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

ORDER PO-2681

Appeal PA08-49-2

Ontario Heritage Trust

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NATURE OF THE APPEAL:

The Ontario Heritage Trust (the Trust) received a request under the *Freedom of Information and Protection of Privacy Act* (*Act*) for "… records relating to the Lister Block, a heritage property in downtown Hamilton." In the interest of processing the request expeditiously, the requester subsequently narrowed his request to:

> ...[A]ny report or reports provided by the Ontario Heritage Trust to the Minister of Culture in relation to the Lister Block."

When he narrowed the request, the requester expressed the further view that this would likely reduce the responsive documentation to a single record.

Pursuant to section 28 of the *Act*, the Trust sought and received the representations of the Ministry of Culture (the Ministry) as an affected party. After considering those representations, the Trust issued a decision letter denying access to the records pursuant to the discretionary exemption in section 13(1) of the *Act*. The decision stated in part:

> Subsection 13(1) applies to this record because it contains advice and recommendations provided by the Ontario Heritage Trust to the Minister of Culture in accordance with responsibilities under the *Ontario Heritage Act* [*OHA*].

The requester, now the appellant, appealed the decision.

In his appeal notice, the appellant indicates that the property is subject to a demolition order. As a consequence, the appellant asked to have the appeal streamed directly to adjudication, rather than being streamed to mediation. Consequently, the matter was assigned to me for adjudication, which takes the form of an inquiry under the *Act*.

I began the inquiry by sending a Notice of Inquiry to both the Trust and the Ministry, both of whom provided representations in response. I then sent a Notice of Inquiry to the appellant, enclosing the complete representations of the Trust and the Ministry, and invited the appellant to provide representations. In the circumstances, I decided to invite the appellant's representations on the possible application of the public interest override at section 23 of the *Act*. The appellant provided representations, including detailed submissions regarding the application of the public interest override.

I then sent the appellant's complete representations to the Trust and the Ministry and invited their reply representations, including on the issue of the public interest override at section 23. Both the Trust and the Ministry provided reply representations.

RECORDS:

In response to the narrowed request for a report or reports from the Trust regarding the Lister Block property, the Trust indentified a three-page report entitled "Lister Block: Discussion Paper". Attached to the Report are a "Statement of Cultural Heritage Value or Interest" and an "Assessment Process Summary". I will consider these to be one record. The Discussion Paper

makes reference to the attached "Statement of Cultural Heritage Value or Interest" as containing the research underlying the discussion paper, and the "Assessment Process Summary" summarizes the research process. I will refer to this record and its attachments, collectively, as the "discussion paper."

The Trust also provided a cover letter to the report, dated June 7, 2006, but took the position that it is not responsive to the narrowed request. However, recognizing that I might view the record as responsive, the Trust also provided representations as to why it would be exempt under section 13(1). I will refer to this document as "the cover letter."

With respect to whether the cover letter is a responsive record, it is helpful to note that the narrowed request was for "any report *or reports* provided by the Ontario Heritage Trust to the Minister of Culture in relation to the Lister Block" (emphasis added). As the Trust notes in its representations, the word "report", which also appears in section 13(2)(k) of the *Act*, has been defined as "a formal statement or account of the results of the collation and consideration of information" (Order PO-1709). As discussed in more detail below, it is clear that the cover letter meets this definition, as it sets out determinations of the Trust's Board of Directors concerning the property that were arrived at after consideration of the research in the discussion paper. Accordingly, I find that, in addition to the discussion paper, the cover letter is a responsive record, and its disclosure is therefore at issue in this appeal.

The Trust and the Ministry maintain that both the discussion paper and the cover letter are exempt from the application of the *Act* by virtue of being "advice or recommendations" within the meaning of section 13(1) of the *Act*. The appellant submits that the exception to section 13(1) found in section 13(2)(k) applies to the records, and if not, that the public interest override at section 23 applies, and disclosure is required for that reason.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

Section 13(1)

Section 13(1) of the *Act* states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the nature of the information contained in the records must either relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process or permit the drawing of accurate inferences as to the nature of the actual

advice or recommendations given (See Orders PO-2028 and PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563).

