



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2593

Appeal PA-060083-1

Ministry of Municipal Affairs and Housing



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BACKGROUND:

In 2002, the *Building Code Act, 1992 (BCA)* and the Building Code regulation (O. Reg. 403/97) were amended to create new qualification requirements for building practitioners and officials in Ontario. Having been designated responsible for the administration of the new requirements, the Ministry of Municipal Affairs and Housing (the Ministry) developed a new set of examinations consisting of 15 categories of technical examinations and four categories of legal/process examinations. These examinations, known as the Building Code Qualification Examinations, are intended to test the writer's knowledge of the *BCA* and the Ontario Building Code. Under the new requirements, building practitioners were required to obtain a passing grade on the particular examinations relevant to their practice no later than January 1, 2006.

NATURE OF THE APPEAL:

In February 2006, the Ministry received the following request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I would like to see my bubble sheet, the question booklet and the correct answers for the complex building exam written on December 12/05 at 1:00 p.m.

The Ministry identified three responsive records and issued a decision letter to the requester denying access to them in full pursuant to the discretionary exemptions in paragraphs (a), (c), and (h) of section 18(1) (valuable government information).

The requester, now the appellant, appealed the Ministry's decision.

A mediator was appointed by this office to try to resolve the issues between the parties. During mediation, the appellant accepted the Ministry's offer to view the score ("bubble") sheet and the examination at Ministry offices and did so. However, no issues were resolved as a result and this appeal was transferred to the adjudication stage where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry to the Ministry, initially. Having determined that the records may contain the appellant's personal information, I invited the Ministry to submit representations on the possible application of section 49(a) (discretion to refuse requester's own information), together with the other discretionary exemptions in section 18(1). I received representations from the Ministry.

In the course of preparing those representations, the Ministry also issued a revised decision letter to the appellant and released a copy of his score sheet to him. However, the Ministry affirmed its denial of access to the examination and answer key under section 18(1).

Following his consideration of the revised decision letter, the appellant advised this office that he continues to seek access to the two remaining records. Accordingly, I sent a revised Notice of Inquiry to the appellant, along with a copy of the Ministry's non-confidential representations, seeking his representations on the issues.

RECORDS:

At issue are the Exam (Building Code Qualification Examination, Complex Buildings – 2003) (20 pages) and the corresponding Answer Key (2 pages).

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 49(a) of the *Act*, taken with sections 18(1)(a), (c), or (h), may apply to exempt the information at issue in the Exam or the Answer Key, I must decide whether the records contain “personal information” and, if so, to whom it relates. The relevant parts of the definition of that term in section 2(1) of the *Act* in this appeal read:

“personal information” means recorded information about an identifiable individual, including, ...

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual, ...
- (h) the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Representations

The appellant’s representations do not specifically address this issue.

The Ministry’s representations are based on the following description of the records:

[The Exam] is a 20 page document ... which contains instructions and identification of the candidate on page 1, and contains 75 multiple choice questions on pages 2 to 20.

[The Answer Key] is a two page document which contains the correct answers to the questions contained in the [Exam].

The Ministry concedes that the Exam may contain the appellant's personal information as contemplated by paragraphs (b) and (c) of the definition of the term in section 2(1) of the *Act*. In particular, the Ministry notes that "the appellant's name and Building Code Identification Number or BCIN (a numerical identifier of persons generated by the Ministry for use in its administration of Building Code qualifying examinations)," and the score he achieved are all contained in this record.

The Ministry submits that because the Answer Key is a listing of answers which was extracted from the examination program database, it has no connection to the appellant, and does not contain his personal information.

Findings

Having reviewed the records, I agree with the Ministry that the Exam contains the appellant's personal information in the form of his name, his BCIN, and his score. In particular, I find that this information in the Exam satisfies the definition of personal information in paragraphs (b) and (c) of section 2(1) of the *Act*. I also find that the appellant's handwritten notations and calculations contained on several of the pages of the Exam also constitute his personal information. Finally, I note that the presence of the appellant's name, together with other personal information belonging to him, points to the application of paragraph (h) of the definition. Accordingly, I find that the Exam contains the appellant's personal information as contemplated by paragraph (h) of the definition in section 2(1).

