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

ORDER PO-2720

Appeal PA07-40

Trent University

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NATURE OF THE APPEAL:

Trent University (the University) received a request, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for the following information:

> The lease arrangement with [named company] to use University land for the proposed hydroelectric generating station and canal and the financial [or revenue formula] arrangements for the lease of this land by the University to [named company]

The University located the lease arrangement as well as two schedules to that arrangement. Prior to issuing its decision letter, the University notified the named company (the affected party) under section 28 of the *Act* as it might have an interest in the disclosure of the record. The affected party advised that it did not consent to the disclosure of the lease arrangement. The University then issued a decision letter, denying access to the lease arrangement, in its entirety, pursuant to the mandatory exemptions at sections 17(1)(a) and (c) (third party information) of the *Act*.

The requester (now the appellant) appealed the University's decision. In his letter of appeal, the appellant stated: "I submit that it is important for the Trent University community and the public to know the details of the lease agreement …" The appellant has therefore raised the possible application of the public interest override provision in section 23 of the *Act*.

During mediation, the University issued a revised decision letter granting partial access to the record. Portions of the lease arrangement itself were severed, while Schedule A to the arrangement was disclosed in its entirety and Schedule B was withheld in its entirety. Access was denied to the severed portions pursuant to sections 17(1)(a) and (c) of the *Act*. The appellant advised that he was not satisfied with the degree of disclosure obtained during mediation because he seeks access to the financial details of the lease arrangement.

As this issue could not be resolved in mediation, the file was transferred to the adjudication stage of the appeal process. This office first provided the University with a Notice of Inquiry, setting out the facts and issues in the appeal.

Shortly after the Notice of Inquiry was sent, the University issued a second revised decision letter, granting partial access to Schedule B. In that second revised decision letter, the University advised that it was claiming the application of sections 18(1)(c) and (e) (economic interests) to all of the severed information, in addition to its prior claim that sections 17(1)(a) and (c) of the *Act* apply. This office was provided with a copy of that decision letter.

Subsequently, the University responded to the Notice of Inquiry providing representations on the application of section 17(1), as well as representations on the application of the discretionary exemptions at sections 18(1)(c) and (e), which it had raised for the first time in the second revised decision letter.

This office then provided the appellant with the complete representations of the University, together with a copy of the Notice of Inquiry. The Notice of Inquiry was modified to include reference to the late raising of the discretionary exemptions at sections 18(c) and (e), as well as

the issue of the application of those exemptions to the responsive record. The appellant provided representations in response.

The University was then provided with an opportunity to respond to the non-confidential portions of the appellant's representations. The University provided reply representations.

As I noted that the named company who was party to the lease arrangement and who had an interest in the disclosure of the record (the affected party) had not been provided with an opportunity to address the issues on appeal, I sent a Notice of Inquiry to the affected party, inviting submissions. The affected party provided representations in response.

RECORDS:

The record at issue in this appeal is a lease arrangement between the University and the affected party, as well as two schedules to that arrangement labeled Schedule A and Schedule B.

As noted above, during mediation, partial access to the record was granted and the majority of the information contained in the lease arrangement, as well as Schedule A in its entirety, was disclosed to the appellant.

The information that remains at issue consists of 57 specific severances that have been made to the 38-page lease arrangement and the 4-page Schedule B. As described by the University in its representations, those severances may be grouped into six categories as follows:

(1) Dates (3 severances)
(2) Termination provisions (18 severances)
(3) Renewal periods (5 severances)
(4) Pricing (18 severances)
(5) Insurance amounts (3 severances)
(6) Force Majeure Thresholds (10 times)

Sections 17(1)(a) and (c) and 18(1)(c) and (e) have been claimed for all of the severances.

It should also be noted that Schedule B refers to a Schedule C which was intended to include a set of sample annual lease income calculations. Schedule C did not form part of the record that was provided to this office by the University. In its representations, the University explains:

> Schedule C is referred to in Article 1.0(3) of Schedule B and was intended to include a set of sample calculations based on the terms of the lease arrangement. Schedule C was not completed by [the affected party], and the parties have moved forward without Schedule C being prepared by the affected party or approved by the University.

