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

# ORDER PO-2612

## Appeal PA06-246

## Ministry of Transportation

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## NATURE OF THE APPEAL:

The Ministry of Transportation (the Ministry) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual for information relating to his work for the Ministry as a land appraiser. The requester sought access to any records that:

1. Describe complaints made by four property owners about his interaction with them (as well as disclose their names).

2. Describe what the requester refers to as "irregularities" in a letter identified by the appellant.

3. Indicate why the requester's score on an identified CPA (consultant performance appraisal) remained the same as his score on the previous CPA.

4. a) Indicate why a recommendation was made on an identified comments page to "strike his name from the list of approved appraisers" and why no page 4 was attached to the first CPA, when there was a page 4 attached to the second CPA;

   b) Indicate the reasons why he is now limited to appraisals of equal or lesser complexity.

The Ministry identified records responsive to the request and, in its decision letter, responded as follows:

- Relying on the exemption in sections 18(1) (economic and other interests) and 49(b) (personal privacy) with reference to section 21(1) of the *Act*, the Ministry denied access to the records that were responsive to Item 1 of the request.

- The Ministry identified two CPA's as being responsive to Item 2 of the request and granted access to them, in full.

- The Ministry advised that there were no records in existence that were responsive to Item 3 of the request.

- With respect to Items 4(a) and (b) the Ministry identified the two CPA's referred to under Item 2 as the responsive records to that part of the request. As noted above, Ministry granted access to these records. The Ministry advised that the first CPA has a fourth page that was attached when it was provided to the appellant.

The requester (now the appellant) appealed the decision denying access to the records responsive to Item 1 of the request. The appellant also asserted that further records exist that are responsive to Items 2, 3 and 4.

Mediation did not resolve the appeal and the matter moved to the adjudication stage of the appeal process.

I commenced the adjudication phase of the appeal by preparing a Notice of Inquiry setting out the issues and inviting representations from the Ministry and a number of parties whose interests may be affected by disclosure of the records. Representations were received in response to the Notice from the Ministry and three affected parties. The Ministry asked that a portion of its representations not be shared due to confidentiality concerns. The position of the three affected parties' who filed representations was that the information in the negotiation reports was private and confidential. I then sent a Notice of Inquiry, along with the Ministry's non-confidential representations, to the appellant. The appellant filed representations in response to the Notice. The appellant's representations do not squarely address the issues that were set out in the Notice. Instead, for the most part, the appellant's representations contain a series of statements and questions challenging how the Ministry reached a conclusion about his performance rating. In answer to an inquiry from this Office during the adjudication of the appeal, the appellant confirmed that he is only seeking the portion of the records that contains the names of the complainants and the complaint itself. This assisted the adjudication process by even further focusing the inquiry.

## RECORDS:

The records at issue in this appeal consist of four negotiation reports. The portions of the records that are responsive to Item 1 of the request consist of the names of the property owners and certain comments about the appellant that are contained in the negotiation reports.

## DISCUSSION:

### SEARCH FOR RESPONSIVE RECORDS

Section 10(1)(a) of the *Act* states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the record or part of the record falls within one of the exemptions under sections 12 to 22.

Section 2(1) of the *Act* provides a definition of the word "record". The definition reads, in part:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise ...

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as

required by section 24 of the *Act* [Orders P-85, P-221, PO-1954-I]. Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

The Ministry submits that it "went to considerable lengths to clarify the appellant's request" and explains that:

> On June 9, 2006, the appellant called the Ministry's FOI Office regarding a privacy complaint. In a discussion which lasted 45 minutes, the FOI Manager was advised by the appellant that he also wanted access to comments from the affected parties referenced in the CPAs and an explanation as to why his score remained unchanged in the June CPA. The FOI Manager provided an overview of the *Act* and explained that the *Act* allows for access to government records, but does not oblige the Ministry to answer questions.
>
> On June 30, 2006, the Ministry's FOI Policy Analyst called the appellant to discuss his access request dated June 19, 2006. In a discussion which lasted over 30 minutes, the appellant again expressed the wish to have his questions answered as part of his access request. He was once again reminded that the *Act* provides access to records in the Ministry's custody or control, and was given assistance to reword his request to seek specific records.
>
> By letter dated July 4, 2006, the FOI Manager confirmed with the appellant his discussion with the Policy Analyst and the Ministry's understanding of his clarified request. On July 14, 2006, the appellant called the FOI Manager in response to her July 4, 2006 letter. That day, he faxed suggested re-wording of parts of his request, and confirmed the clarified request with this re-wording. At that point, the Ministry initiated its search for responsive records.

