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

ORDER PO-2860

Appeal PA06-306

Ministry of Government Services

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Government Services (the Ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

> For each Land Registry Office or Land Titles Office in Ontario, access to the related fee, receiving or day book. The fee, receiving or day book records appear in various forms depending on the Land Registry or Land Titles Office. For example, they may comprise all or part of the records referred to as the Daily Book, Fees, and Receiving ["DBFR"] record, the POLARIS Daily Registration Summary and the Daily Cash Balance report.
>
> The purpose of the request is to allow [the requester] to identify real estate transactions of interest to its subscribers that occurred within the week. [The subscribers] are persons with an interest in real property transactions in Ontario.
>
> The records generally provide the following information on real estate transactions: the PIN (property identification number), instrument number, date of registration of the instrument, land registration fee collected, land transfer tax fee collected and, in some cases, the consideration paid.
>
> The foregoing request is intended, pursuant to section 24(3) of [the *Act*], to be repeated and to have effect for each successive calendar week for a period of two years from the date of this request.
>
> [The requester] further requests access to any instrument identified through the above request, and on payment of the applicable fee, a copy of any such instrument requested by [the requester], for the unrestricted use of [the requester] and its subscribers. [The requester's] subscribers being persons having an interest in the ownership, encumbrances, and other interests affecting the land involved in such transactions.

The Ministry issued a decision letter denying access to the records requested on the basis that, pursuant to 29(l)(a) of the *Act*, access could not be provided because the requested records do not exist. The Ministry indicated that the records did not fall within the definition of "record" as defined in section 2(l) of the *Act*, and section 2 of Regulation 460 to the *Act*.

The requester (now appellant) appealed the Ministry's decision.

Mediation did not resolve the issues, and this file was transferred to the inquiry stage of the process. A Notice of Inquiry identifying the facts and issues in this appeal was sent to the Ministry and an affected party (Teranet). The issues identified in the Notice of Inquiry included the issue of whether the requested information was a "record" for the purpose of section 2(1) of the *Act*, whether section 37 (application of Part III of the *Act*) applied in the circumstances, and whether section 63(2) (pre-existing access) applied.

The Ministry and Teranet provided representations on the issues, and the Notice of Inquiry, along with the representations of the Ministry and Teranet, were sent to the appellant. The

appellant provided representations, and those representations were shared with the Ministry and Teranet, who were given the opportunity to provide reply representations.

At this point in the adjudication process, the parties agreed to engage in further mediation. The Ministry, Teranet, and the appellant attended a mediation session before this office, following which the Ministry and the appellant entered into discussions with a view to clarifying the scope of the request. The appellant then submitted a revised access request for the following records:

a) POLARIS Daily Registration Summary Report
b) DBFR Fee and Receiving Sheet
c) Copies of selected instruments identified in the above reports.

The appellant also sought continuing access to the requested information on a weekly basis for a period of two years. The appellant indicated that the Ministry would be advised which specific instruments it would like to obtain copies of following a review of the weekly reports.

The appellant and the Ministry agreed that copies of 200-400 selected instruments would be requested each week, in addition to the reports.

The Ministry denied access to the records pursuant to the following exemptions in the *Act*:

- for the POLARIS report and the DBFR Fee and Receiving Sheet - sections 17 (third party information) and 18 (economic and other interests)
- for the selected instruments - sections 21 (personal privacy) and 22 (information published or available)

The Ministry also indicated that in the event it was required to produce the records, the cost of production (for the two reports and 200-400 instruments per week) would exceed $25. The Ministry provided the appellant with the following fee estimate:

a) Production of the two reports would cost $1071.50/week
b) Production of 200-400 instruments would cost between $240 to $480 per week.

As a result of the further mediation and clarification, the Ministry and Teranet agreed that they would no longer be taking the position that the requested items are not "record[s]" as defined in the *Act*. The Ministry also revised its position regarding the application of section 37 of the *Act*, and clarified that this section was not applicable in the circumstances of this appeal. The appellant, however, took the position that this section of the *Act* remained at issue.

Following the further mediation, the parties prepared an "Agreed Statement of Facts & Issues," which was submitted to this office by the Ministry on behalf of all three parties. As part of that agreed statement, the parties identified the records remaining at issue as follows:

The appellant seeks access to two reports - the POLARIS Daily Registration Summary and DBFR Fee and Receiving Sheet, and a selection of instruments identified by the reports.

The POLARIS Daily Registration Summary is generated daily and provides a list of instruments registered at each Land Registry office. This report includes the following information:

- PIN (property identification number)
- instrument number
- consideration amount
- date of registration of the instrument
- instrument type

The DBFR Fee and Receiving Sheet is produced daily in the manual registry system and provides a list of instruments registered at each Land Registry office. This report includes the following information:

- geographics
- instrument number
- date of registration of the instrument
- land registration fee
- land transfer tax
- consideration amount
- instrument type

Furthermore, the "Agreed Statement of Facts & Issues" identified the issues remaining in dispute as follows:

- the application of section 63(2);
- the application of sections 17 and 18 to the reports;
- the application of sections 21 and 22 to the instruments:
- the application of the "public interest override" in section 23.

The agreed statement of facts and issues also confirmed the appellant's position that the application of section 37 remained an issue.

As mediation did not resolve the issues, this appeal was returned to the adjudication stage of the appeal process.

The adjudicator previously assigned to this file decided to conduct a new inquiry, and a revised Notice of Inquiry, identifying the facts and issues in this appeal, and including a copy of the "Agreed Statement of Facts & Issues," was sent to the Ministry and Teranet, initially. Both the Ministry and Teranet provided representations in response.

This file was subsequently transferred to me to complete the inquiry process.

I then sent the Notice of Inquiry, along with a copy of the complete representations of the Ministry (including attachments) and the complete representations of Teranet (excluding one attachment), to the appellant. The appellant also provided representations in response.

RECORDS

The appellant seeks access to the following records:

a) two reports - the POLARIS Daily Registration Summary (POLARIS Report) and DBFR Fee and Receiving Sheet (DBFR Report), and;
b) a selection of instruments identified by the reports.

BACKGROUND:

In order to address the issues raised in this appeal, and give them context, it is helpful to review the background information about the land registration system in Ontario, and the relationships of the parties to one another. In addition, it is also helpful to identify the positions taken by the parties regarding whether or not the records were available to the public in the past. This information is set out below.

Background information about the land registration system in Ontario, and the relationships of the parties to one another

The Ministry of Government Services (referred to in this order as "the Ministry") is the Ministry of the Crown responsible for the establishment, operation, and maintenance of the land registration system in Ontario.

Teranet Inc. (Teranet) was incorporated under the laws of Ontario on May 28, 1991. Teranet is under contract to the Crown to provide land registration services including, without limitation, converting records in the registry system to the land titles system, and automating and operating an electronic land registration system (ELRS) on behalf of the Crown.

The appellant is a company that was incorporated under the laws of Ontario in 1996. The appellant carries on business collecting and publishing data on commercial real estate transactions with consideration of $500,000 or more.

This appeal relates to requests for information contained in the land registration system in Ontario. Both the Ministry and the appellant have provided significant background information regarding access to the information, which is set out in the representations of those parties.

The Ministry has provided the following review of the historical evolution of the land registration system in Ontario:

The Crown has maintained two land registration systems in the province which record registered documents and instruments that create or affect ownership rights in land, namely, the registry system and the land titles system.

The Registry System

The *Registry Act*, originally enacted in 1795, governs the registry system. This system, originally established in England, provides a means of registering and storing land ownership documents in a public office. The registry system records documents evidencing title interests on a register called the abstract index. Registry abstract books were originally indexed by farm or township lot. Whenever a Crown patent was issued, the registrar would open a new page in a township abstract or index book and enter notice of the patent and the person receiving the patent at the top of the township lot page. As land was subdivided or severed, the number of owners recorded on a particular abstract index multiplied.

Documents affecting an interest in land, after the original patent, were recorded in chronological order by registration date. Requirements in the registry system regarding the documents that can be filed are less rigorous (as compared with those in the land titles system) with the result that the documents registered can be quite diverse, thus increasing the complexity of title searches.

The registry system does not provide a statement of ownership or a government guarantee of title. The registry system merely provides notice of interests in land. In effect, the registry system is simply a register or inventory of documents. The Land Registry Office (LRO) is responsible for maintaining the property record in an accurate manner, i.e. by recording each document on the appropriate record. Beyond this, the LRO makes only a limited assessment concerning the document or the property record. If the document affects an interest in land it is, generally speaking, registerable. It is the responsibility of each person reviewing that record to make a legal analysis of the effect of each document shown within approximately the last 40 years on the ownership record in order to assess the marketability of title for a purchaser or mortgagee. The title search may require searching through numerous documents that may not be relevant, depending on the extent to which a particular lot has been severed and sub-divided.

As a result of this need to search and analyze past title registrations, the land registry system is considered the less efficient and modern of the two land registration systems in Ontario.

The Land Titles System

In 1885, the *Land Titles Act* introduced the land titles system in Ontario. Land patented after 1885 was generally entered in land titles offices whenever land titles was available. As a result, areas that were settled later, specifically most of the northern districts, are primarily under the land titles system. Since 1973, all new subdivision and condominium developments have been required by law to be either registered in or transferred into the land titles system whenever a land titles office existed in the region of the new development. Land titles is now available throughout the province.

Land titles is a form of "Torrens" or government guaranteed land registration system. In a Torrens system, the titles register mirrors all currently active registrable interests that affect a particular parcel of land. The land titles system creates an up-to-date title register and provides a government guarantee of ownership, with limited exceptions as specified in the legislation. Past registered instruments, which are no longer effective, are either ruled out or deleted from the current property register. Subject to the exceptions set out in the *Land Titles Act*, a title searcher need only complete a search of current registrations listed on the present government guaranteed title register. In addition, unlike in the registry system, there is no need in land titles to search through multiple owners.

The *Land Titles Act* and regulations strictly regulate the form and number of all instruments or documents acceptable for registration. Each time a document is submitted to the LRO, an analysis occurs to ensure that the document complies with the requirements of the *Land Titles Act* and other relevant legislation such as the *Land Registration Reform Act* and the *Condominium Act*. As a result, the documents registered on the ownership record in the land titles system are fewer, current and more uniform than those documents in the registry system. Unlike the registry system, the title register is a register of title, guaranteed by the provincial government and supported by the Land Titles Assurance Fund. The land titles system is generally viewed as a more modern and efficient system of land registration.

The Ministry also provides the following information relating to the reform of the system:

Since the 1950s, there has been unprecedented growth in land transactions which has put a strain on the land registration system. In the 1980s, the Law Reform Commission completed a review of Ontario's land registration system. The Commission described two primary inefficiencies in the system: (1) the system was a paper intensive system that would benefit from automation, and (2) the system consisted of two legal systems of registration instead of one. The Commission recommended the conversion of all registry system lands into land

titles, the automation of all land ownership records and the creation of province-wide, coordinate-based computer-generated, digital, property maps.

As part of a reform initiative, since the 1970s, Ontario has been involved in a massive land registration reform initiative referred to as POLARIS (Province of Ontario Land Registration Information System). The goals of this land registration reform initiative include:

- *Increased efficiencies* - A single legal system streamlines workflows in the LROs and reduces the number of regional variations in record keeping.
- *Decreased cost and time to review the ownership record* - A search of the ownership record in the registry system is time-consuming and costly, as compared with the land titles system.
- *Certainty of ownership* - For many of the people in Ontario, the land they own is their primary asset. In the land titles system, the owner of land is clearly stated on the ownership record. The government, through the operation of the *Land Titles Act*, confirms that the person shown on the ownership record is the owner of that land. The land titles system thus creates a certainty of ownership and a level of ease in determining ownership that does not exist in the registry system.
- *Improved commercial arrangements* - The ability to assert ownership of land is a fundamental underpinning of many financing arrangements…. Certainty of land ownership decreases the risks and costs associated with commercial land transactions.

The Ministry identifies the Crown's relationship with Teranet as follows:

In order to accelerate the POLARIS conversion and to create an Ontario-based company with global information system expertise, in the late 1980s, the province began seeking a private sector partner to assist in the continued implementation of the POLARIS. In 1991, after a competitive bidding process, the Ontario Government selected Real/Data Ontario Inc. (subsequently Teramira) as a joint venture between the public and private sectors. Following this selection, Teranet was incorporated and the Crown and Teramira each owned 50% interests as shareholders in Teranet. The Crown divested its interest in Teranet in 2003.