I accept the University's submissions on Schedule C and have been presented with no evidence to suggest that, despite the University's submission, it might exist. Accordingly, Schedule C is not before me in this appeal.

DISCUSSION:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

Section 11.01 of this office's *Code of Procedure* states, in part:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal … If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

As noted above, the University's second revised decision letter issued at the beginning of the adjudication stage of the appeal process, marked the first time the University raised the discretionary exemptions at sections 18(1)(c) and (e) to deny access to the severed portions of the lease arrangement.

In Order PO-2113, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemption after the expiration of the time period prescribed in section 11.01 of the *Code of Procedure*:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemption is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
>
> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific

> circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

I have decided to allow the University's late raising of section 18(1)(c) and (e) of the *Act* as I am satisfied that the appellant has not been prejudiced in responding to the University's claim. The University raised the section 18(1)(c) and (e) claims in the second revised decision letter and addressed these claims in their representations. Therefore, the appellant was notified of the application of sections 18(1)(c) and (e) prior to the time that I sought his representations. At the time that I sought the appellant's representations, he was provided with an opportunity to reply to not only their application, but also to raise concerns about the late raising of these exemptions. The appellant did not make any submissions on whether he was prejudiced by the late raising of sections 18(1)(c) and (e) and in my view, he was not. Accordingly, I will go on to consider whether sections 18(1)(c) or (e) apply to the record at issue.

ECONOMIC AND OTHER INTERESTS

Sections 18(1)(c) and (e) read:

> 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;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

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

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

Section 18(1)(c): prejudice to economic interests

The purpose of the discretionary exemption at section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector

entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

Section 18(1)(c) takes into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For section 18(1)(c) 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.)].

This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

Representations

The University's argument with respect to the application of section 18(1)(c) to the information at issue is based on what it submits is the conditional nature of the lease arrangement. It explains that because the arrangement is conditional on a number of events it cannot be considered to have commenced until those conditions have been met. It submits that should the information subject to severance be disclosed prior to those conditions precedent having been met and, therefore, prior to the commencement of the arrangement, the University could reasonably be expected to suffer from the harms contemplated in section 18(1)(c). The University first explains the conditional nature of the lease arrangement as follows:

> The lease arrangement is not effective as yet since the conditions precedent to its commencement have yet to be satisfied. In order for the grant of a leasehold interest to take effect and for excavation and construction on the project to commence, the provisions of Article 2.4 must be satisfied and further action is required. Under the lease arrangement, if the approvals are not satisfied or if they are not satisfied by a particular date, the project cannot go forward and the lease arrangement will automatically terminated.
>
> If this lease arrangement is terminated because the conditions precedent to its commencement are not satisfied, the parties are not bound in any way by the arrangement. Accordingly, they may renegotiate a further arrangement or the University may decide to develop the land with another party or to undertake another development project.
>
> The conditional nature of the lease arrangement is borne out as well by the fact that until the conditions precedent are satisfied, the leasehold interest does not take effect; hence, until that time, [the affected party's] access to the land is

> restricted. [The affected party] must obtain the University's consent before it may access the land and must provide prior notice to the University in order to obtain consent. Accordingly, [the affected party] must obtain University approval for any archaeological site tests, bore-hole tests and other on-site testing. These restrictions to access would be lifted only if the pre-conditions to the lease arrangement were satisfied.

The University then goes on to explain how disclosure of the severed information at issue could reasonably be expected to prejudice its economic interests or its competitive position within the meaning of section 18(1)(c). It takes the position that should the project not go forward, the University would lose the revenue that it has expended on the project for professional fees and other work done which amounts to approximately $200,000. It submits that the University's economic interest would be negatively impacted if the severances were disclosed and another different project to develop the lands undertaken with a different partner.