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

The Trust is established by section 5 of the *Ontario Heritage Act* (*OHA*). Its objects are set out in section 7, and include the following:

> (a) to advise and make recommendations to the Minister [of Culture] on any matter relating to the conservation, protection, and preservation of the heritage of Ontario;

Other objects are enumerated in subsections (b) through (e) of section 7.

Section 9 refers again to the Trusts' advisory role. It states:

> The Trust may advise and make recommendations to the Minister on any matter relating to property of historical, architectural, archaeological, recreational, aesthetic, natural or scenic interest and to advise and assist the Minister in all matters to which this Act refers and in all matters as are assigned to it by or under any Act or regulation thereunder.

Consistent with the objects set out in section 7 of the *OHA*, section 10 extends the Trust's powers beyond being merely an advisory body; among other things it can acquire and dispose of property and enter into a variety of agreements with respect to property.

On April 5, 2006, the Ministry asked the Trust to evaluate the Lister Block property to determine whether it meets the criteria prescribed in Ontario Regulation 10/06 for finding that the property is of "cultural heritage value or interest of provincial significance" in accordance with section 34.5 of the *OHA*. The records were prepared by the Trust and provided to the Ministry in response to the request for an evaluation.

The Trust submits that the records contain express advice or recommendations to the Minister, and that the remaining information would permit accurate inferences to be drawn as to the advice or recommendations given. In particular, the Trust submits that:

- the records contain clear and specific recommendations regarding the designation of the Lister Block pursuant to section 34.5 of the *OHA* and concerning the protection, commemoration, or conservation of cultural heritage in relation to the Lister Block.

- the portions of the records that do not contain express advice or recommendations would allow a reader to draw accurate inferences about the advice or recommendations provided to the Minister.

- the advice and recommendations were provided in the context of a possible designation of a property as being of heritage value or interest of provincial significance, which the Minister may elect to follow or reject during the deliberative process.

- the use of the exemption in section 13(1) in this instance is consistent with its purpose that persons employed in the public service are able to advise and make recommendations freely and frankly, without unfair pressure.

- the advice and recommendations were given by a public servant or any other person employed in the service of an institution or a consultant retained by an institution because the Trust acts in an advisory capacity to the Minister.

The Ministry submits that the records contain advice and recommendations within the meaning of section 13(1) of the *Act*. The Ministry states as follows:

> The Minister of Culture is required to consult with the [Trust] in certain circumstances. . . The Minister relies on the ability of the [Trust] to provide her with frank and impartial advice in connection with the designation of property pursuant to section 34.5(1) [of the *Ontario Heritage Act*]. . .
>
> It is our view that disclosure of the [records] would clearly inhibit the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making and would be contrary to the principles that the section 13 exemption is designed to protect.

The appellant's representations question the Trust's assertion that there would be a chilling effect on the ability of the Trust to provide free and frank, impartial advice should the records be disclosed:

> This bald assertion is put forward without any evidentiary support whatsoever… it is very difficult to believe that [the Chair and other staff of the Trust] would have any difficulty carrying out their roles in a frank and forthright manner if aware that they would not be making their decisions in secrecy.
>
> It can always be argued that governmental bodies would act differently, and perhaps with greater expediency, if unburdened by public scrutiny. Subject to very clear and narrow exceptions, secret decision making by government is repugnant to free and democratic societies and in Ontario is contrary to both the spirit and the letter of [the *Act*].

The Trust has made extensive representations claiming that the exemption for advice or recommendations in section 13(1) of the *Act* applies to exempt both records in their entirety. Upon my review of the records, I find that parts of the records clearly set out a suggested course of action, and thereby qualify as "advice or recommendations", and that other portions would allow the drawing of accurate inferences about the nature of the recommended course of action. I am also satisfied that the authors of both records, who are employees of the Trust, clearly qualify as "public servants" for the purposes of section 13(1).