Teranet then assumed certain responsibilities from the Crown for the implementation and operation of POLARIS, including the automation of the overall land registration system through the development of ELRS and the conversion of records and related documents registered within the registry system to the land titles system. In exchange, land registration data relating to automated properties has been exclusively licensed by the province to Teranet, subject to certain restrictions. It is this exclusive license that contributes to the

> consideration for the extensive and costly services being provided by Teranet to the people of Ontario.
>
> As a result of Teranet's involvement, the Crown's land registration reform initiative has consistently moved forward.
>
> There are presently 54 Land Registry Offices (LROs) throughout Ontario, with at least one for each upper tier municipality and territorial district. There are over 5.5 million parcels of land in Ontario. In 2007 - 2008, there were approximately 2.1 million registrations in Ontario.
>
> It is anticipated that, by 2011, 100 per cent of the province's land records will be automated and in the land titles system. These records will be available for search and registration remotely by clients across the province. As of June 1, 2008, electronic registration is available in 51 jurisdictions across the province, including major hubs such as Toronto, Ottawa and London. Approximately 93% of all registrations are now completed electronically and more than nine million documents have been registered electronically since 1999. But for the contractual arrangements between the Crown and Teranet, including Teranet's exclusive license, in all likelihood, this progress would not have been possible.

The Ministry also summarizes the Crown's contractual relationship with Teranet as follows:

> In accordance with the governing land registration statutes, data filed in the land registration system is the property of the Crown. In conjunction with and in order to finance its efforts to automate and modernize the land registration system, the Crown granted an exclusive licence over automated land registration data to Teranet. As the exclusive licence holder, Teranet has the exclusive right to copy the data, modify any such copy, make value added products from the data and sub-licence the data to third parties.
>
> There are, however, restrictions on the exclusive licence granted to Teranet. The Crown has long recognized the potential privacy concerns, which could arise with the use of electronic data, particularly the bulking of such data. Ann Cavoukian, in her capacity as Information and Privacy Commissioner for Ontario, released an annual report noting that the capacity to bulk and search large databases of electronic data should be of concern for keepers of the data.
>
> In light of these concerns, the Crown and Teranet agreements contain an obligation on Teranet to submit to the Ministry a "Privacy Screen" to ensure that any bulking of data (i.e. the aggregation or linking of land registration data from more than one single record) respects the privacy of Ontarians.

Members of the public making use of electronic land registration data are, in turn, subject to certain restrictions intended to protect the privacy of individuals. Any member of the public, like the appellant, wishing to gain access to automated land registration data must do so through Teranet's proprietary software application, also known as "Teraview". In order to use Teranet's software for electronic searches and data retrieval, the appellant, together with all other users of the system, must indicate its acceptance of Teranet's end use restrictions. Although the language may vary somewhat depending on where the End Use Restrictions appear, the terms are substantially similar. An example is reproduced, in part, below:

> Unless otherwise stated herein, no material retrieved from Databases may be copied, extracted, reproduced, republished, uploaded, posted, transmitted, framed, commercially exploited or distributed in any way or by any means whatsoever, except that a single copy of such materials may be printed for personal, non-commercial use only, provided all copyright and other proprietary notices are maintained ....

As an exclusive licensee of the Crown's land registration data, Teranet is entitled to impose the End Use Restrictions on its automated data. It may also use the data to create "Value Added Products" (VAPs) that use the data for purposes other than land registration services offered under statute. Teranet may enter into separate agreements with certain of its customers, which would allow exemptions from the End Use Restrictions. Before this occurs, however, the Ministry will review the proposed VAP against the Privacy Screen to determine whether, in the Crown's view, the privacy rights of the public are adequately protected, and to ensure that the VAP is consistent with the Crown's obligations under [the *Act*]. If the privacy rights of the public are not adequately protected, the Crown will not approve the VAP.

In addition to the foregoing privacy safeguards, the Crown has developed a Privacy Guideline. On or about April 1, 2003, the Director of Land Registration, appointed under the land registration statutes … issued a guideline in accordance with the authority granted to him under section 29 (j) of the *Land Registration Reform Act*, entitled "Policy Regarding Third Party Use of Land Registry Office Records" to, in part, protect privacy rights arising in the context of both paper and electronic land registration records (the "Privacy Guideline"). The Privacy Guideline, which is intended to ensure that all users of land registration data use the data in a manner that respects the privacy of individuals, states that users who access land registration data through Teranet's software must do so "under the terms and conditions of the user's licence with Teranet". The Privacy Guideline also provides, in part, as follows:

> Access to electronic records in LROs is to be provided through public terminals, and is to be permitted for single records only.
>
> Public terminals in LROs are not to be used for collection and aggregation of electronic data for resale or improper use.

The Ministry then reviews the Crown's obligations under the land registration statutes, and states:

> Under both the registry systems and the land titles system, the Crown is obliged to permit members of the public an opportunity to inspect (during office hours and upon payment of a fee) a registered instrument, book, or public record relating to the land and, upon request, supply a copy of the whole or part thereof (including a certified copy).
>
> These documents typically include registered deeds, mortgages, and other registered instruments. In the registry system (i.e. approximately 13 LROs), the Ministry, as provided by the *Registry Act*, allows third party access to a daily index of registrations, in report form, known as the Day Book, and Fee and Receiving Sheet ("DBFR"), for the purposes of providing a means to obtain an "up to the minute" status report on registered instruments affecting a given parcel of land, because of the delay in recording on the abstract index when operating in the registry system. The POLARIS Daily Registration Summary, sought by the appellant, is an internal report which is not referred to in any statute or regulation and, indeed, is not required for the purposes of obtaining an "up to the minute" status report of registered instruments affecting a given parcel of land, because information in the land titles system is immediately recorded on the parcel register.

Finally, the Ministry comments on the relationship between Teranet and the appellant as follows:

> On February 2002, [the appellant] applied for and was granted a Teraview license. On September 2002, [the appellant] entered into a GeoWarehouse subscription with Teranet's subsidiary [Teranet Enterprises]…, which has since been renewed. Geo Warehouse is a software application which permits access to certain land registration information, subject to privacy restrictions. Through each of these software applications, [the appellant] is able to conduct title searches in the ELRS.
>
> Under a Products Licence Agreement dated March 22, 2002, Teranet Enterprises agreed to provide [the appellant] with a VAP consisting of regular delivery of a data file filtered to identify commercial property transactions in certain specified land registry areas with a consideration value greater than or equal to $500,000. Notably, under this commercial arrangement, [the appellant] is not provided with

> access to any personal information; the information it receives is restricted to commercial property transactions.
>
> In July 2003, the relationship between [the appellant] and Teranet began to deteriorate as a result of [the appellant's] posting images of land registration records on its website contrary to the End Use Restrictions contained in the terms and conditions of both Teraview and GeoWarehouse….leading to correspondence from Teranet in which [the appellant] was warned that its conduct could lead to the termination of its Teraview and GeoWarehouse licences.
>
> On August 16, 2005, in response to the dispute with Teranet, [the appellant] brought an application against the Crown, seeking, among other relief, a mandatory order providing [the appellant] with access to the results of searches conducted in the LROs and allowing [the appellant] to publish, without any end-use restriction, any instrument or document obtained as a result of the search. Teranet applied for and was granted, with the consent of the parties, intervenor status in the proceedings.

The "Agreed Statement of Facts & Issues" provided in the course of this appeal included the following additional background to this appeal:

> [The appellant] collects and publishes information about commercial real estate transactions for properties located in Ontario. Information published by [the appellant] includes, but is not limited to, land title/registry instruments such as transfers (deeds) and charges (mortgages).
>
> [The appellant] commenced an application before the Ontario Superior Court of Justice to compel the Ministry to provide access to the Land Registry/Titles reports and instruments at issue pursuant to land registration statutes, including the *Registry Act*, R.S.O. 1990, C. R.20 and the *Land Titles Act*, R.S.O. 1990, C. L.5.
>
> The Court stayed the proceeding and instructed [the appellant] to proceed by way of a request for access to records pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31… and in the event of the request being refused, to pursue an appeal from the decision made under that *Act*.

The positions taken by the parties regarding whether or not the records were available to the public in the past.

The parties take opposing positions regarding the general availability of the records at issue in this appeal.

With respect to the issue of whether the records were historically available to the public, the Ministry takes the position (alluded to above) that neither of the reports currently sought by the appellant was available to the public immediately prior to 1988 in relation to land titles information. The Ministry states:

> Under the *Registry Act*, documents were registered on an 'abstract index'. Due to the delay in recording registrations on the abstract index, the LRO kept an index of daily registrations. The index was called the Day Book and Fee and Receiving Sheet ("Day Book"). In order to have up-to-date title information, one would need to do a 'sub-search' by inspecting the Day Book to determine if recent registrations had been made on the parcel of land in question. Access to the Day Book was required by statute, namely subsection 165(4) of the *Registry Act*, as a "book or public record of the office relating to the land".
>
> Under the *Land Titles Act*, the government provides a guarantee of ownership. Registrations are immediately recorded on the register so one can determine up-to-date title to a parcel of land by inspecting the title register for the subject property. Therefore, historically … there was no need for a LRO, under the land titles system, to maintain a Day Book. Accordingly, the *Land Titles Act* did not require the maintenance of this record and a Day Book was not available to the public under the land titles system.
>
> In addition to the abstract indexes, the "back-up" copy indexes and instruments, the Day Book was the only other record offered to the public prior to 1988. The Day Book was limited in application to land registration information under the *Registry Act*. In 1988, the LROs did maintain a Fee and Receiving Book under both systems, however, that document was used for internal accounting and reconciliation purposes. The Fee and Receiving Book was not made available to the public.

The appellant provides lengthy representations on the nature and type of information it had historically received from the Ministry and/or the LROs. These arguments are made under the portion of the appellant's representations in which the appellant argues that it ought to have access to the records, and that its use of the information it obtains through those records ought not to be restricted.

The appellant states:

> The Ministry and Teranet are attempting to use [the *Act*] to bar access to information and instruments (records) that have historically been available to the public and that are contained in a public registry specifically so that the public can have access. They are doing so in an effort to enhance the value of the monopoly granted to Teranet with respect to such records. It is submitted that this is not a

> proper use of [the *Act*] and that the privacy concerns raised by the Ministry and Teranet should be seen in this light.
>
> If the Ministry wishes to protect or enhance the value of Teranet's monopoly it should make the appropriate statutory changes to do so, and deal with the political repercussions of doing so.

The appellant then reviews the purpose of the land registration system, and that records in the system (under both the Land Registry and Land Titles systems) "perform a critical function in relation to the ownership of land." The appellant refers to a number of court cases which identify the purposes of land registration systems and confirm the importance of ensuring that the public knows who owns land, and what interests there are on it. The appellant also refers to court cases which establish that the public has a right of access to public registries generally, and argues that the right to "publish information and copies of documents from such a registry, has long been recognized by the courts," relying on court cases which date back to the 1800's.

The appellant then provides representations on its view of the Ministry's statutory obligations in connection with land records. The appellant states:

> The Ministry is required, by the provisions of [the *Land Titles Act*, the *Registry Act* and the *Land Registration Reform Act*] to produce for inspection any instrument, document, book or public record of the office relating to land and to provide a copy of the whole or any part of such instrument, document, book or public record of the office.
>
> The governing legislation does not impose end use restrictions on the copies, nor does the legislation authorize the respondent to create regulations respecting end use restrictions on copies.
>
> The governing legislation does provide that the Crown is the owner of the property in every "registered instrument" and that such instruments shall be retained in the custody of the land registrar; however, this is nothing more than the recognition that the Crown must have a right to retain custody of such documents (certainly in the days of paper documents) for the purpose of maintaining the registry. For example, to prevent property owners, executors, lawyers, etc. claiming a right to retain custody of the original document that was created for or by them and thus exposing such documents to the risk of loss, alteration, etc.

The appellant submits that the only right that flows from owning the property in a document is the right to control access to the physical document. In addition, the appellant refers specifically to section 50(3) of the *Registry Act* and section 165 of the *Land Titles Act*, and states:

> The statutes in this case specifically provide that the Ministry must allow access to all instruments, books and records of the office and provide copies of same. The statutes do not restrict the use of such documents. Accordingly, the Crown's property right is merely the custodial right to preserve and protect the original documents and records which are essential to the function of the LRO's as public registries ….
>
> The DBFR Fee and Receiving Sheet and POLARIS Daily Registration Summary records allowed [the appellant] to identify transactions of interest to it. The land registration statutes provided (and continue to provide today) that there is "no fee" for searches of "a fee, receiving or day book". The POLARIS Daily Registration Summary and the DBFR Fee and Receiving Sheet are each "a fee, receiving or day book".
>
> *Registry Act*, R.R.O. 1990, Reg. 994, s. 1
> *Land Titles Act*, R.R.O. 1990, Reg. 689, s. 1
>
> The fact that the Ministry may see itself as co-venturer with Teranet in what has become a commercial enterprise providing LRO services does not relieve the Ministry of its statutory obligations.

