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

ORDER PO-1977

Appeals PA-010054-1 and PA-000417-2

Ministry of Transportation

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BACKGROUND

The records at issue in these appeals relate to the sale of the Highway 407 Express Toll Route (Highway 407) by the government of Ontario (the government) to the private sector. Before proceeding to discuss the nature of these appeals, I feel it would be helpful to provide the following background information, which is contained in the May 24, 2000 prospectus (a public document) of the 407 International Inc., the new owner of Highway 407:

> 407 International Inc. (the "Company") was incorporated on March 17, 1999 under the *Business Corporations Act* (Ontario) ("OBCA"), on the initiative of SNC-Lavalin Inc.… and Cintra Concesiones de Infraestructuras de Transporte, S.A. …, for the purpose of submitting a bid to the Government of the Province of Ontario (the "Province") for the purchase from the Province of all of the issued and outstanding shares of 407 ETR Concession Company Limited (the "Concessionaire"). … This bid was accepted and the purchase was completed on May 5, 1999. …
>
> The Concessionaire was established by the Province in 1993 as a Crown agency under the name Ontario Transportation Capital Corporation ("OTCC") to oversee the design, construction, operation, maintenance, management and financing of Highway 407. On April 6, 1999, OTCC was continued by the Province as a share capital corporation under the OBCA under the name 407 ETR Concession Company Limited and entered into a 99-year concession and ground lease agreement (the "Concession Agreement") with the Province. Together with the *407 Act*, this agreement establishes the Concessionaire's principal rights and obligations with respect to Highway 407. …
>
> …
>
> The principle business of the Company is the ownership of the Concessionaire and, through the Concessionaire, the operation, maintenance and management of Highway 407 Central and the construction, operation, maintenance and management of the Highway 407 Central Deferred Interchanges, 407 West Extension and 407 East Partial Extension.
>
> …
>
> The decision to sell OTCC and thereby privatize Highway 407 was announced by the Province on February 20, 1998. The Province subsequently enacted the *407 Act* to authorize and facilitate the privatization. Under the provisions of the *407 Act*, OTCC and the Province entered into the Concession Agreement which, in combination with the *407 Act*, authorizes the Concessionaire to establish, collect and enforce payment of tolls and obliges the Concessionaire to manage, maintain, repair and toll Highway 407 as well as construct certain extensions and expansions thereto. …

> The Company participated in the competitive bid process established by the Province for the sale of Highway 407 and the design and construction of the Highway 407 Central Deferred Interchanges, 407 West Extension and 407 East Partial Extension. Following the Company's selection as the successful bidder, on April 12, 1999 the Province, the Company [and three other companies] being referred to herein collectively as the "Equity Participants", entered into a share purchase agreement (the "Share Purchase Agreement") pursuant to which, on May 5, 1999, the Company acquired all of the issued and outstanding shares of the Concessionaire for a purchase price of $3.113 billion. …

NATURE OF THE APPEALS

The Ministry of Transportation (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. Highway 407 lease agreement between the 407 ETR and the Province of Ontario; and

2. All related documents to the lease agreement.

The Ministry identified a document entitled the "Highway 407 Concession and Ground Lease Agreement" as the record responsive to the request.

The Ministry responded to the requester by advising him as follows:

> The records have been requested by others previously and the affected third party has objected to any disclosure, thus the records are all now before the Information and Privacy Commissioner who will be making binding Orders regarding disclosure. The Ministry of Transportation is not in a position to make a decision on its release at this time.

The requester (now the appellant) appealed the Ministry's deemed refusal to provide access to the requested records. In turn, this office opened Appeal PA-000417-1 to deal with that matter.

Subsequently, the Ministry agreed to issue an access decision to the appellant and, as a result, Appeal PA-000417-1 was closed.

Pursuant to section 28 of the *Act*, the Ministry gave notice to a number of third parties, seeking submissions with respect to disclosure of the requested record. After receipt of the submissions from the third parties, the Ministry issued its decision to the requester and the third parties advising that partial access to the Highway 407 Concession and Ground Lease Agreement will be granted upon payment of a $165.00 fee. Access to certain portions of this agreement were denied pursuant to sections 21 (invasion of privacy), 14(1)(e) (endanger life or safety), 14(1)(l) (facilitate commission of unlawful act) and 18(1)(d) and (e) (economic and other interests of Ontario).