Accordingly, subject to the consideration of the exceptions to the exemption found at section 13(2), and particularly the exception at section 13(2)(k) raised by the appellant, I find that these portions of the records meet the requirements for exemption under section 13(1) of the *Act*.

The remainder of the records consists of explanatory or background information that neither consists of advice or recommendations, nor permits the drawing of accurate inferences as to the recommended course of action. These portions of the records are not exempt under section 13(1).

Section 13(2)

Section 13(2) sets out a list of exceptions to the exemption provided by section 13(1). If the information falls into one of these categories, it cannot be withheld under section 13 (Order P-726). In the circumstances of this case, the appellant argues that section 13(2)(k) applies to the records. This section states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

An examination of this exception reveals that it has three essential requirements:

(1) the record must be a "report" of a "committee, council or other body";
(2) the committee, council or other body must be "attached to" an institution;
(3) the committee, council or other body mush have been established "for the purpose of undertaking inquiries and making reports or recommendations to the institution."

Requirement 1

In relation to the question of whether the records are "reports", previous orders of this office have defined this word as follows:

> The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact. [Orders 200, M-265, P-363, upheld on judicial review in Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner), Toronto Doc. 721/92 (Ont. Div. Ct.)]

As noted previously, this definition has also been applied in the context of section 13(2)(k) (Orders PO-1709 and PO-1823).

Adjudicator Sherry Liang made comments on the nature of "reports" for the purpose of section 14(2)(a) of the *Act* in Order PO-1988:

> In sum, although it is generally accepted that occurrence reports or inspection reports are generated out of law enforcement activities, it has been found that they do not have the quality of formality of analysis required to qualify as "reports" for the purpose of section 14(2)(a) or its municipal equivalent. I find that the area inspection reports before me are similar in nature to the records under consideration in the above orders. Their purpose is to describe, rather than to evaluate and their contents consist essentially of observations and facts rather than evaluations of those observations and facts. The fact that there are some comments in some of the reports which might be considered evaluative does not detract from their essential nature.

The Trust argues that, based on Order PO-1988, "reports" require a quality of formality of analysis and the contents cannot consist essentially of observations and facts, rather than evaluations of those observations and facts. In my view, this argument is addressed in the definition I am applying (set out above), which requires that reports be a "formal" statement or account.

I have concluded that the discussion paper clearly qualifies as a "report". It contains a formal statement of the results of the collation and consideration of information the Trust received from

its detailed assessment of the property. This included analyzing and collating the responses to 50 questions in 20 tests, answered by a multi-disciplinary committee of heritage experts.

I have reached the same conclusion concerning the cover letter. Although it is a distinct record from the report, it summarizes and sets out the report's findings and recommendations, and adds further recommendations. It is clear from the contents of this record that it is the Trust's response to the Minister's request for an evaluation, and forms an integral part of the Trust's reporting back to the Minister on its findings. It is addressed to the Minister and clearly represents a formal statement of the results of the collation and consideration of information. Its purpose is not "to describe, rather than to evaluate", and its contents do not "consist essentially of observations and facts rather than evaluations of those observations and facts", as discussed in Order PO-1988. I am satisfied that the cover letter is a "report" for the purposes of section 13(2)(k).

Neither the Trust nor the Ministry argues that the Trust would not qualify as an "other body". Being a corporation without share capital established by the *Ontario Heritage Act*, which is also designated as an institution under the *Act* in Regulation 460, it clearly qualifies as an "other body". I find that requirement 1 is met.

Requirement 2

The Trust submits that it is a corporation without share capital pursuant to section 5(1) of the *OHA* and operates as a Crown agent pursuant to section 11(1) of the *OHA*. This could be construed as an argument that it is not "attached" to the Ministry.