The appellant explains its historical access to the requested summary reports and instruments. The appellant states:

> [The appellant] collects the information it publishes, in part, through searches it conducts of the Land Registry and Land Titles records. It also obtains additional information directly from the parties involved in the individual transactions and from other sources. The additional information includes photographs of the property, interactive maps, aerial images, marketing information, property descriptions, etc., relating to the real property involved in the transaction.
>
> The subscribers to [the appellant's] services include many financial institutions, real estate brokerages, real estate appraisal firms, various government departments and many other organizations. All of these entities have a business interest in the information published by [the appellant] which provides them with up to date information on the real estate market.
>
> [The appellant's] livelihood is dependant on its ability to conduct, or have conducted, searches of the land registry and land titles records in the LRO's throughout Ontario and to publish the information located as a result of such searches.
>
> From 1996 until 2002, [the appellant] itself would attend the various LRO's throughout Ontario and conduct searches to identify transactions of possible

> interest and obtain copies of related documents registered on title such as deeds, mortgages, surveys and the like (generally documents registered on title are referred to as instruments).
>
> For the purpose of identifying transactions of possible interest in non-automated LRO's, [the appellant] generally relied on the Daily Book Fee and Receiving Sheet ("DBFR"). The DBFR records list all transactions in the LRO within a given time frame and provide certain information regarding each transaction including, generally, the registration number, instrument type, an identification of the land involved, the fees, consideration (sale price, etc.) and land transfer tax paid.
>
> A similar record was available in connection with the automated records in Land Titles and was referred to as the POLARIS Daily Registration Summary.
>
> Once a transaction of possible interest was identified, [the appellant] would review the instruments registered on title for the property(ies) involved to confirm whether the transaction was one that was of interest to [the appellant's] subscribers and, if it was, would obtain additional information, documents and photographs relating to the property.
>
> All of the information described above, in addition to electronic images of the LRO instruments, would then be published to [the appellant's] subscribers, by way of [the appellant's] secure website.
>
> It is worth noting, that there were no end use restrictions, in fact no restrictions of any kind, which precluded [the appellant] from publishing these documents and information.

The appellant then reviews the circumstances resulting from Teranet's involvement. The appellant states:

> In the early 1990's, the Ministry entered into an agreement with [Teranet] to automate the provincial land registry so that documents could be recorded, maintained and searched electronically and to provide the services of the LRO's to the public electronically.
>
> Further to its agreement with the Ministry, Teranet has now automated many of the Land Registry Offices in Ontario, with the result that the public can only access the land registry information (whether from an offsite location or in the LRO itself) through Teranet's proprietary software. To the appellant's knowledge, Teranet has three kinds of proprietary software: 1) … software which the user installs on his or her computer, 2) … a web based service, and 3) software on onsite terminals available in the LRO's.

> The software only permits access if the user accedes to various conditions imposed by Teranet on the use of the land registry information, including an agreement not to publish such information. The restrictions were not imposed by the Ministry prior to Teranet's involvement.

The appellant notes that the Ministry requires access to LRO records through Teranet, and states:

> The Ministry advised [the appellant] in about 2000-2001 that [the appellant] would shortly have to begin accessing LRO records through Teranet. [The appellant] was told that it would no longer be possible for it to attend at the LRO's and review the DBFR Fee and Receiving Sheet and POLARIS Daily Registration Summary reports. [The appellant] was advised that it would have to enter into an agreement with Teranet and obtain access to the LRO records through Teranet.
>
> Given the Ministry's clear statement that [the appellant] would not be able to continue its previous practice, [the appellant] approached Teranet regarding the provision of the information [the appellant] had previously obtained through searches at the LRO's.
>
> Teranet made a proposal to [the appellant] dated September 5, 2001 describing the reports that it would provide and the reports it would replace, namely DBFR Fee and Receiving Sheet in Land Registry and the Polaris Daily Registration Summary in Land Titles:
>
> > Teranet proposes to provide [the appellant] with electronic summaries of transactions that have occurred in the Land Registry offices during specified periods of time.
> >
> > These transaction summaries will provide information currently publicly available in Land Registry Office ("LRO") reports. In title-automated LROs, these are known as the "Polaris Daily Registration Summary Lists".
>
> Accordingly, [the appellant] entered into an agreement with Teranet under which Teranet would provide what it referred to as Teranet Day Book Reports resulting from various searches conducted electronically in the LRO records and identifying instruments that might be of interest to [the appellant]. The Teranet Day Book Reports would include, generally speaking, the information that [the appellant] had previously obtained through a review of the DBFR and POLARIS Daily Registration Summary Records. As mentioned earlier, the Teranet reports included some additional information and omitted some information contained in the LRO Summary reports.

> [The appellant] intended, as it had previously, to then obtain, on a document by document basis, copies of relevant LRO documents and publish them for the benefit of its subscribers, and it proceeded to do so. The Product Licence Agreement it negotiated with Teranet explicitly provided that "information identified as a result of Client's use of the Products may be used and published by the Client"….
>
> [The appellant] was formally advised by letter dated February 4, 2003 of the Ministry's policy regarding access to DBFR and POLARIS Daily Registration Summary records.

The appellant was provided with a copy of the policy, and the appellant refers to the following portion of it, which discusses DBFR records as follows:

> The Day book, Fees and Receiving (DBFR) is a single record of the office required by legislation that contained aggregated data. As such all users should have access to the DBFR for traditional title searches. However, [the Ministry] is aware that the DBFR is being used for resale purposes. As a result, third parties will not be permitted to access the DBFR or its by-products (such as the LRO Day Book), other than for the purpose of a record by record search, unless ...

The appellant then states:

> It was not clear to [the appellant] why this policy would prevent [the appellant] from accessing the DBFR and POLARIS Daily Registration Summary records since [the appellant] used such information for a "record by record search".
>
> In 2003 Teranet objected to [the appellant's] publication (posting) on its website of images of LRO instruments.

The appellant provides evidence in support of its position that the electronic search capability and the provision of copies of LRO documents through Teranet's software were "both part of the 'Basic Public Service' that Teranet is required to provide under its agreement with the Ministry." The appellant identifies that, although there were discussions between it and Teranet, the issue was not resolved and the appellant continued to post such instruments on its website. As a result, the appellant received a letter from Teranet in June 2005 advising the appellant that if it did not remove all LRO documents from its website, Teranet would cancel the appellant's access to LRO instruments through Teraview and GeoWarehouse, and that Teranet would not renew any agreement for the provision of Teranet Day Book Reports.

As a result, the appellant commenced the application before the Ontario Superior Court of Justice to compel the Ministry to comply with its statutory obligations regarding access to the

summary reports and LRO instruments in issue. This is the application that was stayed as a result of this Freedom of Information request and appeal.

The appellant then reviews some of the information contained in the summary reports requested, and states:

> [The appellant's] interest, and that of its clients, is in real estate transactions where the transaction is for a value greater than $500,000.
>
> The LRO Summary reports simply identify by instrument number each transaction that occurs in an LRO each week. They provide no information of any kind regarding the parties involved in the transaction. The instrument number does, however, allow [the appellant] to identify the LRO instrument that corresponds to the transaction, and [the appellant] can then access (call up on a public terminal in an LRO) or request a copy (or obtain a copy electronically) of the instrument in the same fashion as any other member of the public.
>
> As discussed [above], the land registration statutes provide that there is no fee for searching the summary reports. There is also no fee to view any instrument. …
>
> Generally the summary reports were available either via a computer terminal or as printouts in each LRO. The LRO staff would either allow [the appellant] access to a terminal to review the summary report or they would provide a printout of the summary report. [The appellant] would then review the summary reports to identify transactions of possible interest - where it appeared that the consideration might exceed $500,000.
>
> The automation of the LRO system means that Teranet can now, electronically, filter the transactions of potential interest to [the appellant] and provide [the appellant] with a much smaller list of instruments to review.
>
> Prior to June 2007, Teranet e-mailed weekly text files to [the appellant] which listed instrument numbers and Parcel Identification Numbers ("PIN's") for property transfers with an aggregate consideration of $500,000 or more.
>
> As of June 2007, Teranet ceased to provide the said text files. Instead, [the appellant] would log onto the Geowarehouse website and access a record called the Geowarehouse Online Registration Tracking Report which, rather than listing instrument numbers, makes the instruments available for download via hyperlinks.
>
> [The appellant] reviews the LRO instruments associated with any transactions of potential interest and obtains copies of 200 to 400 LRO instruments each week. On the basis of the Ministry's evidence that approximately 2,100,000 documents

> are recorded each year, [the appellant] obtains copies of less than 1% of the documents recorded each year.

With respect to the access to the instrument, the appellant states:

> Access in the LRO's today (to LRO instruments) is generally through a computer terminal, requires no input of any kind from LRO personnel, and is free to the public. That is, there is no cost to the Ministry of providing such access.
>
> Further, if [the appellant] wishes a copy of a document, it can obtain one by paying the required fee and printing a copy electronically. This does not require any action by the LRO staff.

The appellant also takes issue with the Ministry's claim that responding to the request involves significant work. In addition, the appellant disputes the Ministry's position that the request is for bulk records, and states:

> The Ministry has used the term "bulk" at various points throughout its representations, obviously in an effort to generate a concern over privacy issues, since the provision of records in "bulk" by the government can be a concern under [the *Act*].
>
> However, [the appellant's] request does not involve the provision of "bulk" records by the Ministry.
>
> [The appellant's] request involves access to summary reports to allow [the appellant] to identify land transactions that are of potential interest to it. There is no personal information in these summary reports.
>
> [The appellant], then reviews, on an instrument by instrument basis, the individual LRO instruments related to these land transactions. If a transaction is of interest, [the appellant] then obtains a copy of the LRO instrument (deed, etc). Generally, [the appellant] obtains copies of 200 to 400 LRO instruments each week or less than 1 % of the 2.1 million instruments registered in Ontario each year.
>
> The issue of "bulk" records has been considered in at least three decisions of the Information and Privacy Commissioner and it is clear that [the appellant's] access request does not involve bulk records.

The appellant then refers to Investigation PC-980049-1, Investigation PC-990033-1 and Order P-1144, and states:

> In the first case, the issue was the provision of microfilm copies of every land registry document to certain organizations (including the Ontario Property

Assessment Corporation). The second case involved a request for information related to every driver's licence registration in Ontario. Clearly, these requests involved very large numbers of records (in the millions).

The Information and Privacy Commissioner recognized that privacy concerns existed where large numbers of records are transferred simultaneously from a public registry. Regarding the microfilm copies of every land registry document, the Commissioner stated that:

> … the microfilmed records contain a compilation of all individually registered documents.
>
> I find that disclosure of the entire microfilm, which contains significant amounts of personal information gathered during the course of administering all of the various land registration activities in the province, is not in accordance with section 42(e) of the *Act*. [p. 13]
>
> [Investigation PC-990033-1]

However, the Commissioner also held that accessing multiple records individually, as [the appellant] does, does not raise the concerns involved in the transfer of "bulk" records.

> The Ministry indicates, however, that the Land Registry offices are aware of lending Institutions which employ individuals who compile data from the land registry records. However, the Ministry explains that those individuals, like all other members of the public, obtain data on a record-by-record basis, upon payment of the appropriate fee. The Ministry submits that it does not compile data for any lending institution.
>
> Based on the information provided to us by the Ministry, there is no basis to conclude that the Ministry disclosed the personal information in question in bulk to any lending institutions. It also does not appear to be possible to retrieve such information in bulk from POLARIS. [emphasis added]
>
> [Investigation PC-980049-1]

There is no need for the Adjudicator to revisit the issue of "bulk" records in this case. The issue has been reviewed in detail in these earlier decisions.

> [The appellant's] request is of a different nature. [The appellant] accesses instruments one at a time, in the same manner as any other member of the public examining LRO instruments. The Commissioner emphasized in these decisions, that accessing multiple records one record at a time, does not raise any issues regarding the transfer of "bulk" records. [Investigation PC-980049-1]
>
> The Adjudicator should require that the Ministry produce the records in issue, given that the Commissioner has already reviewed in detail, in these earlier decisions, the question of access to LRO records on a record by record basis.

Furthermore, the appellant states:

> [The *Act*] came into force on January 1, 1988.
>
> The IPC previously considered privacy issues in connection with the Land Registry and Land Titles systems in Investigation Report PC-980049-1.
>
> On the basis of the information provided by the Ministry regarding the operation of the Land Registry and Land Titles systems, both before and after the involvement of Teranet, the IPC concluded that the Ministry had both a legal duty to make land records available to the public and a demonstrated practice of doing so:
>
> > Having reviewed the above-mentioned legislation we concur that they contain a number of provisions which make it clear that the Ministry has a duty to make land registration records available to the public.
> >
> > The above-mentioned legislation also places no restrictions on who may have access to this information or in what manner. The only requirements are to pay a prescribed fee, make a written request in some cases, and obtain access during office hours. Thus, because there is a legal duty to make certain records available to the general public, a demonstrated practice of actually making these records available, and a standardized price applied to all users of the land registration system, it is our view that the personal information in question is maintained at the Land Registry Offices specifically for the purpose of creating a record that is available to the general public.[p.5-6] [bolding added]
>
> As noted by the IPC "The above-mentioned legislation also places no restrictions on who may have access to this information or in what manner."

PRELIMINARY MATTER

Statutory Regulation of Land Registration Information

As a preliminary matter, I note that one of the recurring issues in this appeal, which is argued under each of the issues set out below, and which is discussed above in the "Background" section, concerns the statutory requirements to make land registration information available to the public. All of the parties recognize the importance of ensuring that the public has access to identified land registration information, and the statutes identified above that govern the availability of this information (including the *Registry Act*, the *Land Titles Act* and the *Land Registration Reform Act*) outline specific requirements for the availability of this information.