With respect to the results of its search, the Ministry submits that it has identified all the responsive records and that no others exist. In support of this submission, the Ministry included with its representations an affidavit prepared by the staff person who carried out the search. The Ministry advises that this staff person was also directly involved in the review and approval of the December CPA and in the review of the June CPA. The Ministry submits that the affidavit demonstrates that the Ministry searched for any file where the appellant's appraisal services were

retained by the Ministry. I have reviewed the affidavit which describes in detail the search that was undertaken and also explains why no other responsive records exist.

The appellant's representations do not specifically address the adequacy of the Ministry's search for responsive records. Instead, for the most part, the appellant's representations contain a series of statements and questions challenging how the Ministry reached a conclusion about his performance rating.

**Analysis and Findings**

In Order M-493 Senior Adjudicator John Higgins provided some guidance with respect to the extent to which an institution should respond to questions directed to it by a requester, stating:

> In my view, when such a request is received, the [institution] is obliged to consider what records in its possession might, in whole or in part, contain information which would answer the questions asked. Under section [24] of the *Act*, if the request is not sufficiently particular "... to enable an experienced employee of the institution, upon a reasonable effort, to identify the record", then the [institution] may have recourse to the clarification provisions of section [24(2)]."

I agree with Senior Adjudicator Higgins' reasoning and adopt it for the purposes of this appeal.

I am satisfied that the Ministry's submissions demonstrate that it made a reasonable effort to assist the appellant in clarifying his request. Furthermore, the Ministry's affidavit provides a thorough explanation of the efforts it made to identify and locate records that are responsive to the appellant's request. The affidavit also explains why no other responsive records exist. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist. In my view, the appellant has not provided a reasonable basis for concluding that other responsive records exist. Accordingly, I am satisfied that the Ministry's response to the appellant's request as well as its search for responsive records is in compliance with its obligations under the *Act*.

Therefore, I find that the Ministry has conducted a reasonable search for records as required by section 24 of the *Act*.

**VALUABLE GOVERNMENT INFORMATION**

The Ministry claims that the discretionary exemptions in sections 18(1)(c) and (d) apply to the comments about the appellant's conduct that may have found their way into the negotiation reports.

Sections 18(1)(c) and (d) of the *Act* state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

Broadly speaking, section 18 is designed 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.

Sections 18(1)(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For sections 18(1)(c) or (d) 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 [See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464, (C.A.)].

*The Representations of the Ministry*

The Ministry submits that the negotiation reports are kept confidential because it wants to be able to receive full and frank information from property owners about appraisers it retains. The Ministry submits that disclosing such evaluative information could lead to the "drying up" of the sources of this information. The Ministry submits that if any such comments are disclosed, the Ministry could not guarantee to members of the public that information it receives about its appraisers, and which it intends to use for evaluative purposes (such as those contemplated in the discretionary exemption at section 49(c) of the *Act*), could be withheld from those contractors. This, the Ministry submits, could reasonably be expected to make it more difficult for it to obtain frank assessments of its appraisers, to evaluate the effectiveness of its operations and to plan for the future.

The appellant makes no specific representations with respect to the application of the discretionary exemptions at sections 18(1)(c) and/or (d) of the *Act*.