Subsequently, the requester appealed the Ministry's decision, including the fee. In turn, this office opened Appeal PA-000417-2 to deal with the requester's appeal. One of the third parties, 407 ETR Concession Company Limited (407 ETR), also appealed the Ministry's decision, and accordingly, Appeal PA-010054-1 was opened.

This order will address the issues raised in both Appeals PA-010054-1 and PA-000417-2.

A Notice of Inquiry was sent to the Ministry, 407 ETR, 407 International Inc. and the other affected parties, initially. In response, only the Ministry and 407 ETR submitted representations. The Ministry's representations were forwarded to the requester in their entirety, together with the non-confidential portions of 407 ETR's representations. The requester also submitted representations. The Ministry's representations were then forwarded to 407 ETR and the non-confidential portions of 407 ETR's representations were sent to the Ministry for reply. In turn, both the Ministry and 407 ETR submitted reply representations.

RECORDS:

The record at issue in both Appeals PA-010054-1 and PA-000417-2 is the Highway 407 Concession and Ground Lease Agreement (the CGLA), including all of its schedules.

In response to the Notice of Inquiry the Ministry and 407 ETR clarified their positions with respect to the record at issue in these appeals. The following is a brief summary.

The Ministry's position

In response to the Notice of Inquiry, the Ministry stated that it no longer claims that Schedule 12 to the CGLA contains personal information. Accordingly, the only records relevant to these appeals to which the Ministry is denying access are as follows:

1. Schedule 8 to the CGLA, in part, on the basis of section 21 of the *Act*;

2. Diagram contained in Schedule 15 to the CGLA, on the basis of sections 14(1)(e) and/or (l) of the *Act*; and

3. Information regarding fees contained in Schedules 18 and 23 to the CGLA, on the basis of sections 18(1)(d) and (e) of the *Act*.

407 ETR's position

In its representations in response to the Notice of Inquiry, 407 ETR consents to the disclosure of certain information within the CGLA. 407 ETR maintains its objection to the disclosure of the following portions of this agreement only, on the basis of sections 17(1)(a), (b) and/or (c) of the *Act*:

1. Article 2.6 of the CGLA (the reference to the dollar amount as the rent payable per annum only);

2. Article 16 of the CGLA (in its entirety);

3. Schedule 13 to the CGLA (all dollar amounts in section 4.1 only);

4. Schedule 15 of the CGLA (all dollar amounts in Appendices A and B only);

5. Schedule 18 to the CGLA (all dollar amounts in Schedule C only);

6. Schedule 19 to the CGLA (in its entirety);

7. Schedule 22 to the CGLA (in its entirety); and

8. Schedule 23 to the CGLA (all dollar amounts throughout the schedule only).

DISCUSSION

THIRD PARTY INFORMATION

The Ministry decided that the records do not qualify for exemption under section 17(1) of the *Act*. Therefore, the onus is on 407 ETR as the only party resisting disclosure to establish the application of this exemption.

407 ETR takes the position that sections 17(1)(a), (b) and (c) are applicable to the information contained in the records remaining at issue, as described above. Those sections read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order for a record to qualify for exemption under section 17(1)(a), (b) or (c) of the *Act*, each part of the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

Part one: type of information

407 ETR submits that the information at issue is all commercial and/or financial information concerning the financial and commercial performance of 407 ETR's business, that being the construction and operation of a toll highway.

The terms "commercial information" and "financial information" have been defined by this office as follows:

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

[Order P-493]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs.

[Orders P-47, P-87, P-113, P-228, P-295 and P-394]

Based on my review of the records, I agree that all of the information at issue qualifies as "commercial information" within the meaning of section 17(1). In my view, all of this information relates directly to the operation of the business of 407 ETR and thus relates to the buying, selling or exchange of services. Some parts of the record also include various financial aspects of this business, including amount of the rent payable per annum and various other costs and fees associated with the operation of the business. I find that these parts of the record also contain "financial information" as that term is used in section 17(1). Therefore, part one of the section 17(1) exemption test has been established for the information at issue.