In Order PO-1709, Senior Adjudicator David Goodis addressed the meaning of the word "attached" for the purposes of section 13(2)(k) of the *Act* in Order PO-1709:

> The word "attached" is defined as follows:
>
> > A term describing the physical union of two otherwise independent structures or objects, or the relation between two parts of a single structure, each having its own function ... [emphasis added]
> >
> > Black's Law Dictionary, 6th ed. (St. Paul: West, 1990), p. 125
>
> In my view, the above definition indicates that two entities may be "attached" or joined in a "union", while still remaining "otherwise independent". Had the Legislature intended that section 13(2)(k) exclude bodies with some degree of independence, it could have used language to suggest this, such as referring to the body as a "department", "branch" or "part" of the institution (see, for example, section 2(3) of the Act's municipal counterpart).

Senior Adjudicator Goodis went on to find that HPRAC, an advisory body to the Ministry of Health (as it was then called), was "attached" to the Ministry despite having some degree of independence. He considered a variety of factors that tended to show attachment, and weighed them against factors indicating independence. These same conclusions were reiterated in Order PO-1823. I agree with this approach and will apply it here.

I acknowledge that the Trust was created as a corporation without share capital and operates as an agent of the Crown pursuant to section 11(1) of the *OHA*. Even though the Trust possesses a level of independence, I have concluded, for the reasons that follow, that the Trust is "attached" to the Ministry for the purposes of subsection 13(2)(k).

In this regard, I note that the first object of the Trust, enumerated in section 7(a) of the *OHA*, is "to advise and make recommendations to the Minister on any matter relating to the conservation, protection and preservation of the heritage of Ontario". In addition, and significantly, section 9 of the *OHA* provides further details concerning the manner in which this object is to be achieved. It states:

> The Trust may advise and make recommendations to the Minister on any matter relating to property of historical, architectural, archaeological, recreational, aesthetic, natural or scenic interest and to *advise and assist the Minister in all matters to which this Act refers and in all matters as are assigned to it by or under any Act or regulation thereunder*. [Emphasis added.]

It is also noteworthy that the *OHA*, which continues the Trust as a corporation without share capital, is administered by the Ministry (section 2).

As well, the further powers of the Trust, enumerated at section 10(1) and (2), must be exercised in accordance with the policies and priorities determined by the Minister. Moreover, those further powers may be exercised by the Minister herself if, in the Minister's opinion, it is necessary to ensure carrying out the intent and purpose of the *OHA* (section 10(3)).

Further, I note that the Minister is designated as the "head" of the trust for the purposes of the *Act* in Regulation 460.

While the Trust can receive funding from a variety of sources, some funding may come from the Ministry in the forms of grants under section 17. Also, before the Trust can secure a guarantee on a loan from the Lieutenant Governor in Council, the Minister must recommend the Trust (section 18). Therefore, while the Trust can direct its funds as it sees fit, some funding is controlled by the Ministry. Directors of the Trust are appointed by the Lieutenant Governor in Council; however the creation of by-laws to establish officers must be approved by the Minister.

Finally, the Trust's affairs must be set out in an annual report provided directly to the Minister, and the Trust is also required to make any other reports the Minister requires (section 21).

Similar to the findings in Order PO-1709, where a number of the same factors tending to show "attachment" were cited, I find that the Trust, while it may maintain some degree of independence, is "attached" to the Ministry for the purpose of section 13(2)(k) of the Act. As also stipulated under requirement 2, it is clear that the Ministry is an institution under the *Act*. For all these reasons, I find that requirement 2 is met.

Requirement 3

On the question of whether the Trust was established for the purpose of undertaking inquiries and making reports or recommendations to the Ministry, the Trust submits that:

- The statutory objects of the Trust include an advisory object, but there are also other objects related to heritage matters; and

- The Trust has a wide range of powers and duties under sections 9 and 10 of the OHA.

