reference to the definition of "institution" was only a small part of his reasoning, and as Adjudicator Swaigen concluded, the content of section 9 of the municipal *Act* provides a compelling statutory context to support the interpretation that a municipality is not "another government" within the meaning of section 15(b).

I acknowledge the important role played by municipalities, as noted by both the Ministry and the City. Nevertheless, in view of the overall statutory context, including the provisions of section 9 of the municipal *Act* referred to above, I am not persuaded that this is a sufficient basis for finding that they are "governments" within the meaning of section 15(b).

To conclude, I agree with Adjudicator Swaigen's finding in Order PO-2456 that municipalities are not "governments" for the purposes of this section.

Therefore, since the Ministry received the records (including Record 1) from the City, a municipality, I find that section 15(b) does not apply to the parts of Record 1 I have not found exempt under section 14(1)(i). I will now consider whether this part of Record 1 is exempt under section 17(1)(c).

THIRD PARTY INFORMATION

Section 17(1)(c) 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,
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 affected parties 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.

With respect to the parts of Record 1 that I have found not to be exempt under sections 14(1)(i) or 15(b), I am not satisfied that the third part of the test has been established, for reasons outlined below.

To meet part 3 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].

I note that the affected party that prepared Record 1 (the Project Manual), did not provide representations in this appeal. The representations provided by this affected party to the City in response to the City's notice to this party during mediation contain only a very general reference to "proprietary information" and "prejudice to our position relative to our competitors". No particulars as to how this could be expected to take place are provided. Neither this submission (which cannot be described as "detailed and convincing"), nor the contents of the parts of Record 1 under consideration here, persuade me that disclosure of this information could reasonably be expected to cause undue loss to this affected party. In addition, although the Ministry did not claim section 17(1)(a), which relates to prejudice to competitive position, I would also find, for the same reasons, that no reasonable expectation of that harm would be established under that section if it had been claimed.

The Ministry's representations focus on the damage that would occur if the building were attacked, in a similar vein to its representations on section 14(1)(i), and the undue loss that would ensue. I have already found that the parts of Record 1 under consideration here cannot reasonably be expected to prejudice the security of a building. In the context of section 17(1)(c), I find that the similar basis for harm set out by the Ministry cannot reasonably be expected to arise from this part of Record 1.

The City's representations also refer to undue loss to it and to other occupants of the building based on security concerns, and as with the Ministry's argument, I find that this does not apply in relation to the part of Record 1 that is under consideration here. The City also makes brief submissions echoing those of the affected party as noted above, about undue loss to this party. These representations are not detailed and convincing, and as noted, the record itself does not provide evidence to support a finding that disclosure of this information could reasonably be expected to cause an undue loss to this affected party.

Therefore, part 3 of the test is not met. As all three parts must be met for the exemption to apply, I find that the part of Record 1 that I found not to be exempt under sections 14(1)(i) and 15(b) is also not exempt under section 17(1)(c).

EXERCISE OF DISCRETION

The section 14(1)(i) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. The institution must exercise its discretion, however, and on appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner may also 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; or 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)].

I find that in denying access to the record, the Ministry did exercise its discretion under section 14(1)(i) and that it considered relevant factors in doing so. Specifically, I am satisfied by the evidence before me regarding the section 14(1)(i) exemption that the sensitivity of the information and the interest being protected by that section outweigh the factors favouring disclosure. I note that past orders of this office have established that concern for security of facilities where animals are used in research and that might be targeted for violent action by extremist groups is a valid consideration in the decision regarding the release of records relating to the facility [Order PO-2197].

ORDER:

1. I uphold the Ministry's decision to deny access to all of Record 1 except pages 00010 through 0702, inclusive, and to Records 2-6 in their entirety.

2. I order the Ministry to disclose pages 00010 through 0702, inclusive, of Record 1 to the appellant no later than **May 5, 2006** but not earlier than **April 30, 2006**.

3. In order to verify compliance with provision 2, I reserve the right to require the Ministry to provide me with a copy of the disclosed portion of Record 1.

Original Signed By: March 31, 2006
John Higgins
Senior Adjudicator