As for the Answer Key, I accept the Ministry's submission that this record is not associated with the appellant, except insofar as it reflects the correct answers to the questions contained in the version of the examination administered to him in December 2005. The "answers" it contains are simply alphabetical: that is, a listing of the letter of the alphabet – "a" through "d" – which correlates to the correct multiple choice option for each question. I find the Answer Key does not contain information that satisfies any part of the definition of personal information contained in section 2(1) of the *Act*.

In view of the above findings, my review and analysis of the Ministry's access decision regarding the Exam will take place under section 49(a), taken together with the cited exemptions from section 18(1), while my review of the decision regarding the Answer Key falls solely under section 18(1).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/VALUABLE GOVERNMENT INFORMATION

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Section 49(a) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, **18**, 19, 20 or 22 would apply to the disclosure of that personal information.

In this case, the Ministry is relying on section 49(a), in conjunction with several of the paragraphs of section 18(1), to deny access to the Exam.

I will consider whether the records qualify for exemption under section 18 as a preliminary step in determining if section 49(a) applies.

VALUABLE GOVERNMENT INFORMATION

The Ministry submits that both records are exempt from disclosure under the discretionary exemptions in section 18(1)(a), (c), and (h) of the *Act*, which read:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value; ...
- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution; ...
- (h) questions that are to be used in an examination or test for an educational purpose;

Amendments to section 18(1)(h)

It must be noted that amendments to the wording of section 18(1)(h) under the *Budget Measures Act, 2005* (Schedule F) came into effect on June 10, 2006. Pursuant to these amendments, section 18(1)(h) now refers to the head's discretion to disclose a record containing "information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques."

However, for the purposes of this order, it is the former wording of section 18(1)(h), set out above, that must be considered since that is the language used in the *Act* at the time the appellant submitted his request to the Ministry in February 2006.

General Principles

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

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

For sections 18(1)(b), (c), (d), or (g) [and (h) with its new wording] 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.)].

I will begin my analysis with section 18(1)(h), which includes a discussion of the issue of severance under section 10(2).

Section 18(1)(h) – Examination Questions and Answers

In order for me to uphold the Ministry's claim of the exemption in section 18(1)(h) (as it stood at the time of the appellant's request), the Ministry must establish that the questions in the Exam "are to be used in an examination or test" and that their use is "for an educational purpose" (Orders P-1107, P-1284, PO-2179, and PO-2366-I).

Representations

In Appendix C, the Ministry describes the three phases of development of the examinations, including the Complex Buildings version written by the appellant. The Ministry states that during Phase 1, the syllabus was developed through a consultative process in which Ministry staff and building practitioners identified and "prioritized *BCA* and Building Code subjects based on their difficulty, importance and frequency. The resultant syllabi were validated by Ministry technical staff and were then published on the Ministry website." In Phase 2, feedback received with regard to the published syllabi was then given to external consultants who collaborated with Ministry staff to develop pools of assessment questions and pilot tests for the practitioner examinations. These pilot versions of each of the examinations then went through peer analysis using groups of Ministry staff, technical experts and building officials to validate and revise the

examinations. Finally, in Phase 3, two rounds of field tests of the examinations were carried out in the Winter of 2002, and the Spring 2003, “consisting of over 30 sessions in 20 municipalities ... involving over 700 plans reviewers, inspectors and designers. The results of these pilots were used to ensure the efficacy and integrity of the assessment questions and administration methodology.”

The Ministry provided very detailed representations on the application of section 18(1)(h) of the *Act* to the records. It should be noted that the Ministry’s representations are based on the current wording of section 18(1)(h), notwithstanding the fact that the Notice of Inquiry sent to the Ministry sought representations based on the wording in effect at the time of the appellant’s request.

Questions “are to be used in an examination or test”

The Ministry states that the Exam contains both the questions and answers to one of the Ministry’s Building Code Qualification Examinations and that this constitutes “information” for the purposes of section 18(1)(h). The Ministry also submits that the questions and answers in the Exam are “information relating to [a] specific ... test or testing procedure” within the meaning of section 18(1)(h) because they form part of the question bank for the Ministry’s examination program for the Complex Buildings examination.