Throughout this appeal the appellant argues that, because access to the information is required under the identified statutory requirements, the exemptions under the *Act* ought not to apply or, conversely, the exception in section 63(2) applies. The appellant takes the position that the harms under section 18 of the *Act* cannot be made out as the information is "required to be disclosed under the statute." The appellant makes similar arguments for the application of section 22, and the exclusion in section 63(2). Moreover, the appellant objects to the end use restrictions Teranet places on the information, on the basis that such restrictions are not imposed by statute, nor allowed by it.

The Ministry and Teranet maintain that, throughout the process of converting the records to electronic formats, the statutory requirements to make land registration information available have been considered and included as part of the contractual agreements entered between those parties. The Ministry states:

> Under both the registry systems and the land titles system, the Crown is obliged to permit members of the public an opportunity to inspect (during office hours and upon payment of a fee) a registered instrument, book, or public record relating to the land and, upon request, supply a copy of the whole or part thereof (including a certified copy).

Teranet states:

> Under the terms of the License Agreement and Implementation Agreement, Teranet is required to provide the basic public service, which is the functionality required to access land registration data and carry out functions such as search and registration.

Teranet identifies the process through which "all" can access the data, and the appellant confirms that it continued to receive the information throughout the process of the change, until it was recently advised that its actions might result in the denial of access to the data.

In my view, it is clear that, through the process established by Teranet and the Ministry, access to the land registration information is still being granted. In particular, I find that a process exists through which parties can obtain virtually all of the information in the land registration records (the only exceptions being certain personal information, which is subject to safeguards incorporated in response to concerns identified by this office, as new processes are established for the distribution of that information).

The corollary issue that continues to be raised in this appeal concerns whether or not Teranet (and the Ministry), in its process of converting to electronic records and revising some of the nature and types of actual records available to the public, and revising the methods of providing them (due, in part, to the revised formatting of them), is satisfying the specific statutory requirements set out in the land registration statutes. This is also one of the issues directly before the Court in the proceedings referenced by the parties. The reasons why this Court process was initiated included the following: a) access was threatened to be taken away (and/or access to historically available records was denied); b) restrictions were placed on the uses the appellant could make of the documents to which access was granted; and c) access to certain personal information was reduced and/or denied.

One of the other issues before the Court is whether or not access to the records is available through the *Act*. Accordingly, as identified in the "Agreed Statement of Facts & Issues," the Court stayed the proceeding and instructed the appellant to proceed by way of a request for access to records pursuant to the *Act* and, in the event the request and was denied, to pursue an appeal from the decision made under that *Act*.

It is undisputed that the legislature has developed a detailed and comprehensive statutory scheme to ensure that access to certain land registration documents and materials is available. This statutory scheme has its origins in the common law and the historic rights to land registration information. The Ministry, which is required to follow the statute, has entered agreements with a service provider to convert the land registration system to an electronic system. In the process of converting the system, changes have been made to the method and manner in which the statutorily required land registration information is available. The Ministry and Teranet maintain that, in the process of entering the agreements, the statutory requirements were incorporated into the current processes. The appellant refutes this position, and accordingly brought the Court application.

In these circumstances, it is not for this office to make a determination in this appeal regarding whether or not the processes brought into place by the Ministry and Teranet in the course of converting the data meet the statutory requirements of the various land registration statutes; rather, the issues before me are whether the exemption claims made for the specific records at issue in this appeal are established. Moreover, the appellant's complaints about Teranet's "threats" to terminate its relationship with the appellant relate to the contractual relationship between these two parties, and as such is a matter to be dealt with by the courts and not this office.

In that context, then, I will proceed to review the exemption claims made for the records under the *Act*.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

The Ministry has taken the position that the POLARIS and DBFR Reports qualify for exemption under sections 18(1)(a), (c) and (d) of the *Act*. I will begin my discussion with sections 18(1)(c) and (d). These exemptions 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;

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests. (Order P-441)

To establish a valid exemption claim under section 18(1)(d), the institution must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario. (Orders P-219, P-641 and P-1114)

For sections 18(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 [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Section 18(1)(c)

The Ministry's Representations

The Ministry submits that disclosure of the POLARIS and DBFR Reports would result in prejudice to both its economic interests and its competitive position for the purpose of section 18(1)(c). The Ministry states that the purpose of this section is to protect the ability of institutions to earn money in the marketplace, and that this exemption recognizes that institutions sometimes have an economic interest 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. The Ministry refers to Order P-1190 in support.

The Ministry then states:

> In order to understand the economic loss to the Ministry and the harm to its competitive position, it is helpful to consider the records sought by the appellant globally - in other words, the appellant is in fact seeking, through his request, access to key informational elements of the land registration database.
>
> In this regard, the Ministry submits that [the Commissioner's Office] has previously recognized the prejudice to the economic interests and competitive position of an institution if it were to be required to disclose information that it maintains in a database, and where the institution sells or licences the data within the database for money. In Order MO-2030 (the Municipal Property Assessment Corporation [MPAC]) offered for sale or license its OASYS and Municipal Connect databases, which contained electronic data relating to the assessment of municipal properties. Assistant Commissioner Beamish upheld MPAC's claim that access to its databases under [the *Act*] would prejudice its economic interests and be injurious to its competitive position. The Assistant Commissioner found that requiring MPAC to disclose information in the OASYS database in bulk or to provide access to its online database would prejudice its economic interests as it would reasonably be expected to jeopardize MPAC's ability to earn money in the marketplace, and would deprive MPAC of a significant revenue stream. The database enabled MPAC to generate reports and products that it routinely sells, and online access is provided to exclusively licensed subscribers.

The Ministry then refers to the following quotation from Order MO-2030:

> > If MPAC is required to disclose information from the OASYS database or through Municipal Connect to the appellant under the *Act*, it would be deprived of the significant amount of fees that a request of this size would generate. Moreover, it would be required to release the same information to anyone else who asked,

> which could reasonably be expected to jeopardize MPAC's ability to earn money in the marketplace. The OASYS database allows MPAC to generate reports and products that it routinely sells to mortgage brokers, financial institutions, and planners, which generates millions of dollars in revenues. I find that if OASYS data must be disclosed in bulk for free in response to access requests under the *Act*, MPAC will be deprived of this revenue stream, which could reasonably be expected to prejudice its economic interests and be injurious to its financial interests.
>
> If MPAC is required to disclose information from Municipal Connect to the appellant under the *Act*, it would be required to release the same information to anyone else who asked.... There would be nothing to stop other requesters from setting up a rival business if they are able to obtain access to this information from Municipal Connect. I accept MPAC's submission that disclosing this service, which is currently licensed exclusively to subscribers, would allow MPAC's investment in Municipal Connect to be replicated, but at much lower cost.

The Ministry also states:

> … the findings … in Order MO-1953 also apply to the circumstances of this appeal. In [Order MO-1953], MPAC received a request for property information, in bulk, that was contained in its electronic database. MPAC would sell the information for a fee. The IPC found that disclosure of the information would prejudice MPAC's economic interests, since it would be deprived of a significant amount of fees and the appellant would be able to sell or distribute the property information to other parties at a reduced rate. In addition the IPC noted that the practical reality is that disclosure would constitute disclosure to the world, and other requesters would then be entitled to obtain the same records and they could also set up rival businesses.

The Ministry then submits:

> In the present case, the findings … in Orders MO-2030 and MO-1953 directly apply: the Ministry has entered into an agreement with Teranet, whereby Teranet has been given an exclusive license to use the data in the automated land registration database to market VAPs in exchange for the provision of services, including the automation of the land registration system and the development of ELRS. This exclusive license permits Teranet to copy the data, modify copies, develop and sell VAPs, and sub-license the data to third parties.

> Pursuant to its exclusive license agreement with the Ministry, Teranet is entitled to use the automated land registration data to sell electronic land registration services on behalf of the Ministry. Disclosure of the records would prejudice the Ministry's competitive position, because it would enable other entities to create and market products and services that directly compete with the land registration services of its service provider Teranet.
>
> In the present circumstances, the prejudice to the economic and competitive interests of the Ministry resulting from the disclosure of the records sought by the appellant is clear. The amount of information that the appellant can access through the POLARIS Daily Registration summary [and] the DBFR Fee and Receiving Summary … is vast. By accessing, on an ongoing basis, these reports … the appellant will have access to information about approximately 2 million land registration transactions per year. This will allow the appellant, or any other person who may obtain the information, to create, for remarkably low cost, a comprehensive and current database from which products and services could be developed in direct competition with Teranet and the Ministry.
>
> In addition, Teranet and by extension the Ministry, would be deprived of revenue currently received from the appellant for the VAP it currently purchases. Secondly, other purchasers of similar data products from Teranet may also be able to access similar information causing them to cancel or withhold purchases from Teranet, thereby further depriving Teranet and the Ministry of additional income.
>
> In this regard, the Ministry respectfully submits that there will be clear economic loss to the Ministry and significant prejudice to its competitive position in the marketplace if the records sought by the appellant were to be disclosed. Accordingly, section 18(l)(c) applies to exempt the records in their entirety.

Later in its representations, the Ministry provides some additional information about its contract with Teranet. It states:

> First, disclosure of the records would deprive Teranet, and by extension the Ministry, of the revenue currently received from the appellant for the purchase of the VAP. Should the appellant receive the records under [the *Act*], there will be no reason to purchase the value added product from Teranet. …
>
> If the Ministry were to disclose the records, it would be providing, free of charge, records that it has spent significant time, money and effort creating, and has contracted to receive pursuant to its agreement with Teranet. Under the contract Teranet provides the Ministry with access to software to receive the requested reports, and also provides the Ministry with electronic land registration services. The Ministry enables Teranet to use the data in the ELRS and to market products containing the data. If the appellant is provided with access to the reports and

> instruments under the *Act*, Teranet will be deprived of fees that it has contracted with the Ministry to be able to receive.
>
> Second, the … loss of revenue would extend beyond the appellant where other purchasers of similar data products from Teranet access the same information. The IPC has held that access under the *Act* is essentially access to the world; accordingly the Ministry would be required to release the reports and instruments to anyone else who asks. This would lead to further injury to the Ministry's financial interests: organizations would cancel or refrain from making purchases from Teranet, thereby depriving Teranet and the Ministry of additional income.
>
> Furthermore, the effect of access to the world would mean that the appellant and others would be able to access information that will allow them to prepare their own information products and reports in direct competition with the Ministry and its service provider Teranet. The uncontrolled accumulation and use of the instruments sought by the appellant will allow it or other parties to compile a database of land registration information at a significantly lower cost than the Ministry and Teranet. Therefore, the appellant, and others, will be capable of taking advantage of this information and engage in direct competition undercutting the Ministry and its service provider Teranet in the marketplace, thereby causing additional financial loss.
>
> Finally, the Ministry submits that disclosure of the records would cause economic and financial harm to the Ministry because it would disrupt the current business model established between the Ministry and Teranet. Teranet has been given an exclusive license to make VAPs from information in the ELRS, and to sub-licence the data to third parties. This exclusive right was given in consideration for the ongoing development of the ELRS during the period of the contract, set to expire in 2017. If the appellant and others are able to access the land registration information through [the *Act*], thereby driving down revenue for Teranet, the business model established between the Ministry and Teranet will be disrupted. If the revenue shortfall is material, Teranet will expect to be compensated by the Ministry.

In addition, under its arguments in support of its decision to exercise its discretion to apply section 18(1) to the reports, the Ministry states:

> … the Ministry considered the wording of the section 18 exemption, the interests it seeks to protect, and the legislative intent of including such an exemption in the *Act*. This exemption is designed to protect commercially valuable information of government institutions, in the same way that commercially valuable information belonging to private sector organizations is protected under the *Act*. The intention of the Legislature in developing the section 18 exemption, suggested by the *Williams Commission Report*, is to allow institutions to exploit, on a profit

> making basis, the fruits of effort it has expended in an attempt to recover the value of public investments in research, infrastructure and services.
>
> The Ministry submits that there is no question that information maintained within the land registration system is commercially valuable. In fact, the value of this information has funded the very expensive and resource intensive automation of the provincial land registration system. Teranet, the Ministry's service provider has expended millions of dollars in building the ELRS. The sale of land registration information has contributed to funding the development of the ELRS. Accordingly applying the exemption is consistent with the legislative intention of allowing institutions to recover the value of public investments.
>
> The extraordinary value of land registration information also provides a compelling reason to continue to maintain its confidentiality - the value of the information must be preserved to be available to fund future expensive developments and improvements to the land registration system.
>
> Moreover … the loss of the revenue stream associated with the sale of land registration data may result in taxpayer dollars being assigned in future to fund the ongoing administration and development of the land registration system.