In particular, the Trust submits that it cannot be characterized as being established for the limited purpose set out in section 13(2)(k). As stated above, the Trust has an advisory object as well as other objects related to heritage matters. The Trust submits that it is not an entity that was intended to be caught by this provision, and that it would be an overly broad reading to include the Trust as coming within its scope.

The Trust also refers to Orders PO-1709 and PO-1823, in which materials provided by HPRAC to the Minister of Health were found to attract the application of section 13(2)(k). The Trust seeks to distinguish HPRAC's mandate from its own, arguing that HPRAC has an advisory duty only and its legislated mandate is demonstrably narrower than that of the Trust.

On this point, the appellant makes the following representations:

> Section 13(2)(k) refers to an advisory body "established for the purpose of undertaking inquiries (etc.)"; it does not say "established for the sole purpose of undertaking inquiries (etc.)". It is clear from the [*OHA*] that the purpose of the Trust is to advise the Minister of Culture. . . I am aware of no authority to the effect that an advisory body which also carries out other functions is no longer an advisory body, and such an approach would obviously be grossly at odds with the intention of the relevant provisions of the *Act*. [Emphases in original.]

I disagree with the Trust's contention that only bodies that have been established with a narrow "advisory" role were intended to be caught by section 13(2)(k) of the *Act*. Nothing in the language of that section narrows its scope to entities that have been established for the "sole" purpose of advising an institution. To narrow the scope of the exception in such a manner is contrary to the one of the principles of the *Act*, that "necessary exemptions from the right of access should be limited and specific." Clearly, section 13(2)(k) is intended to ensure that

section 13(1) is, in fact, a "limited and specific" exemption. In this case, section 9 of the *OHA* is entirely devoted to the advisory function of the Trust. That section 10 sets out further powers does not derogate from the conclusion that the Trust was "established for the purpose of undertaking inquiries and making reports or recommendations to an institution."

While this was not argued in the present appeal, I note that the *OHA* contemplates recommendations to the "Minister" of Culture, while section 13(2)(k) refers to recommendations to "an institution" (in this case, the Ministry). The question of whether this distinction is significant in the context of section 13(2)(k) was canvassed in both Orders PO-1709 and PO-1823. In Order PO-1709, Senior Adjudicator Goodis stated:

> The Ministry submits that section 13(2)(k) does not apply because the Advisory Council provides advice to the Minister, as opposed to the Ministry. In my view, this is a distinction without substance. While section 13(2)(k) refers to reports or recommendations "to an institution", I do not accept that this would not encompass a report or recommendation to the Minister, the individual who presides over and has charge of the institution and all its functions. … Moreover, the Act describes the Minister as the "head" of the Ministry …, which supports the position that the Minister and the Ministry are not distinguishable for this purpose. In my view, the Ministry's interpretation would lead to an absurd result where, for example, a report was made to a Deputy Minister or other senior Ministry official and thus held not exempt under section 13(1), while a report of a similar nature would be exempt under section 13(1), simply by virtue of it being made to the Minister.

I agree with this view, and it is equally applicable here, given that the Minister of Culture is the "head" of the Ministry under the *Act* (see the definition of "head" in section 2(1)).

Accordingly, I have concluded that all of the required elements for the exception at section 13(2)(k) have been established. I therefore find that the records are not exempt under section 13(1).

The appellant contends that even if section 13(1) had been found to apply, section 23 would have applied to the records as their disclosure would be in the public interest. Although it is not necessary for me to consider the applicability of section 23 given my findings under section 13, I will examine its applicability for the sake of completeness.

PUBLIC INTEREST OVERRIDE

Section 23 of the Act states:

> An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

If section 23 applies, it would have the effect of overriding the application of section 13, and the appellant would have a right of access to the records.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

In order for the section 23 public interest override to apply, two requirements must be met: there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption (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.), leave to appeal refused [1999] S.C.C.A. No. 134.

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested.