Part two: supplied in confidence

Supplied

Because the information in a contract is typically the product of a negotiation process between the institution and the affected party, the content of contracts generally will not qualify as having been "supplied" for the purposes of section 17(1) of the *Act*. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been "supplied" it must be the same as that originally provided by the affected party. In addition, information contained in a record would "reveal" information "supplied" by the affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

[See, for example, Orders P-36, P-204, P-251 and P-1105]

407 ETR's representations

In its submission, 407 ETR explains that the portions of the Share Purchase Agreement (the SPA) (which are not at issue in this appeal, but are at issue in a number of related appeals) and the CGLA which 407 ETR continues to object to disclosure of break down broadly into two categories:

> In some cases [certain portions of the SPA] contain and, if disclosed, would clearly disclose information provided to the Ontario government by 407 ETR/OTCC [Ontario Transportation Capitol Corporation] in confidence for the limited and specific purpose of being made available, subject to confidentiality agreements, to prospective bidders seeking to acquire Highway 407 from the government and only for their use in connection with that bidding process (the "Information Objections") …
>
> In other cases … 407 ETR objects to the disclosure of specific and limited portions of various agreements which are based on confidential information supplied by 407 ETR/OTCC to the Ontario government in confidence under the circumstances just described and for the same limited purpose described above where disclosure of the portions of the agreement in issue would permit the drawing of accurate inferences concerning the information supplied (the "Agreement Objections"). …

With respect to the "Information Objections" 407 ETR states:

> The information in issue … was, as 407 ETR understands it, supplied to the Ministry of Finance by 407 ETR (then known as OTCC) for the limited and confidential purpose of permitting the RFP [Request for Proposal] process by which the 407 ETR business was to be privatized to proceed. While 407 ETR is not privy to (and has no means of ascertaining) all the details of the way in which

> the 407 ETR business was operated before its privatization, it is readily apparent that the information in issue in Items 2, 5 and 6 concerns 407 ETR/OTCC and the only reasonable conclusion to be drawn is that the information was provided by 407 ETR/OTCC to the Ministry of Finance for the stated limited purpose.

407 ETR also states that the above submissions "apply generally with equal force to the Agreement Objections as well". 407 ETR acknowledges that "[i]n connection with the Agreement Objections, however, 407 ETR must also establish that disclosure of the portions of the various agreements here in issue would permit the drawing of accurate inferences with respect to information supplied to the government which is entitled to protection under section 17". Although 407 ETR goes on to state that it will address this further issue in the paragraphs that follow, the only further information provided by 407 ETR in this regard is as follows:

> The portions of the SPA and the CGLA which 407 ETR seeks to have protected pursuant to the Agreement Objections are all based on information concerning 407 ETR/OTCC and its operations of Highway 407 prior to privatization. That information is financial and/or commercial information of 407 ETR/OTCC. The only reasonable conclusion to be drawn is that that information was supplied to the Ontario government by 407 ETR/OTCC on a confidential basis for the limited purpose of permitting the RFP process by which the 407 business was to be privatized to proceed. (Without limiting the generality of the foregoing, 407 ETR understands that the information central to the development of Item 13 (Schedule 22 to the CGLA) was developed by 407 ETR/OTCC and provided by it to the government for the purpose of developing Schedule 22.)

Findings

General

According to the SPA, the OTCC was a corporation without share capital incorporated pursuant to the *Capital Investment Plan Act, 1993*. The *Highway 407 Act* authorized the Crown in right of Ontario, as represented by the Minister without portfolio with responsibility for privatization (the Crown) to continue OTCC under the *Ontario Business Corporations Act* (the *OBCA*) as a corporation with share capital. OTCC was continued as 407 ETR under the *OBCA* by certificate of continuance dated April 6, 1999. The Crown was the registered and beneficial owner of all of the issued and outstanding shares of 407 ETR. Subsequently, the Crown entered into the SPA, dated April 12, 1999, with 407 International Inc. (formerly 1346292 Ontario Inc.) and three other companies (the equity participants), pursuant to which 407 International Inc. acquired all of the issued and outstanding shares of 407 ETR.