The appellant's representations

As noted above in the background discussion, the appellant reviews the purpose of the Land Registry and the Ministry's statutory obligations with respect to it, as well as the importance of having this land registration information available to the public. In the context of this background, the appellant argues that the section 18(1)(c) exemption ought not to apply to the reports. He states:

> A land registry, for obvious reasons, is an essential component of any legal system that recognizes property rights. The economic interests of the institution, in this case the Ministry, are accounted for through the fees set in the *Registry Act* and *Land Titles Act* and their regulations. The legislature has established a reasonable balance between the public access which is the purpose of a public registry and the costs of operating the registry.
>
> [The appellant] has always paid all appropriate government fees for its access to the land registry records and will continue to do so. The LRO summary reports sought by [the appellant] are not, as discussed earlier, identical to the Teranet reports. They include information omitted by Teranet and omit information included by Teranet.
>
> Accordingly, there is no prejudice to the economic interests of the Ministry.

Findings

The exemptions in section 18(1)(c) and (d) have only been claimed for the POLARIS Daily Registration Summary and the DBFR Fee and Receiving Sheet. On my review of the information provided by the parties, I am satisfied that these records qualify for exemption under sections 18(1)(c) and (d) of the *Act*.

As a preliminary matter, I have reviewed the possible application of the exemption in section 18(1) to the records, even though the information has been licensed to Teranet and it is Teranet that sells the information. Previous orders have established that, if a Ministry is in the business of selling commercially valuable information, the disclosure of this information through access provisions under the *Act* can result in the harms under section 18(1). In this instance, the Ministry has already entered into a financial agreement with Teranet, which grants Teranet exclusive licence to modify or copy the data, make value added products from the data and sub-licence the data to third parties. This exclusive licence was granted for valuable consideration, namely, the automation of land titles records. In my view, the fact that the Ministry has already entered an exclusive licensing agreement with Teranet does not mean that it cannot claim the harms under section 18(1). The fact that the exclusive licence was granted, for valuable consideration, is evidence of the value of the information, and the harms under section 18(1) can still apply to this information, provided the evidence supporting the application of the section is sufficient. In addition, I note that on the expiry of the licence, the Ministry will again be looking for a licensee or will be selling the information itself.

Based on the evidence provided by the Ministry, I am satisfied that disclosure of the information contained in the POLARIS Daily Registration Summary and the DBFR Fee and Receiving Sheet could reasonably be expected to prejudice the economic interests of the Ministry or 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. The Ministry has clearly identified the process through which it has granted Teranet exclusive rights to access and use the information, and that in exchange it has received a significant benefit. I am also satisfied that disclosure could reasonably be expected to be injurious to the financial interests of the Ministry because it would disrupt the current business model established between the Ministry and Teranet.

Furthermore, I am satisfied that the disclosure of the information by the Ministry (outside of the agreement with Teranet), would provide the information to others who would then no longer have to purchase the information from Teranet. The Ministry has identified that disclosure of the records would deprive Teranet, and by extension the Ministry, of the revenue currently received from the appellant for the purchase of the VAP, as there would be no reason to purchase the value added product from Teranet. In addition, the Ministry identifies that this loss of revenue would extend beyond the revenue received from the appellant, to revenue received from others who purchase similar data products from Teranet. The Ministry states that granting access in this way to all of the data that Teranet purchased the exclusive right to from the Ministry would effectively deprive Teranet, and by extension the Ministry, of revenue received from the sale of the information.

I find support for this finding in the decision of Assistant Commissioner Brian Beamish in Order MO-2248. In that order a request had been made to MPAC for the electronic records containing assessment roll information. Assistant Commissioner Beamish reviewed the representations of the parties and stated:

> I … am of the view that if MPAC is required to disclose the requested electronic assessment rolls to the appellant under the *Act*, it would be deprived of the significant amount of fees that a request of this size would generate. Further, MPAC would be required to release the same information to whoever seeks access to an electronic assessment roll under the *Act*, which could reasonably be expected to jeopardize MPAC's ability to earn money in the marketplace. In MO-2030, I found that the OASYS database, which includes all the information found in assessment rolls, enables MPAC to generate reports and products which it sells to mortgage brokers, financial institutions, and planners, which in turn, generates millions of dollars in revenues. Accordingly, I find that disclosure of property assessment information at issue in this appeal, in bulk and for free, in response to access requests under the *Act*, would deprive MPAC of this revenue stream, which could reasonably be expected to prejudice its economic interests and be injurious to its financial interests.
>
> Further, potential competitors could make requests under the *Act* to obtain the information at issue, for free, thus avoiding the expenses MPAC incurred in establishing its business and use the information to generate property assessment reports and products at a reduced cost. In making my decision, I reject the appellant's position that an electronic copy of the assessment roll would have little value to competitors on the basis that some of the property assessment information may not be current or may take longer to obtain. The practical reality is that if MPAC is required to disclose the information at issue in this appeal, there is nothing stopping competitors from making requests under the *Act* for the same information on an ongoing and regular basis.

Although the appellant takes the position that he is not requesting information in bulk, in my view the principles set out above apply. The information the appellant is requesting is the data about all transactions. I find that the disclosure of the information to the appellant would result in the harms set out above. In addition, there would be nothing to stop competitors from making similar requests under the *Act*. Accordingly, I am satisfied that the Ministry has established that disclosure of the information contained in the POLARIS Daily Registration Summary and the DBFR Fee and Receiving Sheet could reasonably be expected to prejudice the economic interests of the Ministry or 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.

On a final note, the appellant points to the fact that the records requested are not identical to the reports which would otherwise be purchased from Teranet, as some information (for example – personal information) is not included, and other information is. In my view, this does not affect

my finding that disclosure of the *information* that the appellant is seeking would result in the identified harm to Teraent and the Ministry for the reasons cited above.

Having found that the POLARIS Daily Registration Summary and the DBFR Fee and Receiving Sheet qualify for exemption under section 18(1)(c) and (d), it is not necessary for me to determine whether they also qualify for exemption under section 17(1) of the *Act*.

INFORMATION PUBLISHED OR AVAILABLE

The Ministry takes the position that the instruments qualify for exemption under section 22(a).

Section 22(a) of the *Act* states:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573]. However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

Representations

The Ministry claims this exemption for the instruments. Its representations state:

> … the land registration instruments sought by the appellant is information that is currently available to the public; accordingly, section 22 operates to authorize the Ministry to direct the appellant's request for access to instruments to one of the two places where the records are made available to the public:
>
> a) in each LRO [Land Registry Office], or
> b) through the ELRS [Electronic Land Registry System].
>
> Public access to automated land registration records is available on-site in LROs in Ontario. Presently 91% of the records in the land registration system are automated and 9% are manual. For properties that are within the automated system, an individual may attend at a LRO and access, through a self-service computer terminal, any instrument registered in that office. For any property that falls within the manual system, individuals may also attend at a LRO and access abstract indexes for such properties. Instrument registrations associated with manual properties may also be accessed through a manual search of hard copy and microfilmed records located within the LRO.
>
> Registered instruments in the ELRS are also publicly available outside the individual LROs, via Teraview software (owned and operated by Teranet). Users of this software may, upon payment of a fee and subject to certain end-user restrictions, examine both the parcel registers, which summarize document registrations pertaining to a particular property, as well as electronic copies of individual instruments registered in respect of a particular property. Teraview does not limit access to instruments to individuals at LROs. Accordingly, an individual with a Teraview licence, may access on his or her computer, any instrument registered in the automated system in any of the 54 LROs in Ontario. Searches are limited to a record-by-record basis rather than bulk searches to protect privacy.

The Ministry then provides the following argument in support of its view that there exists a "regularized system of access" to the instruments the appellant now seeks through his access request.

System exists

Both the *Land Titles Act* and the *Registry Act* require the Ministry to provide the public with access to instruments registered in a LRO. Both statutes provide the public an opportunity to inspect (during offices hours and upon payment of a prescribed fee) any:

- instrument relating to the land that is registered in the office, or a facsimile of the instrument; or
- any book or public record of the office relating to the land, or a facsimile of the book or public record

(s. 165(4), *Land Titles Act*, R.S.O. 1990, c.L.5 s. 15(4), *Registry Act*, R.S.O. 1990, c.R.20)

Instruments are available for inspection at each of the 54 LROs throughout the province of Ontario. The LROs are open from 8:30 a.m. to 5:00 p.m. from Monday to Friday.

The ELRS provides another convenient alternative to visiting a LRO in person. Upon payment of a fee (set out in further detail below), any member of the public may access this software and perform searches to locate instruments registered in any of the 54 LROs throughout Ontario.

Records are available to everyone

It is the Ministry's submission that the instruments recorded in the LROs and available through Teraview software are obtainable to everyone.

The LROs are open to the public and located throughout the province of Ontario. Any member of the public may attend at the LRO in which a particular instrument is registered, and access the instrument or a copy either through the self-service terminal provided at the counter, (in the case of instruments registered in the automated system), or by conducting a manual search for hard copy or microfilmed records, for those instruments not registered in the automated system.

Similarly, the Teraview portal provides public access to instruments registered in the land registration system. Any member of the public who wishes to obtain access to Teraview may do so by paying the prescribed fee.

A pricing structure to access the Instruments is in place

The Ministry has established a pricing structure to enable the public to access instruments registered in LROs. The fee schedule is set out in Regulations made under the *Registry Act* and the *Land Titles Act*.

(*Registry Act*, R.R.O. 1990, Regulation 994, Amended to O. Reg. 516/03. *Land Titles Act*, R.R.O. 1990, Regulation 689, Amended to O. Reg. 5/99.)

Each Regulation provides that there is no fee to search an instrument, deposit or plan. A search of any other index or register for a parcel was $5.00 (and amended to $8.00 by way of Minister's Order made under the *Registry Act*, R.S.O. 1990, c.R.20). Copies of an instrument or plan are 0.50 per page and copies for the index or register of a parcel were $5.00 for the first page (and amended to $8.00 by way of Minister's Order made under the *Land Titles Act*, R.S.O. 1990, c.L.5), and $1.00 for each subsequent page. Paper prints of plans are $5.00 a page.

If an individual wishes to search and access copies of instruments in the ELRS, any person may, for a one-time fee of $595, acquire a license by which an individual may search instruments in the land titles system in any of the 54 LROs in Ontario. Upon payment of a fee, users may examine both the parcel registers, which summarize document registrations pertaining to a particular property, as well as electronic copies of individual documents registered in respect of a particular property. Searches are limited to a record-by-record basis rather than bulk searches to protect privacy.

In summary, the Ministry submits that because it makes instruments available to the public, through a regularized system of access, and for a fixed price it has demonstrated that the instruments are in fact available through a "regularized system of access" and the exemption provided for by section 22 of [the *Act*], authorizes the Ministry to direct the appellant to access the instruments he seeks through the LRO or Teraview portals…

The Ministry then states that its system of public access is "analogous" to the system established by the Ministry of Finance and referred to in Order PO-1655, which the IPC held qualified for exemption under section 22. The Ministry proceeds to refer to the specifics of Order PO-1655 and the findings in that order.

The appellant takes issue with the Ministry's representations, and states:

[The appellant], prior to the involvement of Teranet, was able to access the LRO summary reports at no cost and to make copies of LRO instruments without being subject to any end use restrictions on its use of the instruments. It could post images of the LRO instruments on its secure website so that [the appellant's]

subscribers interested in a particular land transaction could then see the related LRO instrument(s). It can no longer do so.

The LRO summary reports are no longer available to [the appellant] (or anyone else). [The appellant] must, instead, pay for reports from Teranet.

The Teranet reports, as discussed earlier, include information which is omitted from the LRO Summary reports (for example, mortgage information) and omit information which is included in the LRO Summary reports (for example, commercial transactions where both parties are individuals). Access to the LRO Summary reports will allow [the appellant] to access the information omitted by Teranet.

It should be noted that transactions in which both parties are individuals or "personal entities" had been included in the Teranet reports provided to [the appellant] between June, 2003 and June, 2007. This was not inadvertent. On the contrary, it was a topic that was specifically addressed and agreed upon by the parties during the license negotiations of June 2003.

Further, the Teranet reports impose restrictions on any LRO instrument images identified using the reports. The LRO instrument images [the appellant] can now obtain come with strings attached. As discussed earlier, the Teranet reports (and the LRO Summary reports) identify transactions. [The appellant] must then review the LRO instruments associated with each transaction to decide if the instruments are of interest.

Users who access LRO instruments through Teranet software must agree to end use restrictions on the instruments. Users who identify LRO instruments of interest using Teranet reports (as does [the appellant]) must agree to end use restrictions on any instruments they subsequently obtain - regardless of whether they obtain them using Teranet software.

The language of the end use restrictions varies slightly between the licences but generally is similar to the Geowarehouse licence and provides that material may not be "copied, reproduced, republished, uploaded, posted, transmitted, framed, commercially exploited or distributed in any way or by any means whatsoever..."

The user is allowed to make one copy for internal use.