In addressing the part of the section 18(1)(h) test relating to the requirement that the questions “are to be used”, the Ministry asserts that the examination used in this particular instance is considered current and will be administered to future candidates who write the Complex Buildings examination. The Ministry states that it:

... has a policy of re-using Building Code qualification examinations until such time as new examinations are prepared, and has a policy of re-using questions from its questions banks when preparing new examinations.

This policy is a necessary consequence of the fact that a large number of examinations must be administered on an ongoing basis at regular intervals.... [and was adopted] ... to manage the potential for delay between opportunities to write examinations and the potential for increased costs (some of which would be passed on to examination writers in the form of higher fees) that would result from the development of new examinations.

The Ministry provided information about the volume and frequency of all of the Building Code Qualification Examinations, including the number of examinations administered overall. It submitted that nearly 35,000 individuals took the tests between November 2003 and the end of 2006 at 19 Ministry locations plus several others in northern Ontario. The Ministry submits that the examination at issue in this appeal – the Complex Buildings examination - was administered approximately 2646 times between February 2004 and the end of 2006.

The Ministry also provided considerable detail provided about the resources – financial and administrative - expended on the creation of the Building Code Qualification Examinations. For example, the Ministry submits that it is not reasonable or practical for the Ministry to create new Building Code Qualification Examinations for each sitting because this would require a large expenditure of funds and would, in turn, necessarily and significantly restrict the number of opportunities for people to write the examinations. Although this information is presented in argument regarding the reasonableness of the expectation of “prejudice [to] the use or results of the tests or testing procedures” regarding the new wording of the exemption, it is offered as well as justification for the Ministry’s policy on the re-use of examination questions.

In addition, the Ministry notes that there is overlap in the subject areas of various categories of examinations and that some questions appear in the question banks for more than one category, including the Complex Buildings examination at issue in this appeal. The Ministry submits:

Each examination consists of 75 multiple choice questions (the On-site Sewage Systems – Inspector and Supervisor examinations have 60 and 50, respectively). Each examination may have several editions which present the pool questions in various orders. As well, each edition may have several versions which present the answers to each of the questions in different order.

The Ministry acknowledges that there may come a time when the examination is replaced, but states that questions from the old version will be retained for future use because “there are a finite number of questions in the question banks, and the existing question banks ... would quickly be exhausted if the questions could not be re-used”. The Ministry adds:

The re-use of questions in accordance with this policy would satisfy the “to be used” requirement of s. 18(1)(h) as interpreted in previous IPC Orders which have determined that not every question on the examination need necessarily be used in a future examination (Orders PO-2366-I, 2386-F, and 2387), and that it is not necessary that the questions be used within a short time frame as long as they will be used within a reasonable period of time in accordance with a policy of the institution (Order PO-2413).

The appellant was provided with a copy of the non-confidential representations of the Ministry and provided the following representations in response:

The Ministry has put forward an argument that a person is denied access to the answers to the exam because ... [the Ministry] could not use those questions again in a future exam and therefore would have to develop more questions which costs more money. It is based on the assumption that a person viewing the exam answers will remember them. I believe a person with a good memory would not remember verbatim any more than a handful of the 75 questions. Since there is a pool of 1,000 questions, the odds that those 5 or 10 questions the examinee remembers would happen to be on the next exam he or she writes is very small.

The remainder of the appellant's representations are directed at other concerns unrelated to the exemptions claimed by the Ministry.

The Ministry's representations regarding the Answer Key are also based on the revised wording of section 18(1)(h). Taking this approach, the Ministry submits that the correct answers listed in the Answer Key are "information relating to a specific test", namely the Complex Buildings examination, for the purposes of section 18(1)(h) as they relate to questions which are part of the question bank for the Ministry's Building Code Qualification Examination program.

Use is "for an educational purpose"

As regards the issue of whether the questions are to be used for an educational purpose, the Ministry states the following:

The purpose of the Building Code Qualification Examinations is to assess "knowledge of the [BCA] and [Building Code]" possessed by building practitioners. As noted above, the Ministry offers a number of training courses and self-study guides in the BCA and Building Code in connection with the Building Code Qualification Examinations. It is accordingly submitted that the ... [Exam] is to be used "for an educational purpose", for the purposes of s. 18(1)(h).