***Section 18(1)(c)***

I find that the Ministry has failed to provide me with sufficiently detailed evidence to establish that disclosure of the comments about the appellant that may have found their way into the negotiation reports could reasonably be expected to result in the harm contemplated by the section 18(1)(c) exemption. The Ministry acknowledges that the CPA's are the only documents used by the Ministry in rating its appraisers and consultants. The information the appellant seeks relates to comments about him that may have found their way into the negotiation reports, not the CPA's. I am not satisfied that there is sufficient evidence before me to support the Ministry's contention that without the comments that may have found their way into the negotiation reports, it would not otherwise be able to conduct an evaluation of its appraisers. As a result, I find that the evidence and submissions tendered by the Ministry in support of its argument that any such comments are exempt under section 18(1)(c) are speculative at best. I conclude that the generalized statements made by the Ministry in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario* (*Workers' Compensation Board*), cited above.

Accordingly, I find that any comments about the appellant that may have found their way into the negotiation reports do not qualify for exemption under section 18(1)(c).

***Section 18(1)(d)***

The harm addressed by section 18(1)(d) is similar, but broader, than that under section 18(1)(c), as this exemption is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

Again, the Ministry's representations are not persuasive. I find that the Ministry has failed to provide the appropriate evidentiary foundation to establish a reasonable expectation of harm to the "financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario". These are serious concerns warranting careful consideration, which are simply not established by the assertions made by the Ministry which I have found above to be speculative at best. Again, the generalized statements made by the Ministry in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)*, cited above.

Accordingly, I find that any comments about the appellant that may have found their way into the negotiation reports do not qualify for exemption under section 18(1)(d).

**PERSONAL INFORMATION**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (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,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (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.

To qualify as "personal information", it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe,* [2002] O.J. No. 4300 (C.A.)].

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225, PO-2435].

The records at issue describe certain aspects of the negotiations relating to the purchase of properties owned by the affected parties. They were prepared by an individual other than the appellant, but they contain references to him.

The Ministry submits that the responsive portions of the negotiation reports convey opinions about the appellant, the names of the affected parties, information about their emotions and state of mind, comments made by the affected parties to Ministry officials, information about their interaction with the appellant, and information about incidents that occurred to the affected parties in connection with the appellant. The Ministry submits that this information reflects more than opinions about the manner in which the appellant discharged his professional responsibilities, and is the personal information of the affected parties themselves. The Ministry refers to Orders MO-1290 and PO-1926 in support of its position. The appellant makes no specific representations on this issue.

Although the comments relate to the appellant's actions while working as an appraiser, because of their content, I find they reveal something of a personal nature about him. In my view, the responsive portions of the negotiation reports contain information about the appellant that meets the definition of "personal information" in paragraphs (g) (the views or opinions of another individual about the individual) and (h) (the appellant's name along with other personal information relating to him). In addition, they also contain the personal information of the affected parties because they include information relating to financial transactions in which they have been involved (paragraph (b)), or their names, along with other personal information about them (paragraph (h)).

**PERSONAL PRIVACY**

If a record contains the personal information of the requester along with the personal information of another individual, section 49(b) of the *Act* applies.

Section 49(b) of the *Act* reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

Accordingly, under section 49(b) where a record contains personal information of both the appellant and other identifiable individuals, and disclosure of that information would "constitute

an "unjustified invasion" of another individual's personal privacy, the Ministry may refuse to disclose that information to the appellant.

That does not end the matter however. Despite this finding, the Ministry may exercise its discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

Under section 49(b), the factors and presumptions in sections 21(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 21(4) of the *Act*, or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

**The Presumptions in Section 21(3)**

The negotiation reports generally focus on aspects of the negotiations relating to the purchase of properties owned by the affected parties. Some of the comments made about the appellant that are found in the records also contain discussion of certain aspects of the negotiations. Although the Ministry did not raise the application of any of the presumptions in section 21(3) to the comments about the appellant in the records, that section lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. I will, therefore, consider whether the presumption in section 21(3)(f) applies to the responsive portion of the negotiation reports that also contain discussion of certain aspects of the negotiations.