It is impossible for [the appellant] to identify land transactions of interest without use of the Teranet reports (since the Ministry no longer makes the LRO summary reports available). Accordingly [the appellant] can no longer post images of LRO instruments for the benefit of its subscribers as it had customarily done with

> images obtained using the LRO summary reports and LRO instrument images obtained through the LRO's.
>
> Therefore the LRO instruments that [the appellant] is requesting (without end use restrictions) are not available to the public.
>
> Further, as stated in the Notice of Inquiry, for this section to apply, the institution must establish that the record is available to the public generally, "through a regularized system of access".
>
> To show that a "regularized system of access" exists, the institution must demonstrate that:
>
> - a system exists
> - the record is available to everyone, and
> - there is a pricing structure that is applied to all who wish to obtain the information.
>
> Access to the data that was available to [the appellant] at no cost through the LRO Summary reports is now available to [the appellant] only through Teranet at a price negotiated with Teranet. There is no pricing structure applied to all, Teranet negotiates with each interested user. This is unlike the situation in IPC Order P-1316.

Teranet has also provided information regarding the nature of its business dealings with the Province and the services it provides, which are relevant to this issue. In this regard, Teranet states:

> Teranet was selected, in 1991, by Ontario to partner with Ontario in undertaking the task of automating, converting and operating Ontario's land registry system, using an application known as POLARIS (Province of Ontario Land Registration Information System). Since then, Teranet has been responsible for building and maintaining an Electronic Land Registration System ("ELRS").

Teranet notes that its rights and responsibilities regarding the ELRS and the land registration system are governed, in part, by two agreements; an Implementation and Operation Agreement and a License Agreement. With respect to its services, Teranet states:

> Under the terms of the License Agreement and Implementation Agreement, Teranet is required to provide the basic public service, which is the functionality required to access land registration data and carry out functions such as search and registration.
>
> …

> In addition to the basic public service, Teranet has used its exclusive license to the land registration data to develop products and services for clients…

Teranet goes on to describe its services and the way in which its "proprietary" software can be used to permit users to search the ELRS and electronic registration, and states:

> In all cases, where Teranet provides services to customers it imposes contractual terms and conditions relating to the use of those services. For on-site terminals at Land Registry Offices, the terms and conditions are imposed as a precondition to the use of the services available at those offices. In all other cases, the terms and conditions form part of the contract between Teranet and its customers for the services provided.

Analysis and Findings

To begin with, I note that the Ministry has taken the position that the section 22(a) exemption at issue only applies to the instruments, and these are the sole records for which this exemption has been claimed.

On my review of the representations of the parties, I am satisfied that the instruments are publically available, and qualify for exemption under section 22(a).

In this regard, I find, for the reasons set out below, that all three requirements necessary to find that a regularized system of access exists have been satisfied.

System exists

The Ministry has clearly indicated that the public is able to access the instruments through two procedures.

One of these procedures is by attending on-site at any of the Land Registry Offices in Ontario and accessing the instruments (either through a self-service computer terminal in the case of properties within the automated system, or through a manual search of hard copy and microfilmed records for properties within the manual system). I am satisfied that a system exists to provide the public with access to the instruments registered at each of the 54 LROs throughout the province of Ontario.

The second procedure is through the Teraview software, in which users of this software may, upon payment of a fee and subject to certain end-user restrictions, access on his or her computer any instrument registered in the automated system in any of the 54 LROs in Ontario. I am satisfied by the representations of the Ministry (and Teranet) that, upon payment of a fee, any member of the public may access this software and perform searches to locate instruments registered in any of the 54 LROs throughout Ontario. In my view, the fact that the provider of

this information is a private sector organization does not negate the accessibility of the instruments within the meaning of section 22(a) (see: Order PO-2737).

Records are available to everyone

Based on the representations of the Ministry, I am satisfied that the instruments recorded in the LROs, as well as those available through Teraview software, are available to everyone.

The Ministry has stated that the LROs are open to the public and located throughout the province of Ontario, and that any member of the public may attend at the LRO in which a particular instrument is registered, and access the instrument or a copy either through the self-service terminal provided at the counter, (in the case of instruments registered in the automated system), or by conducting a manual search for hard copy or microfilmed records, for those instruments not registered in the automated system. The Ministry has also stated that the Teraview portal provides public access to instruments registered in the land registration system, and that any member of the public who wishes to obtain access to Teraview may do so by paying the prescribed fee.

Accordingly, I am satisfied that these records are available to everyone.

However, I do wish to address an argument raised by the appellant regarding whether the records are indeed "available to everyone." This issue concerns the manner by which an individual can identify the instrument they are interested in. In its representations the appellant states:

> The Ministry … states that the number of records registered in the LROs in a year is approximately 2.1 million. [The appellant is] interested in only a small subset of these records (less than 1%). The LRO reports are essential to anyone interested in identifying land transactions that meet certain pre-determined criteria. The alternative, reviewing all 2.1 million records each year, is practically impossible.
>
> If [the appellant] is denied access to the LRO reports, it can no longer, practically, identify the records that relate to land transactions of interest to [the appellant] and its subscribers.

The appellant is taking the position that, even though the appellant may indeed be able to access the individual instruments through a regularized system of access, this ability is meaningless if the appellant is unable to have access to the "key" by which it can identify the specific records (instruments) of interest to it. This position parallels a similar argument made before former Assistant Commissioner Tom Mitchinson in Order P-1281. He addressed this issue as follows:

> The appellant argues that the alternative system of access identified by the Ministry does not apply to his request, because it relates to individual records and not the entire database which is the subject of his request.

In Order P-1114, I considered the possible application of section 22(a) to a similar request involving access to business data stored by the same Ministry on microfilm. In that case, as in this one, the Ministry identified the individual record search system as an alternative regularized system of access to information contained on a database (microfilm in that case, the ONBIS database in this appeal). I stated in that order:

> In my view, if the requested information is otherwise available from a public library, government publications centre or other similar system, then access rights under the *Act* are not diminished by requiring members of the public to utilize these alternative sources (Order P-327). However, I feel that section 22(a) should only be invoked in situations where the request can be satisfied through the alternative source.
>
> In the circumstances of this appeal, I find that the information responsive to the appellant's request is the compendium of registrations included on the microfilm, which consists not only of the individual registration details, but additional information as to which registrations were filed on a particular day. ... The information which responds to the appellant's request is the compendium of registrations filed on any particular day, and, in my view, directing the appellant to the business names registration database on an individual record-by-record search basis does not provide him with access to the requested information.

Having considered the representations provided by the parties in this appeal, I reject the Ministry's position, for the same reasons as outlined in Order P-1114.

The information which responds to the ONBIS portion of the appellant's request is the *entire* ONBIS database. In my view, directing the appellant to the individual record-by-record search facility provided to access portions of the database containing business data of specific business registrants does not provide him with access to the requested information. Not only is the public access limited to searches by individual business identifiers to specific pieces of information, as opposed to the collection of the relational data elements, but it is also clear from the Ministry's submissions that the third component part of the database, the software programs has never been publicly available.

As I stated in Order P-327 in discussing the application of section 22(a):

> In my view, the section 22(a) exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience

> favours this method of alternative access; it is not intended to be used in order to avoid an institution's obligations under the *Act*.
>
> (See also Order 170)

> For the reasons I have outlined, I find that the alternative system of access established by the Ministry will not provide the appellant with access to the information which responds to his request, and the section 22(a) exemption does not apply to the ONBIS database in the circumstances of this appeal.

As identified above, in the circumstances of this appeal, I am satisfied that the instruments are available to everyone. It is clear that everyone who wants to access a particular instrument is able to access that instrument for the fee set out in the statute.

In this appeal the appellant takes the position that he is only seeking access to specific records (less than 1% of the land registration records filed per year), and that without the "list" or "key," which would allow the appellant to identify the instruments of interest, access to the records the appellant is interested in is effectively denied to him.

I have carefully considered this position. I accept the basic premise that, if a request is for specific records, an institution cannot respond by stating that records of that type are publically available if there is no way of identifying the specific records requested. This, in my view, would argue against the position that the instruments are publically available, and would certainly argue against the position that the balance of convenience would support the application of the exemption (an issue addressed below).

With respect to the "key," which would enable the appellant to identify specific instruments without requiring a review of all 2.1 million instruments, as noted above, the Ministry has not claimed that these records are "publicly available" under section 22(a) of the *Act*. The Ministry has claimed that the exemption in section 18(1) applies to these records. I found above that the records do qualify for exemption, and are not available under the *Act*, because the harms identified in section 18(1) are established; however, I made this finding on the basis of the information provided to me – that the disclosure under section 18(1) would result in the identified harms because the Ministry (through Teranet) *sells the information* to anyone who wants to purchase it. Although purchasers must enter an agreement with Teranet to purchase the specific information they want, the parties have made it clear that this information is not restricted and that fees are established for the purchase of the requested information.

Indeed, the appellant confirms that he was able to purchase the "key" from Teranet, and continued to receive the information. The appellant states:

> The Ministry argues … that [the appellant] is not precluded from access to instruments. However, the parties are in agreement that [the appellant] would be precluded from access to the reports if it were to use the instruments in a way that

> Teranet did not approve (that is, make copies of the instruments available, on request, to its subscribers).

This supports the position that the reports (the key) are also available. The fact that access to certain records may be restricted if a party breaches a term of an agreement does not, in my view, alter that fact that the records are available to everyone. In the circumstances, the appellant's argument that the "key" is not available cannot be sustained. The appellant can access the "key," and can obtain the instruments identified as being of interest. The fact that the Ministry has contracted with a third party to sell the information, and that there are restrictions on the use of this information, does not affect the fact that the information is publicly available.

Furthermore, as discussed above, the statutory scheme established by the legislature has identified the types of records that are required by statute to be made available to the public. In the absence of a finding that the revised methods of access established by the Ministry and Teranet to meet the statutory requirements in some way violate the statutes, I am satisfied that the information is available to everyone.

Accordingly, in the circumstances, I am satisfied that the records at issue are available to everyone.

A pricing structure to access the Instruments is in place

Regarding the pricing structure to enable the public to access instruments registered in LROs, the Ministry has identified the statutory fee schedule is set out in Regulations made under the *Registry Act* and the *Land Titles Act* that apply to searches for instruments and copies of instruments at the individual LROs.

With respect to pubic access to copies of instruments through the Teranet software, the Ministry states that any person may, for a one-time fee of $595, acquire a license by which they may search instruments in the land titles system in any of the 54 LROs in Ontario, and through which they can access electronic copies of individual documents registered in respect of a particular property.

Based on the representations of the Ministry, I am satisfied that a pricing structure that is applied to all who wish to obtain the information is in place.

Balance of Convenience

The Ministry also provides the following information regarding the "balance of convenience" test. The Ministry states:

> In considering the application of section 22, the Ministry also turned its mind to the question of whether referring the appellant to either of the two avenues in which instruments can be accessed, is appropriate in the circumstances having

regard to the ease by which the appellant may access the instruments, and the work required by the Ministry to respond to the request. As established by the IPC in previous Orders, the exemption is intended to provide the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. In the circumstances, the Ministry has determined that the balance of convenience favours the Ministry's referral. …

As established above, the appellant has two alternate means of access to the instruments it seeks. One is through the LROs and the other is through the Teraview software application. In this regard, the appellant already obtains access to instruments through Teraview. Accordingly, the Ministry respectfully submits that there is no need for Ministry staff to be put to the effort of locating, copying and severing instruments to provide to the appellant when the appellant is able to search and access the instruments from a computer terminal at its workplace - as it currently does. This would require the Ministry to needlessly spend time and money to retrieve the very same information that it has already spent time and resources making available to the public in accordance with statutory requirements….

Given that the instruments sought by the appellant are publicly available, it is contrary to the public interest for the Ministry to expend time and resources producing these same records to the appellant under [the *Act*]. The land registration system has been established as a public registry for the purpose of permitting the public to access information about interests in land. The system is designed to allow the public direct access, thereby freeing government resources to be devoted to other initiatives and programs. If access to instruments were to be given to the appellant under [the *Act*], then access would have to be given to all users of the land registration system. In this regard, the "floodgates" would open, and the province could never be sufficiently resourced to respond to the number and scope of requests for land registration information given that over two million transactions per year are processed by LROs in Ontario.

Further, the time and effort required to respond to the request would necessarily interfere with the ability of the Real Property Registration Branch to perform its duties and functions within legislated time frames, and any delay in the Division performing its functions would be prejudicial to the effective administration of land registration services in the province. Simply put, the effective delivery of land registration services are critically important to the proper functioning of the economy of Ontario. Meeting the appellant's request establishes a precedent which would seriously impair the ability of the Ministry to deliver land registration services. Accordingly, the Ministry submits that the balance of convenience clearly favours the Ministry, and it is appropriate for the Ministry to

> apply section 22 to direct the appellant to access the instruments sought through existing public portals.

The Ministry also takes the position that the appellant's cost in accessing instruments from the public portals is neither prohibitive nor substantially different from the costs associated with accessing the same records under the *Act*. The Ministry notes that, in the present appeal, the fees prescribed by regulation under the *Registry Act* and *Land Titles Act* are less than those involved in producing the information through an access request under the *Act* based on the Ministry's fee estimate.