... [The] purpose of the Ministry's Building Code Qualifying Examinations is similar to other tests which have been found to be for an education purpose by the IPC: examinations for breathalyser technicians which result in designation as a "qualified technician" as defined in s. 254(1) of the *Criminal Code* (Order P-1107), and examinations in connection with mandatory qualifications for life insurance agents (Order PO-2061).

The Ministry provided a series of appendices with its written representations which contain additional information about the statutory framework for the Building Code Qualification examinations, the development of the qualification examinations, and information about refresher courses offered by the Ministry, which is available to the general public on its website (<http://www.obc.mah.gov.on.ca/>).

The Ministry's submissions on the educational purpose of the Answer Key refer back to the reasoning provided with regard to the use of the Exam, seemingly relying upon the assertion that the answers are inextricably linked to the examination.

Severance

As a component of its representations on the claim of exemption under section 18(1)(h), the Ministry also provided representations on severance, noting that the applicable standard is one of reasonableness. Relying on Order PO-2366-I, among others, the Ministry takes the position that

it would not be reasonable to apply the principle of severance to the Exam as “virtually the entire record would be subject to severance” under section 18(1)(h). The Ministry does not provide specific representations on severing portions of the Answer Key.

Findings

Having carefully considered the representations provided by the parties and the records at issue in this appeal, I find that the exemption in section 18(1)(h) applies to the Exam, but that it does not apply to the Answer Key, subject to one small consideration referable to severance.

Based on the Ministry’s extensive submissions regarding the Building Code Qualification Examination program, of which the Complex Buildings exam is one of many, I accept the Ministry’s contention that the Exam will be used again in the same, or a substantially similar, form. More specifically, I am satisfied that questions on the Exam will be re-used in accordance with the Ministry’s policy of re-use of questions. Accordingly, I am satisfied that the questions contained in it “are to be used” in an examination or test as that term is contemplated by section 18(1)(h) of the *Act*.

In considering whether or not the second requirement of section 18(1)(h) that the questions in the record are to be used “for an educational purpose” was met in the circumstances of this appeal, I turned to the reasoning of Adjudicator Donald Hale in Order PO-2179. In that appeal, Adjudicator Hale reviewed the decision of the Education Quality and Accountability Office to deny access to a component of the Ontario Secondary School Literacy Test under section 18(1)(h). With regard to the term at issue, Adjudicator Hale had the following to say:

... I have no difficulty in making a finding that the questions which form the record at issue are to be used in an examination or test "for an educational purpose" within the meaning of section 18(1)(h). The mandate of the EQAO described in section 3 of the Education Quality and Accountability Office Act includes an evaluation of the quality and effectiveness of elementary and secondary education. Part of that mandate, which clearly has an educational purpose, includes the development, administration and marking of testing materials completed by elementary and secondary students. The test which forms the subject matter of the request was created as part of that educational mandate.

In determining the “educational purpose” requirement, Adjudicator Hale took into consideration the mandate of the body that created the records and the chosen means of carrying out that mandate. I agree with this approach and adopt it for the purposes of the appeal before me.

As previously noted, the Ministry of Municipal Affairs and Housing is the Ministry responsible for the oversight of the mandatory examination program for individuals seeking the provincial designation as a building practitioner. Successful completion of the relevant Building Code Qualification Examinations requires knowledge of the technical and legal aspects of building practice, as contained in the *Building Code Act, 1992* and the Building Code. As indicated by the

Ministry, individuals may prepare for these mandatory examinations by participating in educational courses, either in the classroom or by self-study.

Having considered the information provided to me regarding the various components of the Ministry's Building Code Qualification Examination program, I am satisfied that the program itself serves to promote an educational purpose. Furthermore, I am satisfied that the Exam at issue in this appeal, as a necessary extension of the Building Code Qualification Examination program, serves an "educational purpose" as the instrument by which an applicant's knowledge is measured.

I also accept the Ministry's submission that the examination program at issue here is analogous to the examinations considered by Adjudicator Hale in Order PO-2061. In that order, Adjudicator Hale accepted that the mandatory examinations administered by the Ministry of Finance in connection with the training and qualification of life insurance agents were "for an educational purpose" for the purposes of section 18(1)(h).