The University also submits that should the lease arrangement terminate, disclosure of the severed terms could reasonably be expected to harm its competitive position. The University submits that should this occur, it would either have to renegotiate or another selection process would have to be conducted and a new arrangement negotiated. It submits that it is not in the interests of the University for other parties, who continue to be interested in the project, to know all of the details of the lease arrangement, as it would compromise future negotiations and arrangements with respect to the development of those lands. It submits:

> Moreover, if disclosed and the conditional lease arrangement did not go forward other lease arrangements for similar projects would be dictated by the information disclosed in the severances to the detriment of the economic interests and the competitive position of the University. The intent of this exemption is to protect the institution's ability to earn money in the marketplace and compete for business and the knowledge of the terms of this conditional lease arrangement could, it is submitted, prejudice the economic interests of the University and its competitive position.

To support its position, the University requests that its submissions made with respect to the harms under the section 17(1) be considered. In those representations, the University goes through each category of severance and explains why each type of information is particularly sensitive and how its disclosure would be detrimental to any future negotiations which may be necessary should the conditions to the arrangement not be met and the arrangement terminated. I will summarize its representations on each category of severance below.

The University submits that it is critical that the automatic termination date not be disclosed. It explains that there are a small group of vocal objectors who have raised repeated complaints about the project and that if the severed date was known to them, it could reasonably be expected that these objectors would raise objections or seek delays to ensure that the deadline is not met. It submits that "any delay, whether due to frivolous or reasonable objections, would jeopardize the project, would prejudice the contractual and other negotiations or various entities…"

With respect to the termination provisions, the University explains that they reflect a special arrangement between the University and the affected party that would reveal the costs the parties have agreed to bear should the lease arrangement be terminated. It submits that if these termination provisions were revealed it would mean other parties would expect similar termination provisions.

The University explains that renewal periods and extensions are sensitive business terms that relate directly to and would reveal details about the parties' respective confidential financial models. It submits:

> In any lease arrangement, the parties wish to maximize their ability to generate revenue. Revenue is maximized in part by having longer lease terms. To that end, the parties have made calculations based on their revenue expectations and on the lease term and lease renewal terms. The length of the renewal periods of the lease arrangement relate directly to the revenue potential of the project for [the affected party]. If the renewal periods were disclosed then others negotiating with [the affected party] on other projects would expect the shorter renewal periods agreed upon here. These provisions are not the norm in the power generation industry, and are significantly shorter.
>
> …
>
> In addition, these specific renewal periods are very rare. Hydro electric projects often last for 100 years, much longer than the terms of this lease. Shorter lease terms benefit the landlord, but not the tenant constructing and operating the facility. Because of the nature of the negotiation with the University, these rather unusual conditions were agreed to by both parties as a means of meeting common needs. Usually, for these sorts of projects the developer would acquire the land outright or seek a very long initial lease term.

Addressing the pricing information that has been severed from the lease arrangement, the University explains that the financing arrangements in Articles 4.5 and 4.6 are "very rare and are considered highly confidential by the University and [the affected party]. It also submits that:

> [T]he pricing thresholds and financial amounts primarily outlined in Schedule B, are sensitive business terms that relate directly to the parties' respective confidential financial models. In any lease arrangement, the parties wish to maximize their ability to generate revenue. To that end, [the affected party] has made calculations based on it revenue and profit expectations, and critical components of those calculations are the severed pricing provisions.

The University explains that although insurance coverage is a standard feature of some infrastructure projects, the actual amount of insurance coverage is unique to each project. It also explains that in the lease arrangement that is at issue in this appeal the affected party must procure and maintain the insurance coverage and that higher coverage amounts result in higher

costs to the affected party. The University submits, therefore, that "the disclosure of the severed insurance amounts would result in these amounts serving as a benchmark for insurance coverage on other projects" which "could result in significant interference in the contractual negotiations."