The Ministry also provides representations in support of its position that it has properly exercised its discretion to apply section 22 to direct the appellant to access the instruments it seeks from existing public access portals. The Ministry states:

> The Ministry has long made land registration information available to the public. In fact, the government has made land registration information available through its LROs since the 18th century. Notably, in the last number of years, land registry information has also been available to the public through Teraview.
>
> The land registry system paradigm is based on the principle that a user pays for access to the system. The fees charged to register and search records are an offset to the costs the Ministry pays to maintain the land registry system.
>
> Breaking this paradigm by allowing the appellant access to the land registration instruments via [the *Act*] would open the floodgates for duplication of efforts. In effect, it would cause the Ministry to duplicate its costs and effort if it were to have staff perform search and retrieval functions that the Ministry has already expended considerable sums in system design and infrastructure to permit members of the public to perform.
>
> To provide access under [the *Act*] would also mean the creation of a third system of access to land registry information when there are already two other effective systems in place. The Ministry submits that the exemption provided for under section 22 exists to prevent the duplication of this kind of expense and effort in circumstances where the balance of convenience favours the institution. Accordingly, the Ministry submits that it has properly exercised its discretion to apply section 22 in a manner consistent with both the spirit and intention of the exemption.
>
> In the present appeal, the Ministry has also considered the fact that the appellant is a corporation and not an individual seeking his/her own personal information. In the present circumstances, the appellant has demonstrated no sympathetic or compelling need to receive the information through an access request as opposed to the regularized system of access already in place.

Based on the Ministry representations on the balance of convenience and on the manner in which it exercised its discretion, I am satisfied that the balance of convenience favours the application of section 22(a), and that the Ministry has properly exercised its discretion to apply the section 22(a) exemption. Accordingly, I am satisfied that the instruments qualify for exemption under section 22(a).

Having found that the instruments qualify for exemption under section 22(a), it is not necessary for me to review the alternative argument that the records qualify for exemption under section 21(1) of the *Act*.

THE POSSIBLE APPLICATION OF SECTION 63(2) OF THE *ACT*

The appellant has maintained throughout the course of this appeal that section 63(2) of the *Act* entitles the appellant to have access to the records regardless of whether or not an exemption applies.

Section 63(2) of the *Act* reads as follows:

> This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force.

The appellant takes the position that the *Land Titles Act* and the *Registry Act* require the Ministry to make identified records available to the public, and that this was the practice of the Ministry immediately before the *Act* came into force. As a result, the appellant argues that the existence of these statutory requirements allow the appellant access to the records without any terms or conditions on access.

The Ministry's representations on this issue read as follows:

> With respect to both the instruments and reports, the Ministry … submits that subsection 63(2) does not apply to the records at issue in this appeal, as the information contained in the records was not available to the public *by custom or practice* before [the *Act*] came into force; rather, the information in the records at issue was required to be made public by statute before January 1, 1988. If the Legislature had intended subsection 63(2) to also encompass information made public under statute, it would have expressly provided for this in [the *Act*], in the same way as it has in the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*").
>
> In the alternative, the Ministry submits that subsection 63(2) of [the *Act*] must be interpreted to only authorize the disclosure of information in the same *form, manner and purpose* as it was made available to the public before January 1, 1988. In 1988, neither of the reports now sought by the appellant were available.

> Rather a "Day Book" was made available, as was required by statute, for the purpose of enabling members of the public to complete up-to-date title searches in the registry system. Access to the Day Book was not provided in the land titles system, as it is not necessary since the system creates an up-to-date parcel register and provides a government guarantee of ownership. At the present time, substantially all of the information contained in the reports the appellant now seek relates to registrations in the land titles system. Information relating to registrations in the land titles system was never provided in a publicly available report such as the Day Book - consequently the appellant cannot assert a right to access land titles related information contained in the Records under subsection 63(2).
>
> In the further alternative, the Ministry submits that subsection 63(2) does not apply to the personal information in the records at issue in this appeal. Subsection 63(2) is limited in application to information that is *not personal information*. Accordingly, the records requested must be excluded from the application of subsection 63(2) or severed of all personal information before the subsection can apply.

The Ministry provides detailed background information about the types of information which was available prior to the coming into force of the *Act*. It states:

> Immediately prior to January 1, 1988, both the *Land Titles Act*, and the *Registry Act* required a land registrar to produce for public inspection any instrument retained in a LRO during office hours or any book of the office relating to such instrument.

The Ministry then sets out the specific sections of these Acts, (subsection 15(4) of the *Registry Act* and subsection 165(4) of the *Land Titles Act*), and then states:

> In addition to the above sections, section 14(1) of Regulation 995 of the *Registry Act* and section 51(1) of Regulation 690 of the *Land Titles Act* required that "copy index" be maintained at LROs. This index was only required at times that the automated system was not available. The index was required to include for each instrument registered to a property: the property identifier, the type of instrument, the registration number and the date of the registration. As the automated system was functional almost 100% of the time this index was rarely provided. These sections of the Regulation were revoked in 1999.

The Ministry then states:

> … subsection 63(2) does not apply to the records at issue in this appeal, as the information contained in the records was not available to the public by custom or practice before [the *Act*] came into force.

The Ministry then expands on the three arguments set out above in support of its position that the information in the records was not available to the public by custom or practice.

Analysis and Findings

I have carefully considered the possible application of section 63(2) to the records at issue in this appeal, and find that it does not apply to these records. I make this finding primarily on my view of the purpose of section 63(2).

In my view, the purpose of section 63(2) is intended to foster informal access outside of the *Act*, without the need for individuals to make a formal access request under the *Act* for information (not including personal information) to which access had historically been provided. I am not satisfied that, in circumstances where there is an access request under the *Act*, it was the legislative intent to prohibit institutions from claiming exemptions where the identified harms are established, particularly in circumstances where the means of access has changed over time (as is the case with records pertaining to real property registrations).

I am supported in this view by previous orders of this office. Although section 63(2) of the *Act* has not been referenced in many previous orders of this office, to the extent that it has been applied, previous orders have applied this section with care. In P-217 former Commissioner Tom Wright found that the disclosure of drawings and specifications for certain government offices qualified for exemption under section 14(1)(i) of the *Act*, as disclosure could reasonably be expected to endanger the security of a building. He then had to address the appellant's position that it had been the earlier practice of the government to disclose drawings and specifications of this nature. In addressing this argument, the former Commissioner took a purposive and pragmatic approach to its application. He stated:

> I addressed the application of subsection 63(2) of the *Act* in Order 187 …. At page 11, I stated:
>
> > In general, the thrust of the *Act* is to promote open government; however, in cases where prior access practices were perhaps not as well thought out as they should have been, I do not believe that subsection 63(2) of the *Act* should be invoked in order to perpetuate such practices.
>
> In its representations, the institution states that, as its experience with the *Act* has developed, records such as those at issue in these appeals are now released in a limited manner to qualified contractors who are bidding on or involved in a project to which to the records pertain. It further states that such records have not been given, in the past, to an individual who did not justify the reason the individual was seeking access. I am satisfied that subsection 63(2) of the *Act* does not apply in the circumstances of these appeals.

In addition, former Assistant Commissioner Tom Mitchinson identified the purpose of section 63(2) in Order PO-1717, where he stated:

> The purpose of section 63(2) is to make it clear that any practice of routinely or informally disclosing information by government institutions prior to the *Act* coming into force should not be encumbered by the creation of the new statutory scheme. Exemption claims, with few exceptions, are discretionary in nature, and this section recognizes that information can continue to be disclosed even if it would qualify under one of the discretionary exemption claims. …

The excerpts from the orders set out above confirm the approach to section 63(2) which I have taken in this appeal. In Order P-217 former Commissioner Tom Wright found that records routinely disclosed to requesters in the past could nevertheless qualify for exemption in circumstances where the identified harm was made out. He refused to apply section 63(2) to "override" the ability of the institution to claim the exemption, where the disclosure would result in the identified harm, even though the institution's former practice was to disclose these records. Similarly, former Assistant Commissioner Mitchinson's statement of the purpose of section 63(2) focuses on the intent of that section to foster informal access outside of the *Act*, and the importance of continuing to provide informal access even where discretionary exemptions may be claimed. The former Assistant Commissioner did not address circumstances where mandatory exemption claims may apply to information previously disclosed, nor did he address what appears to be the mandatory language of section 63(2) itself.

In Order PO-1717, former Assistant Commissioner Mitchinson referred to the practice of routinely disclosing information. In 1994, a joint project of this office and the Freedom of Information and Privacy Branch, Management Board Secretariat identified practices to encourage government organizations to "routinely disclose" or "actively disseminate" information. This report identifies that routine disclosure occurs when access to general records is granted on a routine basis as the result of an access request. Active dissemination refers to the release of information without any request. On September 1, 1998, this office issued Practices No. 22, which addresses this issue.

After considering this issue, particularly in light of the above discussion, I conclude that the *Act* governs access to government information, and when it was enacted, the intent of section 63(2) was that (except for personal information), access to government information ought not to be reduced because of the *Act*. This interpretation is consistent with the principles of routine disclosure and active dissemination and previous orders of this office.

I am not satisfied that, in circumstances where there is an access request under the *Act*, it was the legislative intent to prohibit institutions from claiming exemptions where the identified harms are established. Furthermore, I am not satisfied that the intent of section 63(2) was to make existing statutory schemes in place on January 1, 1988 unalterable, without reference to how these schemes may change and evolve due to changes in electronic access and legislative change.

Although this is sufficient to address the position that section 63(2) does not apply, the parties have provided significant representations on the issue of whether the fact that section 63(2) does not refer to previous access being available "by statute" is relevant, and I will address this issue.

Can disclosure pursuant to statutory requirement be read into section 63(2) of the Act?

As identified above, the Ministry submits that to the extent that information was made available to the public in 1988, it was not done by "custom or practice," rather, it was available under a statutory requirement. The Ministry argues that disclosure required under a statute cannot be read into the expression of disclosure "by custom or practice" in subsection 63(2) of the *Act*. The Ministry states:

> The appellant is presently seeking access to the DBFR Fee and Receiving Sheet, still used in non-automated and partially automated LROs, and the POLARIS Daily Registration Summary (which also records daily registrations of instruments in LROs across Ontario). In addition, the appellant is seeking access to the instruments referred to in these records.
>
> As outlined above, on January 1, 1988, both the *Registry Act* and the *Land Titles Act* required the land registrar of each LRO to produce for public inspection any instrument retained in a LRO during office hours or any book of the office relating to such instrument.
>
> Some of the information contained in the records that the appellant is now seeking was (in a different form and manner) available to the public immediately before [the *Act*] came into force; however, this information was not made publicly available by the custom or practice of the LROs. This information was made public because the *Land Titles Act* or the *Registry Act* required this information to be made public. The Ministry submits that subsection 63(2) cannot apply to require disclosure of the records because the plain meaning of the term "custom or practice" in the provision necessarily excludes any disclosure required under statute. Had the Legislature intended public disclosure required by statute to be included in subsection 63(2), it would have expressly provided for this.
>
> The Ministry's interpretation of subsection 63(2) is further supported by reference to the analogous provision in [the *Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA")*], subsection 50(2), which provides that:
>
> > This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by ***statute***, custom or practice immediately before the 1st day of January, 1999. (emphasis added)

Notably, the *MFIPPA* provision includes the term "by statute". The equivalent [provision in the *Act*] does not.

Interpreting the difference between the wording of the two corresponding provisions in the two access to information statutes made by the Legislature of Ontario invites the application of two principles of statutory interpretation discussed by Sullivan in *Dreidger on the Construction of Statutes*:

> Where statutes deal with the same subject, it is presumed that their language is consistent throughout. Identical phrases and expressions are presumed to have the same meaning while differences in wording are presumed to reflect differences in the intended meaning or effect.
>
> This principle was confirmed by the Canadian Supreme Court in *Dauphin Plains Credit Union Ltd. V Xyloid Industries and the Queen* (1980), 108 D.L.R. (3d) 257.
>
> The *expressio unius est exclusion alterius* rule: to express one thing is to implicitly exclude another.
>
> An implied exclusion argument lies whenever there is reason to believe that if the Legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned.

In accordance with this first principle of statutory interpretation, the Ministry submits that [the *Act*] and *MFIPPA* when contrasted with each other indicate that the two analogous sections were informed by a different legislative intent. Accordingly, the presence of the expression "by statute" in subsection 50(2) of *MFIPPA*, in addition to the term "by practice or custom", necessarily informs the interpretation of the term "by practice or custom" found in subsection 63(2) of [the *Act*], (where the term "by statute" is not included). Accordingly, the Ministry submits that the term "by practice or custom" in subsection 2(3) cannot be interpreted to include information made public by statute.