I am satisfied that the Exam contains questions that are to be used in an examination for an educational purpose and that it qualifies for exemption under section 18(1)(h) and, consequently, section 49(a).

I will now consider the "answer trees", or the four possible answers provided for each question in the Exam, in conjunction with the principle of severance.

Section 10(2) of the *Act* requires the head to disclose as much of a responsive record as can reasonably be severed without disclosing information that falls under one of the exemptions. Past orders of this office have established some general principles. In Order P-1107, Inquiry Officer Holly Big Canoe reviewed the decision of the Ministry of the Solicitor General and Correctional Services to deny access to the test administered to police officers seeking to become qualified as breathalyzer technicians. As regards the issue of severance of "answer trees" related to questions found to be exempt, Inquiry Officer Big Canoe had this to say:

Having found that the record is one which qualifies for exemption under section 18(1)(h), section 10(2) of the Act requires the Ministry to "disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions" (Lincoln County Board of Education v. Information and Privacy Commissioner/Ontario et al. (5 July 1995), Toronto Doc. 289/93 (Ont. Div. Ct.)). This means that where disclosure of one of the answers found in the record would disclose the question (which I have found to be exempt), the answer could not be disclosed. The only information which can be severed and disclosed to the appellant would be those answers the disclosure of which would not disclose the question.

The key question raised by section 10(2) is one of reasonableness. It is not reasonable to require a head to sever information from a record if the end result is

simply a series of disconnected words or phrases with no coherent meaning or value. A valid section 10(2) severance must provide the requester with information which is responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption (Order 24).

Similarly, in Order PO-2366-I, Adjudicator Frank DeVries found that the disclosure of the short answer options associated with questions could lead to accurate inferences about the nature or content of the related question. In those circumstances, Adjudicator DeVries declined to apply severance.

I agree with the reasoning of Inquiry Officer Big Canoe in Order P-1107 and Adjudicator DeVries in Order PO-2366-I and adopt it for the purposes of this appeal. Accordingly, I find that the exemption in section 18(1)(h) applies to the “answer trees” related to each of the questions in the Exam and that severance is not possible in the circumstances.

As regards the Answer Key, on the other hand, I do not accept the Ministry’s arguments in support of applying section 18(1)(h) to withhold it. On my review of this document, I note that the Answer Key does not contain "questions that are to be used in an examination or test". It contains the correct answers to questions posed in a certain version of the Exam in the form of single letters of the alphabet beside the corresponding question number.

Although the Ministry would have me consider the Answer Key through the looking glass of the revised wording of section 18(1)(h), which refers to the broader category of “information relating to specific tests or testing procedures or techniques ...”, I must consider it in the light of the former wording of the section, which clearly refers to “questions”. Faced with a similar record in Order P-461, former Commissioner Tom Wright stated:

While I can appreciate the position of the College, in my view, it is clear that section 18(1)(h) applies to "questions" only. ... The record at issue does not contain "questions", but rather contains the correct answers to questions. Therefore, I find that the record does not qualify for exemption under section 18(1)(h) of the Act.

I agree with the former Commissioner that the wording of the exemption - as it stood when the appellant made his request - is unequivocal. I find that section 18(1)(h) does not apply to the Answer Key in the circumstances of this appeal.

There is one additional point I must address that relates to the severance of exempt information. Having found that the Exam may be withheld in its entirety, subject to my review of the Ministry’s exercise of discretion, I note that this would include the identification of the version of the examination that was administered to the appellant. As this version identification also appears at the top of page one of the Answer Key, I find that it may be severed from that record pursuant to section 18(1)(h).

Although I have found that the Exam qualifies for exemption under section 18(1)(h), and consequently, section 49(a) of the *Act*, this does not settle the matter. In view of the fact that both of these exemptions are discretionary, I must still review the Ministry's exercise of discretion in choosing to apply those exemptions to the Exam in the circumstances of this appeal.

However, I will first consider the Ministry's other exemption claims under sections 18(1)(a) and (c) in relation to the Answer Key.

Section 18(1)(a) – Information that belongs to government

The Ministry claims that the exemption in section 18(1)(a) applies to the Answer Key. For section 18(1)(a) to apply, the Ministry must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information
2. belongs to the Government of Ontario or an institution, and
3. has monetary value or potential monetary value.