Finally, the University explains that the force majeure thresholds relate to changes in the power generation capacity of the facility and to the rent payments payable by the affected party once the facility has begun operations. The University submits that:

> Where the output of the facility is reduced to a serious degree, resulting in [the affected party] earning significantly reduced revenue, the parties have agreed that [the affected party may, in certain circumstances, pay reduced rent. In extreme circumstances, [the affected party] may terminate the lease arrangement, and in even more extreme circumstances, either party may terminated the arrangement.
>
> These percentages and timelines are sensitive business terms that relate directly to the parties' respective confidential financial models. Specifically, the severed force majeure thresholds reveal the specific tolerances [of the affected party's] financial model to absorb diminished revenue over time…

The University refers to two prior orders issued by this office in support of its position that section 18(1)(c) applies to the information at issue. First, the University refers to Order PO-1894, where former Assistant Commissioner Tom Mitchinson found that a Agreement of Purchase and Sale that was conditional on zoning approvals and that had not closed, was exempt under section 18(1)(d). The University submits that section 18(1)(d) is similar to section 18(1)(c). The University quotes former Assistant Commissioner Mitchinson's finding with respect to that record as follows:

> I am satisfied that information which relates to the terms of the conditional agreement of purchase and sale, which has not yet closed, qualifies for exemption under section 18(1)(d) of the *Act* … I accept that until the purchase and sale of the property has been finalized, it is possible that the sale will not take place, and that the ORC [Ontario Realty Corporation] may have to find a new purchaser for the property. If that were to occur, disclosure of the terms negotiated between the ORC and the current prospective purchaser could place the ORC in a disadvantageous position with future potential purchasers. Furthermore, disclosure of the prospective uses and the value placed on the property by various parties could similarly be disadvantageous.

The University also refers to Order PO-2569, which dealt with access to information related to a proposal by Bombardier to the Ontario government for the building of an assembly plant for Bombardier's *C-Series* aircraft. In that order, I found that section 18(1)(c) applied to the some of the records at issue. The University links that decision to the circumstances in this appeal:

> In accepting that subsection 18(1)(c) applied, the [Information and Privacy Commissioner/Ontario] indicated that disclosure of the details put forward by the

> Ministry and how much Ontario was prepared to offer in order to have the assembly plant located in Ontario "would also set a benchmark for other large industry sector in their attempts to negotiate financial contribution packages for comparable projects" [at page 38]. Similarly, if this conditional lease arrangement does not go forward and the severed information is disclosed, the University's economic interests and competitive position could reasonably be expected to be compromised in its efforts to develop the lands to the economic benefit of the University.

Addressing the possible application of the exemption at section 18(1), the appellant simply states:

> Government sponsored research is not involved so there is nothing to be exploited.

Analysis and Findings

As noted above, for section 18(1)(c) of the *Act* to apply, the University must demonstrate that disclosure of the record could reasonably be expected to prejudice its economic interest or competitive position.

In Order PO-1747, Senior Adjudicator David Goodis discussed the phrase "could reasonably be expected to" in the context of this exemption:

> The words 'could reasonably be expected to' appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated 'harms' [including section 18(1)(c)]. In the case of most of these exemptions, in order to establish that the particular harm in question 'could reasonably be expected to' result from disclosure of a record, the party with the burden of proof must provide 'detailed and convincing' evidence to establish a 'reasonable expectation of harm' [see Order P-373; *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)].

Accordingly, the application of section 18(1)(c) turns on the particular circumstances of the appeal in which it is claimed, and, more specifically, the quality of the evidence adduced by the institution claiming its application.

In the circumstances of the current appeal, having reviewed the information that remains at issue closely and having considered the representations submitted by the University on the application of this exemption carefully, I am satisfied that the University has adduced the type of "detailed and convincing" evidence required to establish that the exemption at section 18(1)(c) applies to all of the categories of severances at issue in this appeal.

I agree with the University's position that section 18(1)(d) is similar to section 18(1)(c). 18(1)(d) being restricted to the economic interests of the Government of Ontario while section 18(1)(c) applies more generally to any institution covered by the *Act*. Both sections require the same type of "detailed and convincing" evidence to establish that their respective harms could reasonably be expected to occur. As such, I accept that Order PO-1894 is relevant in my analysis of the circumstances of this appeal.