Section 21(3)(f) of the *Act* provides that:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

In Order PO-1847 adjudicator Kathy Laird found that information relating to negotiations between the Ministry of Transportation and vendors (the affected parties in that appeal) for the possible acquisition of their property would fall within the presumption in section 21(3)(f). In my view, the same considerations apply in the circumstances before me. I find that the comments about the appellant in the negotiation reports also contains some information that describes the financial activities of the affected persons which falls within the presumption contained in section 21(3)(f). Section 21(4) does not apply to this information. Accordingly, I conclude that disclosure of the information in the responsive portion of the negotiation reports that describe those aspects of the negotiations relating to the purchase of properties owned by the affected parties, is presumed to constitute an unjustified invasion of their personal privacy. Subject to my discussion on the exercise of discretion and severance below, this information is, therefore, exempt under section 49(b) of the *Act*.

In my view, the comments about the conduct of the appellant that have found their way into the negotiation reports (that do not contain information on aspects of the negotiations relating to the purchase of properties owned by the affected parties) do not fall within any of the section 21(3) presumptions.

**The Factors in Section 21(2)**

As set out above, if a section 21(3) presumption does not apply, section 21(2) of the *Act* provides some criteria for the Ministry to consider in making a determination whether the "unjustified invasion of personal privacy" threshold is met.

The representations of the Ministry and the appellant raise the possible application of the factors listed in sections 21(2)(d), (f) and (h) of the *Act*, with respect to the names of the affected parties and their comments about the conduct of the appellant that have found their way into the negotiation reports (that do not contain information on aspects of the negotiations relating to the purchase of properties owned by the affected parties).

Those parts of section 21(2) of the *Act* provide that:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive; and
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence.

***Section 21(2)(d)***

The appellant's submissions discuss various concerns about the conduct of the Ministry in evaluating his performance and expressly states that he "wants to be able to defend" himself. I interpret this as a submission that the personal information is relevant to a fair determination of his rights, a circumstance listed in section 21(2)(d).

The Ministry submits that there is no proceeding that would engage the application of this section.

*Analysis and Finding*

Former Assistant Commissioner Tom Mitchinson stated the test for the application of section 21(2)(d) in Order P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)]:

> In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:
>
> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The appellant suggests that he needs the information remaining at issue because "he wants to be able to defend" himself. However, the appellant has not provided me with any information respecting an existing or contemplated proceeding to which the information at issue may be relevant. As a result, I find that section 21(2)(d) does not apply.

***Section 21(2)(f)***

The Ministry submits that interactions of the appellant with the Ministry and the affected parties, and the "likely impact" of any disclosure on them, point to a conclusion that the remaining

information at issue in this appeal is "highly sensitive" within the meaning of s. 21(2)(f) of the *Act*. The Ministry asserts that the comments at issue in the records, "lend support" to its position that the affected parties in this appeal could be subjected to pressure if this information is disclosed to the appellant.

The Ministry explains that:

> The appellant has been extremely persistent and assertive in pursuing the issue of his performance rating by the Ministry. He has communicated on numerous occasions by telephone, e-mail and letter with various Ministry officials and has escalated his complaints over what he considers to be the unfair rating of his performance as an appraiser to the Assistant Deputy Minister - Provincial Highways Management. The appellant's direct approach to the Assistant Deputy Minister was made despite the fact that he had also appealed his CPAs to the Qualification Committee, which is the established appeal mechanism for individuals and firms in the appellant's position.
>
> Many of his communications to the Ministry contain strong and emotional language over the perceived injustices he has suffered at the hands of the Ministry. He has referred to the comments made by the affected parties as "allegations" to which he has a right to respond, and has asserted that without such a right, he has been "charged, convicted and executed without recourse". Further, at one point, he had indicated to the Ministry that he intended to confront the affected parties once he has been given the information at issue in this appeal. All this despite the fact that he has been provided with the CPAs, which are the only documents used by the Ministry in rating its appraisers and consultants.
>
> The appellant has also pursued a privacy complaint against the Ministry, claiming that it has breached his confidentiality and damaged his professional reputation, a claim adamantly denied by the Ministry.
>
> It should be recalled that the ultimate source of the appellant's complaint with the Ministry is the fact that the two CPAs were not as favourable to the appellant as he believed they should have been. It should also be recalled that the Ministry made available to the appellant its evaluations of his work and then accepted his appeal against the December CPA by removing the comments page and revising the recommendations to improve his eligibility for future assignments. Yet despite the somewhat routine issue that is the basis of this dispute, and the Ministry's attempt to accommodate the appellant's concerns in respect of the December CPA, the appellant has pursued the dispute to an unreasonable extent and caused the Ministry to divert considerable resources to responding to his complaints.
>
> In the context described above, the Ministry would be alarmed at the prospect of having to disclose the personal information of the affected parties to the appellant,