Representations

In submissions related to the first part of test, the Ministry contends that the Answer Key contains "technical information", as that term has been defined in previous orders of this office.

Technical information has been described as:

... information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

In seeking to establish the information in the Answer Key as technical information for the purposes of section 18(1)(a) of the *Act*, the Ministry submits that

The [Answer Key is] an integral part of the Complex Buildings examination, which contains information about Building Code requirements relating to the construction of buildings. This is information that falls within the general category of applied sciences such as architecture or engineering and describes the construction of a thing (a building). It is accordingly submitted that the [Answer Key] contain[s] "technical information" for the purposes of s. 18(1)(a) (Order P-662, PO-2010).

The appellant did not provide representations specific to this issue.

Findings

Based on the first part of the test, I find that the Answer Key does not qualify for exemption under section 18(1)(a).

My findings with respect to whether the Answer Key contains the appellant's personal information provide useful context for my findings on this issue. Previously in this order, I found that the Answer Key,

... is not associated with the appellant, except insofar as it reflects the correct answers to the questions contained in the version of the examination administered to him in December 2005. The "answers" it contains are simply alphabetical: that is, a listing of the letter of the alphabet – "a" through "d" – which correlates to the correct multiple choice option for each question.

Section 18(1)(a) is claimed separately in relation to both of the records at issue. However, having found that the Exam may be withheld by the Ministry under section 49(a), taken with section 18(1)(h), the nature of the Answer Key as a stand-alone record bears further emphasis. In particular, I reject the Ministry's contention that the Answer Key is "an integral part of the Complex Buildings examination, which contains information about Building Code requirements relating to the construction of buildings". In my view, it cannot reasonably be said that the single letters which signify the answers to the questions in the Exam relate to the *construction* of any thing. The Answer Key does not, in and of itself, contain or convey information. It must be viewed in conjunction with the Exam to have any meaning at all.

On this basis, I find that the Answer Key does not contain "information" for the purposes of Part 1 of the test for exemption under section 18(1)(a). Accordingly, the Ministry's claim fails and it is not necessary for me to consider the remaining parts of the test for this exemption.

Section 18(1)(c) – Prejudice to economic interests of government

The Ministry also claims that the Answer Key qualifies for exemption under 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

The Ministry submits that

If the Ministry disclosed the [Answer Key] then, for the reasons described above in respect of the application of s. 18(1)(h) to the [Exam], the Ministry could not use the examination to which the answers relate or any of the questions contained in that examination. As the Ministry must continue to offer the Complex Buildings examination, the Ministry would be required to expend funds to develop a new Complex Buildings examination. It is accordingly submitted that the economic position of the Ministry would be prejudiced for the purposes of s. 18(1)(c) by having to expend funds on the new Complex Buildings examination to replace the examination that was disclosed.

The appellant's representations address only incidentally the potential costs incurred by the Ministry in the event access is granted to the Exam and do not address the Answer Key at all. The crux of the appellant's argument appears to be that the risk of the outcome forecast by the Ministry is too remote to be given effect.

Findings

Section 18(1)(c) requires that it be shown that there is a *reasonable* expectation of prejudice to the Ministry's economic interests or competitive position with disclosure of the record. However, given my finding that the Exam qualifies for exemption under section 49(a) in conjunction with section 18(1)(h), the Ministry's arguments about potential prejudice with disclosure of the Answer Key - as a stand-alone record - are cast into the realm of speculation where, as the appellant suggests, the risk of harm contemplated by section 18(1)(c) is too remote.

In my view, the potential disclosure of the listing of correct answers to the Exam written by the appellant contained in the Answer Key cannot give rise to a reasonable expectation of prejudice to the Ministry's economic interests or competitive position. Furthermore, the suggestion of any prejudice to government interests is further diminished by my finding that the version identification may be severed from the Answer Key pursuant to section 18(1)(h). In the circumstances, I find that the exemption in section 18(1)(c) of the *Act* does not apply to the Answer Key.