Following the reasoning taken by former Assistant Commissioner Mitchinson in Order PO-1894, I accept the University's argument that the conditional nature of the lease arrangement renders the University particularly vulnerable to the harms contemplated by section 18(1)(c). As in Order PO-1894, the current lease arrangement has not yet commenced and should the conditions precedent not be met before the automatic termination date, the arrangement will not go forward. Should that occur, the University may be required to enter into new negotiations with another party. I accept the University's position that not only is it quite possible that the conditions precedent might not be met before the automatic termination date but also, that should that occur, the University could reasonably be expected to be put in a position where it has to negotiate a new lease arrangement. In my view, the University has provided sufficiently detailed and convincing evidence to demonstrate that disclosure of the severed information could reasonably be expected to prejudice its economic interests and its competitive position in those negotiations by revealing to the parties of future negotiations sensitive information about the University's bargaining position.

Accordingly, given the conditional nature and the specific terms of this particular lease arrangement and the evidence adduced by the University, I am satisfied that the University has satisfied the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Worker's Compensation Board)* cited above, and has established that disclosure of the severances at issue could reasonably be expected to prejudice its economic interest or the competitive position. Accordingly, I find that, subject to my review of the University's exercise of discretion and the possible application of the public interest override provision, the severed information at issue qualifies for exemption under section 18(1)(c) and should not be disclosed.

As I have found that the exemption at section 18(1)(c) applies to exempt the information at issue, it is not necessary for me to determine whether the exemptions at section 17(1) or section 18(1)(e) apply in the circumstances of this appeal.

EXERCISE OF DISCRETION

The section 18(1)(c) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

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

Representations

In its submissions, the University submits that it exercised its discretion to claim the exemptions in section 18(1)(c) in accordance with proper principles and considered whether, despite its application, section 18(1)(c) should nonetheless be claimed. It goes on to explain the reasons why it exercised its discretion to sever the portions of the lease arrangement that it did:

> [The affected party] and the University worked to provide as much information as was possible to the appellant and in the result provided much of the lease arrangement with limited severance. In all the circumstances, and particularly the submissions made above, the head has determined that it is in the best interests of the University to claim the exemptions for the severances to the lease arrangement.

The appellant does not make any specific submissions on the University's exercise of discretion, but his representations make it clear that he feels that the University should have exercised its discretion to disclose the information. In particular, he submits that the University has previously stated that it is committed to transparency and accountability. He also states that it has previously stated as a "strategic direction" the goal of increasing the transparency of the University's operations and financial procedures. He submits that "the term 'transparency' is widely used in the University and should be applied to the lease agreement with [the affected party] since it has been used in a financial context."

Analysis and findings

With careful consideration of the representations of the parties as well as the circumstances of this appeal, including the specific severances made to the lease arrangement, I am satisfied that the University exercised its discretion under section 18(1)(c) of the *Act* properly.

Specifically, I am satisfied that the University has properly taken relevant factors, and not irrelevant ones, into consideration in exercising its discretion to withhold this information. In particular, it appears that the University considered the lease arrangement as a whole and severed

only the information that it felt was particularly sensitive, the disclosure of which it believed could reasonably be expected to lead to harms contemplated by section 18(1)(c). In particular, it appears that the University took into account the purpose of the exemption at section 18(1)(c), which is to protect the economic interests of institutions and their ability to be competitive in the marketplace by competing for business with other public or private sector entities. I agree with the University that disclosure of specific information that has been severed from the lease arrangement could reasonably be expected to negatively impact the University's economic interest and competitive position and find that it did not fail to consider any relevant considerations that might outweigh that purpose.

Accordingly, I conclude that the University exercised its discretion based on proper considerations. I am not persuaded that it failed to take relevant factors into account or that it considered irrelevant factors in applying the section 18(1)(c) exemption. I find, therefore, that the University's exercise of discretion was proper.

PUBLIC INTEREST OVERRIDE

I will now consider whether public interest override at section 23 applies to allow disclosure of the severed portions of the lease arrangement that I have found to be exempt under section 18(1)(c).

Section 23: 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.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

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 [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, 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].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

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.)].

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, 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]

- 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.