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

The appellant submitted detailed representations on the public interest in the Lister Block property. The appellant's representations state:

> The fate of this building and the plans for its ultimate use, along with the plans for neighbouring properties, have been dominant political issues in Hamilton for years and are the subject of daily news coverage in all of Hamilton's mainstream print and other media. The debate is passionate, and often heated; I note that on Wednesday [April 23rd] evening there was a protest at the regular City Council meeting in which scores of protestors disrupted the proceedings. The handling of this matter by Mayor Eisenberger, senior City of Hamilton management, and Minister of Culture Carroll is being harshly criticized, and is the subject of print editorial comment, talk-show interviews, and other forms of public discourse.
>
> There is a clear relationship between the report of the Ontario Heritage Trust and the central purpose of the [*Act*] of shedding light on the operations of government. The people in Hamilton, and indeed the people of Ontario, need to be able to

> determine whether Minister Carroll has followed the advice of the [Trust] in the handling of the Lister Block affair….

The appellant also makes submissions that refer to the Balfour Building, which is not addressed in the records but, according to the appellant, forms part of the part of the Lister Block complex. The Balfour building partially collapsed in mid-April, heightening the perceived urgency around the fate of the Lister Block structure:

> Shortly thereafter, it was reported that City officials had agreed to the demolition of the [Balfour] building. Heritage advocates, including Dr. Grant Head, sought intervention by Minister of Culture M. Aileen Carroll in the form of a temporary stop-work order, to explore options for the as-yet-undamaged façade of the structure. On Friday, April 18, Minister Carroll advised by letter that she would not issue a stop-work order, on the basis that the owner of the building had "*agreed that during the demolition, the stone elements of the façade [would] be hand removed as safely as possible and reserved for future reuse*."
>
> Less than 24 hours later, on Saturday, April 19, 2008, the [Balfour] building was demolished in its entirety (i.e. including the façade, without the stone elements having been removed) by use of an excavator. I do not believe that Minister Carroll has issued a statement with respect to this turn of events.

The representations of the Trust and the Ministry address, in similar fashion, whether there is a compelling public interest that outweighs the purpose of the section 13(1) exemption. The Trust and the Ministry contend that a compelling public interest does not exist where a significant amount of information has been disclosed which is adequate to address the public interest (Orders P-532, P-568 and P-61), or where another forum has been established to address public concerns (Orders P-123, P-124, P-391, and M-539).

To substantiate the claim that information that would satisfy the public interest is publicly available, the Ministry and the Trust point to the formation of a community-based working group in 2006, created at the request of the former Minister of Culture, chaired by the Provincial Development Facilitator and composed of various Hamilton stakeholders, including members of the municipality, business groups, heritage groups, and the owner of the Lister Block. This group produced a publicly available report that discusses the positions of these groups and the conclusions they have reached. A further publicly available Heritage Report by Julian Smith & Associates and the City of Hamilton's "Lister Rehabilitation Proposal" are also cited, which the Trust and the Ministry allege would satisfy any public interest in disclosure.

The Trust further submits that:

> [T]he records at issue do not shed light on the operations of government or the other matters the appellant claims would be addressed by disclosure of the records at issue. The information in the records would not "serve the purpose of

> informing citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices": (P-984).

In submissions that relate to whether any established public interest would outweigh the purpose of the exemption, and/or whether there is a public interest in non-disclosure, both the Trust and the Ministry argue that reports of the nature of the records at issue are required to be confidential to provide frank and impartial advice in connection with the designation of properties. In addition, they argue that without confidentiality, the free-flow of advice and recommendations would be inhibited. The Trust submits that it would "be required to be more circumspect and possibly less candid in its assessments without the benefit of confidentiality."