Generally speaking, information provided to a provincial government institution by another institution of the same government cannot be considered to have been "supplied" for the purpose of section 17, and that the appropriate exemption to consider in those circumstances would be section 18, which is designed to protect government interests. However, the circumstances here are unusual, in that what was once a government institution, the OTCC, is clearly now a private sector third party, 407 ETR.

The purpose of section 17, as stated by Senior Adjudicator David Goodis in Order PO-1805, is to protect the "informational assets" of businesses or other organizations. If I were to find that section 17 cannot apply because the information was supplied to the Ministry not by 407 ETR, but by its predecessor, the purpose of this exemption would be defeated. At the same time, while section 18 might have been the appropriate exemption to consider had a request been made while OTCC existed, that exemption clearly cannot apply now, since the government no longer has a financial stake in 407 ETR's assets. In my view, the Legislature could not have intended the result that, in these circumstances, an organization's informational assets could not be protected by either section 17 or 18, based simply on the fact that the assets traded hands from the government to a private company. Therefore, given that 407 ETR's interests may be affected by the disclosure of the information at issue in these appeals, I find that it is entitled to avail itself of the protection afforded under section 17, assuming the remaining elements of this exemption are satisfied.

I have reviewed the CGLA and have made the following findings with respect to each portion of this record that remains at issue in these appeals.

Concession and Ground Lease Agreement

The parties to the CGLA, which is dated April 6, 1999, are the Crown and the 407 ETR, referred to in this agreement as the "Concessionaire".

The May 24, 2000 issue of the 407 International Inc. prospectus states the following with respect to the CGLA:

> Together with the 407 Act, the Concession Agreement is the key agreement which governs the Concessionaire's rights and obligations with respect to Highway 407 and regulates the relationship between the Province and the Concessionaire. It grants the Concessionaire a 99-year ground lease of the Project Lands owned by the Province which commenced on April 6, 1999 for a nominal rent, which has been prepaid by the Concessionaire in its entirety for those 99 years. It further grants the Concessionaire the exclusive concession to develop, design and build the Highway 407 Central Deferred Interchanges, 407 West Extension and 407 East Partial Extension and obliges the Concessionaire to finance, operate, manage, maintain, rehabilitate and toll the Project in accordance with the provisions of the Concession Agreement.

407 ETR is objecting to the disclosure of the dollar amount within Article 2.6, which specifies the rent payable per annum, as well as Article 16 in its entirety, which deals with insurance that is to be maintained by 407 ETR.

There is no evidence before me to suggest that the contents of these clauses were "supplied" by 407 ETR/OTCC. On their face, these clauses appear to be negotiated terms arrived at in the normal course of the negotiation of the agreement. There is also nothing on the face of these sections of the agreement to support 407 ETR's assertion that these clauses were "based on confidential information supplied by 407 ETR/OTCC to the Ontario government". Therefore, I

find that the sections of the CGLA at issue were prepared as a result of negotiations, however minimal this may have been, and that this information was not "supplied" for the purposes of section 17(1) (see also Orders P-1545, PO-1698 and PO-1646).

Schedule 13 to the CGLA

Schedule 13 to the CGLA is entitled "Ministry of Transportation Enforcement Services". 407 ETR is objecting to the disclosure of the dollar amounts specified in section 4.1.

Section 4 of this schedule relates to costs of enforcement, specifying that the 407 ETR shall be responsible for the costs of Ministry Enforcement Officers' enforcement activities on Highway 407 based on the formula provided in section 4.1. The dollar amounts specified under this section relate to the following:

- the hourly rate of Ministry Enforcement Officers;
- the "per kilometre" and monthly charge for a cruiser;
- the "per kilometre" and monthly charge for a mini-van; and
- the "per kilometre" and monthly charge for a Mobile Truck Inspection Station.