Representations

Appellant's representations

The appellant submits that there is a compelling public interest in the disclosure of the lease arrangement. In his appeal letter, he explains that he wishes to know the details of the lease arrangement because of the impact that the hydroelectric facility will have on the University campus land and because he feels that the University community has not been made aware of the financial gain that the University will realize in leasing the campus land to "for-profit private corporations for generating electricity". He submits that this disclosure is necessary to determine whether the financial gain justifies the short and long term damage "to the close canopy woodland and its environment which will be split into two narrow woodland strips in which the environmental conditions will be drastically different." He also submits that disclosure is necessary because "the University Administration has not brought this project and its environmental implications to the attention of the entire [University] community" and has not responded to the University Environmental Advisory Board's concerns. He submits:

> Because the University Administration has not responded to the expressed concerns of its Environmental Advisory Board then it is only be examining the lease that members of the University community can decide for themselves if the enormous cost to the riverbank woodland community and its environment justifies the contribution of only 8 megawatts (or less) to the 10,000 megawatt shortage in Ontario.

In his appeal letter, the appellant also submits:

> [I]t is important for the Trent University community and the public to know the details of the lease agreement between Trent University and [the affected party] because a significant stretch of riverbank woodland on the University campus, originally purchased to remain undeveloped parkland, is to be detrimentally impacted for financial gain by the private corporations proposing the hydroelectric project.
>
> This information is important because in a vacuum of public knowledge about the financial benefits accruing to Trent University how can the cost of impacting so detrimentally such a large natural heritage site be evaluated? The 1.2 km stretch of riverbank woodland has biological, ecological, educational and research, aesthetic and recreational values which need to be evaluated in much more detail than is occurring in an environmental screening study by the private sector proponents of the project. The University community has so far been denied the chance to question University administrators about the wisdom of this project and whether or not the riverbank woodland has a greater value for its natural heritage, aesthetics, educational, research, and recreational uses than for generating a relatively small amount of hydroelectric power. Furthermore, the potential impact of global warming reducing the flow of water down the Otonabee River and the reduction of Canada's population in coming decades has not been factored into the rationale for this particular hydroelectric project and need to be widely discussed.

In his representations, the appellant reiterates that he believes there is a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemption at section 18(1)(c).

The appellant also submits that in the *Environmental Assessment – Screening Report March 2007*, the affected party asserts in its overall conclusion that the proposed project has a terrestrial impact, but that this impact is overridden by bringing "very significant economic benefits to Trent University." He states that support for this statement has not been provided by the affected party or the University and submits:

> Without providing a set of annual lease income calculations it is difficult to determine if the lease income to be received by the University will compensate the deletion of nature areas status and the tremendous environmental damage to be wreaked upon a 1.2 km stretch of the west bank of the Otonabee River. Without such financial information the public has no way of judging the value of the proposed hydroelectric project and has to rely solely on subjective assertions of the proponents.

University's representations

The University submits that the public interest override provision in section 23 has no application in the current appeal because the appellant's interest is private rather than public and that prior orders of this office have held that for section 23 to apply a public interest and not a private interest is required. It submits:

> The severances deal with the commercial and financial aspects of the lease arrangement and the non-disclosure of this particular information does not raise a "public interest" or "compelling public interest". Moreover, the interest the appellant has in the disclosure of the severed information does not outweigh the interest the University has in ensuring that its economic interest are not prejudiced. Similarly, [the affected party's] interests in protecting the confidential commercial and financial information in the conditional lease arrangement is not outweighed by the interests represented by the appellant.
>
> Moreover, the fact that other proceedings were held in this matter and information disclosed that addresses the public interest is significant. The public disclosure in this matter satisfies the public interest and obviates the need for the disclosure of the severances at issue … [P]ublic participation, both in the form of oral comments and written submissions, has identified some ecological and social concerns. Written submissions have been reviewed both by government agencies and by [the affected party], and in response, aspects of the design of the proposed project have been altered and, in numerous instances, additional analysis undertaken to provide further information. [The affected party] has attempted to respond to all concerns raised by the public in appropriate sections in the Environmental Screening Report. It is submitted that the intensive approval process is sufficient to address any public interest and that the severances at issue are not reflective of matters that ought to be disclosed in the compelling public interest.