With respect to the Trust's argument that disclosure of the report would result in the Trust being more circumspect and possibly less candid in its assessments, the appellant states:

> This bald assertion is put forward without any evidentiary support whatsoever… it is very difficult to believe that either [the Chair of the Trust], or his esteemed colleagues at the [Trust], would have any difficulty carrying out their roles in a frank and forthright manner if aware that they would not be making their decisions in secrecy. . .
>
> . . . Subject to very clear and narrow exceptions, secret decision making by government is repugnant to free and democratic societies and in Ontario is contrary to both the spirit and letter of our [*Act*].

I have carefully considered all of these submissions, and have reviewed the records. For the reasons that follow, I find that there is a compelling public interest in the disclosure of both the cover letter and the discussion paper that would clearly outweigh the purpose of the section 13(1) exemption if it applied. I am also not satisfied that there is a compelling public interest in non-disclosure.

To emphasize the public interest in heritage properties, I refer to the following statement from the Ontario Heritage Trust website:

> Heritage resources cannot be replaced. They are priceless gifts to our own and future generations.
>
> Ontario's heritage is everything we have inherited that we value and wish to preserve for future generations. It is a living legacy that helps us understand our past, provides context for the present and influences our future.

In my view, there is a compelling public interest in the fate of the Lister Block property. The importance of heritage buildings, as acknowledged by the Ministry, is unquestionably a matter of public interest. The debate over Lister Block is well documented in print and electronic media,

and I accept that it has been the subject of spirited discussions at city council meetings, one of which was disrupted by protestors. In this context, I find the public interest in disclosure of the records, which speaks directly to the preservation of the Lister Block, to be "compelling".

As well, I am not persuaded that the publicly available material satisfies the public interest in disclosure of the particular records at issue in this appeal. The materials referred to by the Trust and the Ministry do not indicate what recommendations were made by the Trust in relation to this matter of vital public interest. The Trust and the Ministry cite no publicly available material that would reveal that important information. I have reached the same conclusion about the community-based working group chaired by the Provincial Development Facilitator. Its public records also fail to provide any substantial disclosure of the recommendations that were made by the Trust.

It is significant that the Minister is in a position of higher authority with the ability to intervene in this matter, by virtue of her powers under the *OHA* to designate buildings as heritage properties and to issue stop-work orders to prevent alteration or damage to properties (sections 34.5 and 35.2 of the *OHA*). In my view, the recommendations to the Minister contained in the records would serve the purpose of informing the public about the activities of the government and inform the public for the purpose of expressing their opinions. This information, and other parts of the records that would permit accurate inferences to be drawn about it, is the information that would have been exempt under section 13(1), but for section 13(2)(k) (as outlined above). For the foregoing reasons, I find that there is a compelling public interest in its disclosure.

I am also persuaded that this compelling interest in disclosure outweighs the purpose of the section 13(1) exemption in the circumstances of this appeal. As noted previously, the purpose of this exemption is "to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making" (Order 94), or put slightly differently, to ensure that "persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure" [Orders 24, P-1363 and PO-1690].

I am not satisfied that the Trust has demonstrated that these purposes would, in fact, be frustrated by disclosure of the records at issue. Part of the Trust's statutory mandate is to advise the Minister on matters such as historical properties. Given that statutory mandate, I agree with the appellant that advice would continue to flow in a frank and forthright manner in order to honour the statutory objects of the Trust. I am also not satisfied that any "pressure" generated by disclosure could be construed as "unfair" in view of the fact that this is a political issue, on which vigorous positions have already been taken. For these same reasons, I am also not satisfied that any compelling interest in non-disclosure exists.

For all these reasons, I find that section 23 would apply to override the section 13(1) exemption, if I had found it to apply. Given the demolition of the Balfour building and the urgency surrounding this appeal, I am ordering disclosure of the records on an expedited basis.

ORDER:

1. I order the Trust to disclose the cover letter and the discussion paper, including all its attachments, by **June 13, 2008**, but not before **June 11, 2008**.

2. In order to verify compliance with order provision 1, I reserve the right to require the Trust to provide me with a copy of the records disclosed to the appellant.

June 5, 2008

John Higgins
Senior Adjudicator