Based on my review of this record, it appears that the dollar amounts at issue would have been supplied by the Ministry and not the OTCC/407 ETR. It is also possible, however, that this information represents the negotiated amounts that were agreed upon between the parties to this agreement. In either case, I find that this information was not "supplied" for the purposes of section 17.

Schedule 15 to the CGLA – At issue: all dollar amounts in Appendices A and B to Schedule A

Schedule 15 to the CGLA is entitled "Police Services Agreement". Schedule A to this agreement is a document entitled "Policing Requirements for Kings Highway 407". This Schedule specifies that it was prepared by the Municipal Policing Section of the Ontario Provincial Police (the OPP). Appendices A and B to this schedule are entitled "1999 charges for Contract Police Costs" and "Costing Summary", respectively, and contain the estimates of the costs for the policing requirements and police services as described in Schedule A. 407 ETR is objecting to the disclosure of all dollar amounts within these appendices.

Based on my review of this record, I find that given that this schedule was prepared by the OPP, the dollar amounts at issue cannot be said to have been supplied by the OTCC/407 ETR.

Schedule 18 to the CGLA

Schedule 18 to the CGLA is entitled "Authorized Requester Electronic Data Transfer Agreement". This agreement grants 407 ETR a licence to access and use certain "Information Products" from the Ministry. Schedule C to this Agreement is entitled "Fees" and sets out the "Connectivity Fees" and the base fee for access to the "Information Products" which will be

charged by the Ministry. 407 ETR is objecting to the disclosure of all dollar amounts within Schedule C.

Once again, I have not been provided with any evidence to suggest that this information was "supplied" by 407 ETR. To the contrary, in its submissions with respect to sections 18(1)(d) and (e) in these appeals, the Ministry states that the fees within Schedule 18, as well as 23 which is discussed below, were in fact negotiated:

> … The negotiation of the fees to be paid by the lessee to the Government of Ontario in such a case was without precedent, and without operational experience. Hence the establishment of the quantum of fees of necessity could only be based on informed estimates, the relative advantage or disadvantage flowing to the various parties being speculative.

In view of the above, I find that the dollar amounts in question were not supplied for the purpose of section 17.

Schedule 19 to the CGLA

Schedule 19 to the CGLA is entitled "Restrictions on Transfer Agreement". This is an agreement between the Crown, 407 ETR, 407 International Inc. and the three equity participants that was entered into by the parties concurrent with the execution of the SPA. This agreement outlines certain restrictions with respect to the transfer of the ownership of the shares. 407 ETR is objecting to the disclosure of this agreement in its entirety.

Once again, I have not been provided with any information concerning the context in which this agreement was prepared or the extent of discussions that took place before the final terms were agreed to between the parties. There is also nothing on the face of this record to establish that the terms of this agreement are a direct reflection of information given by 407 ETR/OTCC, without contribution by the other parties to this agreement. Similar to the CGLA, this agreement appears to be the product of negotiations, and therefore, I find that the information in it was not "supplied" by the OTCC/407 ETR.

Schedule 22 to the CGLA

Schedule 22 to the CGLA is entitled "Tolling, Congestion, Relief and Expansion Agreement". The parties to this agreement, dated April 6, 1999, are the Crown and the 407 ETR, referred to in this agreement as the "Concessionaire". 407 ETR is objecting to the disclosure of this agreement in its entirety.

The 407 International Inc., May 24, 2000, prospectus describes this agreement as follows:

> The Tolling Agreement between the Concessionaire [407 ETR] and the Province will remain in effect throughout the term of the concession Agreement and will affect the range and scope of the tolls which may be charged by the Concessionaire. The Tolling Agreement's primary purpose is to regulate toll

> levels in relation to traffic flow, allowing for toll increases provided certain traffic thresholds are met. As well, the agreement sets forth the requirement for lane expansions once certain traffic levels are exceeded.

As outlined above, 407 ETR submits that it "understands that the information central to the development of Item 13 (Schedule 22 to the CGLA) was developed by 407 ETR/OTCC and provided by it to the government for the purpose of developing Schedule 22". 407 ETR also submits that it "is not privy to (and has no means of ascertaining) all the details of the way in which the 407 ETR business was operated before its privatization".