The University's representations describe, at length, the various reports, approvals and processes that the affected party was required to complete in order to address the requirements of federal and provincial environmental agencies. I will attempt to briefly summarize the lengthy process below.

The University explains that the affected party was required to seek environmental assessment approval under the *Canadian Environmental Assessment Act* and prepared a comprehensive Environmental Screening Report which is available to the public and is intended to provide full disclosure of the environmental aspects of the project. It further explains that the drafting of the report was an extensive process that involved the oversight of a number of government agencies as well as frequent public consultation and goes on to detail various public meetings or "open houses" where the public was both provided with information on the project and invited to submit written protests or objections. It submits that when the draft Environmental Screening Report was released to the public, notices were published in local newspapers indicating where

the public could access the report and written comment were requested within 30 days of the posting. It submits that further public meetings were conducted. The University also explains that the affected party met with a number of representatives from various provincial and federal agencies and received comments from the responsible government authorities after their review of the Environmental Screening Report. Finally, the University submits that when the final draft of the report was released, notices were again placed in local papers and the public was provided with a chance to provide comments.

Returning to the issue of whether the specific severances contain information, disclosure of which, can be considered to be in the public interest, the University submits:

> As well, the severances do not raise health or safety concerns; information that may relate to health and safety has or will be addressed through the public approval process. The University respectfully submits that the disclosure of the severances would not inform citizenry about the activities of government and there is no evidence that disclosure of this information would address a general concern among the public in relation to this proposed project.

The University also refers to Order MO-2179-F to support its position that there is no compelling public interest in the disclosure of the severances. It submits;

> It is submitted that as in Order MO-2179-F, dealing with the application of the compelling public interest in records of a proposed waste management facility, the development of a power generation facility is itself in the public interest. While information about the facility and its environmental impact itself should and has been made public, the commercial and financial information ought not to be. As was noted in MO-2179-F, in relation to the application of the compelling public interest in the location of a waste management site, "the necessary approvals process for the eventually selected site will provide an adequate forum for such concerns to be addressed" [at 15]. Further, Senior Adjudicator [John Higgins] noted that:
>
> > …there is an important public interest in having adequate waste management facilities and in having them constructed at a reasonable cost. Disclosing information about potential sites would likely have a significant impact on that identified public interest. For this same reason, I would also not find that if there were a compelling public interest in disclosure, it would be outweighed by the purpose of section 11(d) [section 18(d) of the *Act*], which exists to protect the financial interests of institutions.
>
> In addition, where there is a public interest in maintaining the confidentiality of information, then that too is a relevant consideration. Accordingly, the University respectfully submits that the information at issue should not be disclosed under the compelling public interest.

Analysis and findings

In Order P-1190 former Assistant Commissioner Mitchinson stated:

> The *Act* is silent as to who bears the burden of proof in respect of section 23. The burden of proof in law generally is that a person who asserts a position must establish it. However, where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, I have reviewed the records with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the section 18(1)(c) exemption.

I agree with former Assistant commissioner Mitchinson's reasoning and adopt it for the purpose of the current appeal.

In order for me to find that section 23 of the *Act* applies to override the application of the exemption at section 18(1)(c), I must be satisfied that there is a *compelling* public interest in the disclosure of the *particular information at issue* that *clearly outweighs* the purpose of that exemption.

Based on my review of the appellant's representations, and in the circumstances of this appeal, I am not satisfied that a compelling public interest exists in the disclosure of the specific severances at issue and I find that section 23 does not apply.

As noted above, the word "compelling" has been defined in previous orders as "rousing strong interest or attention". Also noted above, for there to be a compelling public interest in disclosure of a record, the information must serve the purpose of informing the citizenry about the activities of their government (or in this case the public institution that is the University), adding in some way to the information the public has to make effective use of means of expressing public opinion [Order P-984].