EXERCISE OF DISCRETION

Introduction

As previously noted, the section 18(1)(h) and 49(a) exemptions are discretionary, and permit the Ministry to disclose information, despite the fact that it could be withheld. On appeal to this office, the Ministry's decision to deny access to information under a discretionary exemption may be reviewed by an adjudicator to determine if the Ministry exercised its discretion and, if so, whether it erred in doing so.

I may find that the Ministry erred in its exercise of 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

If any of these circumstances are present, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573]. I may not, however, substitute my own discretion for that of the Ministry [see section 54(2) of the *Act*].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public;
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Representations

The Ministry states that in exercising its discretion under section 49(a), it took into account the purposes of the *Act*, the wording of section 18(1)(h) and the interests it seeks to protect, the presence of the appellant's personal information in the record, and the appellant's need to receive the information.

The Ministry submits that the purpose of the exemption in section 18(1)(h) is to permit institutions to deny access to examinations and examination questions that will be administered in the future. Disclosing the Exam, the Ministry argues, would frustrate the purpose of the exemption because it could not be used again, in whole or in part.

The Ministry also argues that exercising its discretion to disclose the Exam at issue in this appeal would have had negative consequences for the entire Building Code Qualification Examination program because it would:

- set a disclosure precedent that would make it necessary to develop new examinations for each sitting which would, in turn;
- necessitate a reduction in the number of sittings due to the increased costs of exam development and;
- result in a dwindling pool of questions and compromised quality and uniformity.

The Ministry submits that although it has not given the appellant a copy of the actual examination he wrote, there is a sample examination on the Ministry's website which contains examples of questions from all categories of the Building Code Qualification Examinations, including the one at issue in this appeal. The Ministry also notes that the website has a section that offers suggestions for writing successful examinations.

Finally, the Ministry states that:

Persons who contact the Ministry to express concerns about their examination scoring can, if a formal request is made, view their examination booklet and bubble sheet (the Appellant in fact accepted this offer and has viewed the [Exam] and his bubble sheet at the Ministry offices). This policy is intended to address concerns by persons that they may have made transcription errors when transferring answers from their examination booklet onto the bubble sheet. In accordance with the Ministry's security policy, however, the person is supervised when viewing the examination booklet and may not take any notes or remove material from the viewing room. While the person is not provided with the correct answers to their test, they have an opportunity to ask questions about the examination and seek guidance about strategies for passing the test.

The Ministry also stated that it is currently reviewing the practice of requiring that requests by test-takers to review their examinations be made under the *Act*.

The appellant did not provide representations that specifically address the Ministry's exercise of discretion.

Findings

I have carefully reviewed the representations provided to me by the parties in this appeal. I have also considered the broader circumstances of the appeal in order to assist me in making a determination about the exercise of discretion by the Ministry.

Based on the details provided in the Ministry's representations, I am satisfied that it appropriately exercised its discretion under section 49(a) of the *Act* in choosing not to disclose the Exam to the appellant. I am also satisfied that the Ministry considered relevant factors in exercising its discretion. In particular, I accept that the Ministry has taken steps to provide feedback to candidates, such as the appellant, who have not been successful in writing a Building Code Qualification Examination. Specifically, I accept that the Ministry's practice is to permit candidates to view their examination booklet and score sheet, and to follow up with Ministry staff about improving their performance on the examination. In my view, the practice described by the Ministry demonstrates an effort on its part to provide a meaningful response to unsuccessful candidates, including review of personal information contained in the examination booklet, without compromising the future use or re-use of examinations and examination questions.

I have also taken into consideration the fact that the Ministry re-exercised its discretion during the adjudication stage of this appeal and disclosed the appellant's score sheet to him.

In the circumstances, I am satisfied that the Ministry exercised its discretion under section 49(a) in deciding not to disclose the Exam, and that it did not err in doing so by taking into account irrelevant considerations or failing to take into account relevant factors. I see no basis upon which to disturb the Ministry's exercise of discretion, and I uphold the Ministry's decision to withhold the Exam pursuant to sections 49(a) and 18(1)(h).

ORDER:

1. I uphold the Ministry's decision to deny access to the Exam.
2. I order the Ministry to disclose the Answer Key to the appellant, with the version identification severed, by sending him a copy of it no later than **July 30, 2007**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the appellant pursuant to provision 2, upon my request.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ June 28, 2007