Given the history of 407 ETR, I accept that it may not have "all the details of the way in which the 407 ETR business was operated before its privatization". I also recognize that it may not be in a position to provide evidence as to precisely what information would have been supplied by the OTCC/407 ETR to the Ministry in preparation of this agreement. The Ministry's representations also do not include any information on this issue, other than generally stating the following:

> … it is normal operating procedure for information exchanged between government agencies and Ministries to be treated confidentially. The Ministry is unaware of any higher standard of confidentiality accorded to any information supplied by the OTCC to the Ministry or the Ministry of Finance relevant to this Appeal.

Order PO-1974, which is being issued concurrently with this order, deals with two related appeals involving the Ministry of Finance where the records at issue relate to the request for proposals used for soliciting the sale of Highway 407. In its representations in the Ministry of Finance appeals, 407 ETR explains that one of the records at issue (also identified as Schedule 22), entitled the "Final Bidding Draft of the First Amending Agreement to the Highway 407 Concession and Ground Lease Agreement", "is substantially identical to the existing Schedule 22 of the Concession and Ground Lease Agreement under which 407 ETR currently operates Highway 407 …". With respect to this record 407 ETR states that:

> … Schedule 22, the protocol for toll rate setting, is Canadian developed intellectual property that if ordered disclosed would be gifted to the international business community. The information relates to the way in which 407 ETR regulates its tolls, deals with congestion pricing and strategies for future growth and expansion of its infrastructure.

In response to 407 ETR's submissions on the issue of whether the information at issue was "supplied" for the purposes of section 17(1), the Ministry of Finance states the following:

> The 407 ETR Concession Company Limited has asserted that the information at issue was "supplied to the Ministry of Finance by 407 ETR (then known as OTCC) for the limited and confidential purpose of permitting the RFP process by which the 407 ETR business was to be privatized to proceed".

> It is this ministry's understanding that while some information was provided by the OTCC, then an agency of the Ministry of Transportation, information was also developed by Ministry of Transportation employees and advisors to the former Office of Privatization for use during the sale process. Hence, it is the opinion of this Ministry that the documents were not strictly *supplied* by the Concession Co. [original emphasis]

Furthermore, the "Confidential Information Memorandum", which was prepared by the Privatization Secretariat in connection with the sale of Highway 407 (portions of which are at issue in the Ministry of Finance appeals) states the following with respect to "tolling, congestion relief, and expansion" at page 26:

> Highway 407 provides congestion relief for East-West travel in the GTA [Greater Toronto Area] and will provide further congestion relief when Highway 407 West, Highway 407 East Partial, and Highway 407 East Completion are built. In order to achieve its congestion relief objective, *the Province has designed a protocol for toll rate setting*.
>
> In addition, the Province wishes to ensure that Highway 407 continues to provide congestion relief into the future. Accordingly, *the Province has established pre-defined thresholds that, once reached, will require ConcessionCo [now 407 ETR] to expand the capacity of Highway 407*.
>
> The Tolling, Congestion Relief, and Expansion Agreement is outlined in Appendix 4.3 and will be a schedule to the Concession and Ground Lease Agreement. [emphasis added]

As indicated above 407 ETR argues that "information central to the development of [Schedule 22] was developed by 407 ETR/OTCC and provided by it to the government for the purpose of developing Schedule 22". 407 ETR does not, however, provide any indication as to what this information would have been, or how disclosure of this record would permit the drawing of accurate inferences with respect to this information. Insofar as 407 ETR is referring generally to the "protocol for toll rate setting", based on the above, I do not accept that this information was developed solely by the OTCC/407 ETR and supplied to the government.

As far as the agreement itself is concerned, similar to my findings with respect to other agreements addressed above, it also appears to be one that was negotiated and not supplied. Although this record contains very detailed and complex provisions relating to the regulation of toll levels in relation to traffic flow, it is not apparent on the face of this agreement that any of the information within it was originally provided by the OTCC/407 ETR or that disclosure of this record would permit the drawing of accurate inferences with respect to this information. Accordingly, I find that the information within this record was not "supplied" within the meaning of section 17(1) of the *Act*.