The appellant takes the position that transparency with respect to the terms of the lease arrangement is necessary to assess whether the financial benefit that the University may incur as a result of the hydroelectric project outweighs the ecological and environmental damage that he submits it will cause. The appellant's submissions essentially raise the argument that there is a public interest in the ecological and environmental impact of the project and the details of the lease should be disclosed in order for the University's decision to embark on this project be scrutinized by the public.

I agree that it could be argued that the public has an interest, and perhaps even a compelling one, in scrutinizing the actions of institutions when they embark on major projects that might have a significant impact on the environment. However, I am not persuaded by the evidence that, in the circumstances of this appeal, there is any relationship between the disclosure of the specific type of information that remains at issue and such public interest. Nor am I convinced that there is a relationship between the specific information at issue and the *Act's* central purpose of shedding light on the activities of the institution.

Dealing with the specific information that is before me, the severances at issue in the lease arrangement and Schedule B, I find that there does not exist a sufficiently compelling public interest in the disclosure of the dates, the termination provisions, renewal periods, insurance amounts or force majeure thresholds. In my view, disclosure of this information will neither reveal nor shed light on the financial benefit that the University will incur with respect to the hydroelectric project. Moreover, in my view, it will not provide the public with any information about the environmental or ecological impact of this project. From my review of the information and the evidence provided, disclosure of these particular severances would not serve to inform the citizenry about the activities of the University and would not contribute in any meaningful way to the public's understanding of the University's decision-making process with respect to embarking on this hydroelectric project. These particular severances are simply details of leasing arrangement between the University and the affected party and do not reveal anything of public interest, compelling or otherwise.

The majority of the remaining severances, which fall in the category of pricing information, are found in Schedule B. It should be noted that this pricing information does not reveal specific amounts but is presented in the form of complex formulas. Having reviewed those severances, I do not accept that there is a compelling public interest in the disclosure of the pricing information simply because it may reveal the financial benefit that the University expects to incur as a result of the hydroelectric project. In my view, the suggestion that the University is sacrificing environmental concerns for financial gain is purely speculative in nature. No evidence has been adduced that the University's potential financial benefit "rous[es] strong interest or attention" by members of the general public. Moreover, while there may be an interest in the disclosure of some of the terms and conditions of the lease arrangement for the purpose of subjecting the University's activities to public scrutiny, I find that the disclosure that has already been made satisfies that interest. I do not accept that there is a compelling public interest in the disclosure of the severed pricing information itself

Even if it can be said that there exists a compelling public interest in the disclosure of any of the specific severances, given the circumstances of this appeal, I would find that such interest does not outweigh the purpose of the exemption at section 18(1)(c).

I accept the University's submissions that the development of this hydroelectric project is subject to environmental assessments required by law and it has been the subject of numerous public consultations that have allowed for concerns and objections to be raised. In my view, these approvals, processes and procedures provided sufficient means to address any public interest concerns that might exist with respect to the development of this project and any environmental

or ecological impact that it will have on the surrounding lands. Moreover, these other means do so without compromising the University's ability to earn money in the marketplace and prejudicing its economic interest and competitive position with respect to other public or private entities.

Furthermore, I note that the University has disclosed a substantial amount of information in response to the request. Any public interest considerations that could be said to exist in ensuring the public be provided with precise details of the lease arrangement between the University and the affected party have, in my view, already been served since this disclosure permits scrutiny of the terms and conditions that have been agreed upon by the parties as a result of the negotiated arrangement. As such, even if a public interest of a compelling nature exists in the disclosure of the details of the lease arrangement, given that the majority of the information in the lease arrangement has already been disclosed, I would find that interest would not outweigh the purpose of the section 18(1)(c) exemption.

In sum, I find that no compelling public interest exists in the disclosure of the severances at issue in this appeal and even if a compelling public interest could be said to exist, that interest would not outweigh the purpose of the exemption at section 18(1)(c). Accordingly, the public interest override at section 23 does not apply.

ORDER:

I uphold the University's decision to deny access to the severed portions of the lease arrangement, including the severed portions of Schedule B to that arrangement.

September 29, 2008

Catherine Corban
Adjudicator