Secondly, the fact that the Legislature expressly provided for disclosure "by statute" in subsection 50(2) of *MFIPPA* but was silent on this point in respect of subsection 63(2) of [the *Act*] invites the application of the *expressio unius est exclusion alterius* rule. In this case, the Legislature must be presumed to have intended to exclude "by statute" from ss. 63(2) of [the *Act*]. Moreover, had the

> Legislature wished subsection 63(2) of [the *Act*] to include "by statute" it could have amended [the *Act*] to align the provision with subsection 50(2) of *MFIPPA*, at the time *MFIPPA* was introduced - a step it did not take.
>
> In conclusion, the Ministry respectfully submits that subsection 63(2) cannot be applied to authorize the disclosure of instruments, the DBFR and the POLARIS Daily Summary reports sought by the appellant, as the information contained in those records was not available by custom or practice immediately before January 1, 1988. In fact, the information that was made available to the public by the land registrar of each LRO prior to the proclamation of [the *Act*] was done so under statutory compulsion. Disclosure "by custom or practice" in subsection 63(2) of [the *Act*] cannot reasonably be interpreted to include disclosure "by statute".

The appellant addresses this argument as follows:

> By making [the argument set out above], the Ministry admits that it was, and continues to be, required by statute to make the reports accessible to the public, including [the appellant].
>
> If information that was available by custom or practice must remain accessible to the public, *a fortiori*, information that was provided by statute must remain accessible. The statutory language has not changed. It should be noted that the language under both the Land Titles and the Land Registry regulations is the same for the types of searches (reports) that are available at no charge.
>
> Further, the reports in question, in both Land Titles and Land Registry, continued to be available after January 1, 1988 and were available to the public and [the appellant] until 2003 when [the appellant], and others, were required to turn to Teranet for reports containing comparable information.
>
> … The Ministry's, and Teranet's, interests are in maximizing the value of the monopoly granted to Teranet. However, as argued earlier, the proper way to do this is by way of appropriate legislative action and not through [the *Act*].

The appellant also argues that although the records were available by statute, they were also available by practice, and then states:

> Regarding the Ministry's reference to the analogous section of [*MFIPPA*], section 50(2) of *MFIPPA* was enacted some time after section 63(2) of [the *Act*]. Statutory amendment is a complex and imperfect process. Many facts influence the language used at the legislative and drafting levels. There is no reason to believe that minor differences in language have any particular significance (unless made clear in the statute or in the legislative record).

> It would be an odd interpretation of the language of section 63(2) that it applies to information available to the public by custom or practice but not to information available by statute and not to information available to the public both by custom and practice and by statute.

Analysis and findings

In my view, the circumstances of this appeal, as discussed below, support a finding that the lack of the words "or statute" in section 63(2) is significant. As a result, I find that, because section 63(2) does not include the words "or statute," and because the previous approach to disclosing this information was mandated by statute, this section has no application in the circumstances of this appeal. I make this finding without addressing issues which may be raised regarding the application of section 50(2) of *MFIPPA*, as that section is not before me in this appeal.

1) Statutory interpretation

Section 63(2) specifically states "by custom or practice," and does not include the words "or statute."

I find that the principles of statutory interpretation discussed by Ruth Sullivan in *Dreidger on the Construction of Statutes* and referred to by the Ministry are persuasive in determining this issue. In my view, the fact that the wording of section 63(2) does not include "statute," but the wording of the parallel section of the municipal Act (section 50(2)) does, supports a finding that the omission of the word "statute" is significant. I do not accept the appellant's position that "there is no reason to believe that minor differences in language have any particular significance." In my view, the exclusion of the word "statute" in the *Act* (which, could have been included by the legislature in the course of amending the *Act* over the past 30 years) is an important consideration. This finding is supported by the other reasons set out below.

2) Statutory scheme in place

As identified above, the legislature has established a statutory scheme for the provision of the important land registration information at issue. This scheme is a complex and detailed method of ensuring the public has access to the information, which includes provisions for the types of records to be made available, the methods of access, and the fees which can be charged for the types of information. Unlike a custom or practice, the statutory provisions require certain items to be made available, and specify how this should be done.

Furthermore, this statutory scheme enacted by the legislature can be and, indeed, has been amended by the legislature since the *Act* came into force. Although the specific provisions of the statutes do not appear to have been amended, the parties have identified that various regulations governing the types of records to be made available have been. The Ministry states:

> In addition to the above sections, section 14(1) of Regulation 995 of the *Registry Act* and section 51(1) of Regulation 690 of the *Land Titles Act* required that "copy index" be maintained at LROs. This index was only required at times that the automated system was not available. The index was required to include for each instrument registered to a property: the property identifier, the type of instrument, the registration number and the date of the registration. *As the automated system was functional almost 100% of the time this index was rarely provided. These sections of the Regulation were revoked in 1999.* [emphasis added]

This supports the view that the legislature has enacted a comprehensive statutory scheme for the provision of land registration information, which has also been modified over time, as new and improved electronic and automated systems have been established.

If I were to accept the appellant's position that the word "or statute" could be read into section 63(2), I would in that case presumably have to review the statutory requirements in place at the time the *Act* came into force, (disregarding any amendments that may have been enacted in the ensuing period), and require the production of the records which the statutes required back in 1988. In my view, reading in such language would lead to significant differences in access that would be inconsistent with legislative intention.

The appellant also suggests that the words "custom or practice" would apply to statutory requirements in any event, because it was the "custom or practice" to follow the statute in 1988. I do not agree. By its nature information that is required to be made accessible by statute is not the same as information that is simply available through "custom or practice" - statutorily required information was (and in this case, still is), statutorily required. Furthermore, there is some dispute as to what the "custom or practice" was in 1988. The Ministry submits that certain records required to be made public by the *Land Titles Act*, were not made available in 1988 because they were not necessary; furthermore, the Ministry states that the records which are now at issue are not the same as the ones which were available in 1988. These positions confirm my finding that the omission of the words "or statute" is significant.

As a result, I find that, because section 63(2) does not include the words "or statute," and because the previous approach to disclosing this information was mandated by statute, and not merely by custom of practice, section 63(2) has no application in the circumstances of this appeal.

Summary

In summary, for the reasons set out above, I find that section 63(2) cannot be applied to land registration information at issue in this appeal. I make this finding primarily on the basis of my view of the purpose of that section. I also find that this section does not apply as the information was available by statute, rather than by custom or practice, prior to the coming into force of the *Act*.

Having found that section 63(2) does not apply, it is not necessary for me to review the additional alternate arguments regarding the possible application of section 63(2) to the records.

Furthermore, I note that, in the circumstances of this appeal, neither of the two exemption claims which I have upheld for the two types of records (sections 18 and 22) prohibits access to the records under the separate statutory scheme.

PUBLIC INTEREST OVERRIDE

The appellant argues that there is a compelling public interest in the disclosure of the records. He refers to section 23 of the *Act* and states:

> It is in the public interest to ensure that institutions follow the legislation that binds them, and to allow members of the public to access information to which the public has a statutorily mandated right.
>
> It is in the public interest to have a "common agent", such as [the appellant], access and publish information from public registers, as has long been recognized by the Courts.
>
> Finally, and perhaps most importantly, it is in the public interest to ensure that the right of access of the public to public information is not improperly restricted by the government, or its licensees, whether for financial or other motives.

General principles

Section 23 states:

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

The public interest override does not apply to records that have been exempted from disclosure pursuant to section 22 of the *Act*. I found above that the instruments were properly exempted under that section of the *Act*. Accordingly, I will only consider whether the public interest override applies with respect to the records to which I have found section 18 to apply.

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

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. 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 or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

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

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

Any public interest in non-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

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

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

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

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

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

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

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

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

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614]

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

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

Purpose of the exemption

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

Analysis/Finding

On my review of the records at issue and the representations of the parties, I find that the public interest override found in section 23 does not operate to override the records which I have found qualify for exemption under section 18(1)(c) and (d). Although the appellant correctly identifies that there is a public interest in ensuring that institutions follow the legislation that binds them, and to allow the public to access land registration information to which the public has a statutorily mandated right, I am not satisfied that this public interest overrides the application of section 18(1) exemption claims in the circumstances of this appeal.

I have found that the POLARIS Daily Registration Summary and the DBFR Fee and Receiving Sheet qualify for exemption under section 18(1)(c) and (d) of the *Act*, as the Ministry has established that the harms identified in those sections could reasonably be expected to result. However, I made this finding on the basis that the disclosure under section 18(1) would result in the identified harms because the Ministry (through Teranet) *sells the information* to anyone who wants to purchase it. My findings above, and the legislative scheme set out by the Legislature to ensure that the public has access to land registration information meet the public interest concerns raised by the appellant. Accordingly, I am not persuaded that any public interest in the disclosure of these records is sufficiently compelling to override the exemption, and I find that section 23 does not apply.

PUBLICLY AVAILABLE PERSONAL INFORMATION

The appellant takes the position that section 37 of the *Act* applies in the circumstances of this appeal.

The appellant states:

> Section 37 of [the *Act*] is in Part III and states:
>
> > This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.
>
> The Ministry submits that section 37 does not apply because the request was made under Part II of [the *Act*], and section 37 is in Part III. However, the Ministry argues that End Use Restrictions on data are there to ensure that Teranet's products are "consistent with the Crown's obligations under [the *Act*]."
>
> The Crown's obligations under [the *Act*] regarding disclosure of personal information are set out in Part III, and these restrictions do not apply because information in the LRO's is "maintained for the purpose of creating a record that is available to the general public". That section 37 applies to land registration records was accepted by the Information and Privacy Commissioner of Ontario in Investigation PC-980049-1, as discussed above.
>
> Additionally, the Ministry relies on section 21 (unjustified invasion of personal privacy) in Part II as an exemption to disclosure requirements; however, section 21 uses the same language as section 37 – "except ... personal information collected and maintained specifically for the purpose of creating a record available to the general public."
>
> Finally, in the Ministry's previous submissions, it argued that "Subsection 63(2) cannot be applied to authorize the bulk disclosure of land registry records where such disclosure would imperil the privacy of the citizens of Ontario, contrary to the privacy principles of [the *Act*]", and it urged "a purposeful interpretation" of [the *Act*] to reach this conclusion.
>
> However, "the privacy principles of [the *Act*]" are set out in Part III, and therefore, "a purposeful interpretation" would require a consideration of Part III, including section 37.
>
> Section 37, and other sections of [the *Act*], reflect the fact that the personal interest in privacy must sometimes defer to a greater public interest - in this case, the need for a public registry of land transactions.

> For all of the above reasons, section 37 applies in the circumstances of this appeal.

The appellant's position that section 37 applies in the circumstances of this appeal relates to issues regarding personal information. The application of the personal privacy exemption was raised for the instruments, and since I found that the instruments qualify for exemption under section 22(a), it was not necessary for me to determine whether the instruments contained personal information nor whether section 21(1) of the *Act* applied.

In any event, the appellant's position that section 37 applies in the circumstances of an access request has been addressed in a number of previous orders. In Order M-936 Adjudicator Fineberg addressed this issue in the context of a request under the equivalent section of the municipal Act (section 27). She stated:

> Section 37 appears in the provincial *Freedom of Information and Protection of Privacy Act* (the provincial Act). It is the equivalent of section 27 of the [*MFIPPA*], which is the applicable legislation in this appeal. Section 27 deals with the non-application of Part II of the Act, the section dealing with the collection and retention of personal information in the absence of an access request. This appeal relates to Parts I and III of the Act which deal with access requests and appeals. ….
>
> Furthermore, … section 27, relied on by the appellant, deals with the non-application of Part II of the Act, the section dealing with the collection and retention of personal information. This request was made under Part I of the Act and the appeal is being conducted under Part III.
>
> In Order M-96, former Assistant Commissioner Mitchinson considered the relationship between Parts II and III of the Act in the context of an appeal. In that case, the Ontario Secondary School Teachers' Federation (the Federation) had submitted a request under the Act to a school board for access to the home telephone numbers of its members. Both the Board and the Federation agreed that the requested information was the personal information of the members. One of the arguments made by the Federation was that the home phone numbers should be disclosed pursuant to sections 32(c) and (e) of the Act. These sections read as follows:
>
> An institution shall not disclose personal information in its custody or under its control except.
>
> > (c) for the purpose for which it was obtained or compiled or for a consistent purpose;

> (e) for the purpose of complying with an Act of the Legislature or an Act of Parliament, an agreement or arrangement under such an Act or a treaty;

The former Assistant Commissioner stated:

> Section 32 is contained in Part II of the Act. This Part establishes a set of rules governing the collection, retention, use and disclosure of personal information by institutions in the course of administering their public responsibilities. Section 32 prohibits disclosure of personal information except in certain circumstances; it does not create a right of access. The Federation's request to the Board was made under Part I of the Act, and this appeal concerns the Board's decision to deny access. In my view, the considerations contained in Part II of the Act, and specifically the factors listed in section 32, are not relevant to an access request made under Part I.

This approach was followed in Orders P-679, P-940 and P-1014. On this basis, even if I were to entertain other provisions of the Act in assessing my jurisdiction under section 52(3), I would not consider the application of section 27 as it is not relevant to an access request under Part I of the Act.

I find that section 27 of the Act has no application

I agree with the analysis set out above, and find that section 37 has no application to this appeal.

ORDER:

I uphold the decision of the Ministry, and dismiss the appeal.

December 30, 2009

Frank DeVries
Adjudicator