> given the emotional and sustained manner in which he has pursued his issue with the Ministry. The Ministry is concerned that the affected parties not be exposed to the risk of being approached or subjected to pressure by the appellant over a matter that is strictly between him and the Ministry.

The Ministry refers to Orders PO-1681, PO-1834 and PO-2339 in support of its position with respect to section 21(2)(f) of the *Act*.

The appellant states that he has the telephone numbers of each property owner, but does not intend to contact or otherwise harass them.

*Analysis and Finding*

In Order PO-2518 Senior Adjudicator John Higgins revisited the issue of what evidence is required to fall within the ambit of section 21(2)(f). He wrote:

> Throughout the Ministry's representations, it argues that the information at issue is highly sensitive. Previous orders have stated that, in order for personal information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause "excessive" personal distress to the subject individual [Orders M- 1053, PO-1681, PO-1736]. In my view, this interpretation is difficult to apply and a reasonable expectation of "significant" personal distress is a more appropriate threshold in assessing whether information qualifies as "highly sensitive."

I have concluded that, considering all the circumstances, releasing the remaining information at issue would cause the affected parties "significant personal distress". As a result, I accept that section 21(2)(f) is a relevant factor weighing strongly in favour of the protection of privacy of the affected parties.

As I have found that there are no factors that favour disclosure, I need not consider whether section 21(2)(h) also applies. Accordingly, I conclude that disclosure of the comments about the conduct of the appellant that have found their way into the negotiation reports (that do not contain information on aspects of the negotiations relating to the purchase of properties owned by the affected parties) and the names of the affected parties would constitute an unjustified invasion of their personal privacy. Section 21(4) does not apply to this information. As a result, subject to my discussion on the exercise of discretion and severance below, this information is exempt from disclosure under section 49(b).

## SEVERANCES

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. However, no useful purpose would be served by the severance of records where exempt information is so intertwined with non-exempt information that what is disclosed is substantially unintelligible. The key question

raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. A head will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)]. Most of the comments about the conduct of the appellant in the negotiation reports are phrased in such a way that disclosing them would lead to disclosure of the affected parties' personal information, including their identity, which I have found to be exempt. However, it is possible to sever some of the personal information of the appellant without disclosing the information that I have found to be exempt. I have highlighted those particular portions on the copies of the records that I have enclosed with this order.

In so doing, however, the appellant will only receive a portion of the information that is responsive to Item 1 of his request.

**EXERCISE OF DISCRETION**

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 49(b) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the information that I have found to be exempt. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

I may find that the Ministry erred in exercising their discretion where, for example:

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations

In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

The Ministry submits that its representations also reflect the factors it considered in exercising its discretion to deny access to the negotiation reports.

In the circumstances of this appeal, I conclude that the exercise of discretion by the Ministry to withhold the information in the responsive portion of the negotiation reports that I have not found to be exempt was appropriate, given the circumstances and nature of the information.

## ORDER:

1. I find that the Ministry's search for responsive records is reasonable.

2. I order the Ministry to disclose to the appellant the portions of the negotiation reports that are highlighted on the copies provided to the Ministry with this order by sending them to the appellant by **October 26, 2007** but no earlier than **October 19, 2007**.

3. I uphold the Ministry's decision to deny access to the unhighlighted parts of the responsive portions of the negotiation reports.

4. In order to verify compliance with provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the records as disclosed to the appellant.

Original signed by: September 20, 2007
Steven Faughnan
Adjudicator