Schedule 23 to the CGLA

Schedule 23 to the CGLA is entitled "Toll Collection/Enforcement Procedures" which stipulates that the Crown may charge 407 ETR certain fees for services in connection with the collection of outstanding toll charges by the Ministry. It also outlines the cost for the Ministry to provide 407 ETR with certain information concerning commercial vehicles over a certain weight registered with the Ministry. Finally, this record specifies the service fees for the distribution of transponders by the Ministry over a certain time period. 407 ETR is objecting to the disclosure of all dollar amounts within this record.

Once again, I have not been provided with any evidence to establish that the dollar amounts within this schedule were supplied by the OTCC/407 ETR. To the contrary, as outlined above, the Ministry has indicated in its representations that the fees within this schedule were in fact negotiated between the parties. Therefore, I find that this information was not "supplied" within the meaning of section 17(1).

Summary

I have concluded above that none of the information at issue in these appeals was "supplied" by the OTCC/407 ETR for the purpose of the section 17(1) exemption, and therefore, the second part of the three-part test for exemption under this section has not been established. Accordingly, it is not necessary for me to consider whether harm is likely to result from disclosure of this information.

In Order MO-1393, Adjudicator Sherry Liang stated the following with respect to the municipal equivalent of section 17(1):

> … I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the "intimate details of our operation (costs and constraints) to our direct competition." There may indeed be harm to the affected party from the disclosure of the information. Nevertheless, section 10(1) of the *Act* does not shield this information from disclosure unless it is clear that it originated from the affected party and is therefore to be treated as the "informational assets" of the affected party and not of the Town. In these circumstances, the record is not exempt from the *Act*'s purpose of providing access to government information.

I agree with these comments. Accordingly, I find that the requirements for the application of section 17(1) have not been met with respect to the information at issue and it does not qualify for exemption under this section of the *Act*.

ECONOMIC AND OTHER INTERESTS

The Ministry relies on sections 18(1)(d) and (e) to deny access to the fees contained in Schedules 18, Authorized Requester Electronic Data Transfer Agreement and Schedule 23, Toll Collection/Enforcement Procedures. Both these records are schedules to the CGLA.

Sections 18(1)(d) and (e) state:

> A head may refuse to disclose a record that contains,
>
> (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;
>
> (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;

As outlined above, in Order PO-1747, Senior Adjudicator Goodis stated:

> 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". 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 probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Applying this reasoning, in order to establish the requirements of the sections 18(1)(d) and (e) exemption claims, the Ministry must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm as described in these sections resulting from disclosure of the records.

Representations

The Ministry states that the government has announced on numerous occasions that “its plans include the construction of new provincial highways as toll roads and/or upgrading and conversion of existing provincial highways to toll roads, which toll roads may involve electronic toll collection fees and may be subject to private sector participation which will require the

negotiation of fees of the nature set forth in the records which are at issue herein". With respect to the section 18(1)(d) exemption, the Ministry states:

> The position of the Government of Ontario is that the disclosure of the fees negotiated in this case would prejudice its ability in the future to negotiate the terms most favourable to Ontario's revenues, thereby causing injury to its financial interests. The Agreement of which these records are a part was the result of a unique approach by the Government of Ontario, or any other government, to the construction, financing and leasing of a major highway with totally automated toll imposition and collection of user tolls. The negotiation of the fees to be paid by the lessee to the Government of Ontario in such a case was without precedent, and without operational experience. Hence the establishment of the quantum of fees of necessity could only be based on informed estimates, the relative advantage or disadvantage flowing to the various parties being speculative.

The Ministry goes on to state the following with respect to the section 18(1)(e) exemption claim:

> The position of the Ministry and of the Government of Ontario is that the positions and criteria which they intend to apply to future negotiations with potential private sector partners or participants in the creation and operation of toll roads will have as a key element the financial arrangements between the parties, of which the nature and quantum of fees to be charged by the Ministry will be of fundamental importance. Disclosure of the arrangements entered into in the pilot project of such magnitude would constrain the Government's negotiating positions.

In its reply representations the Ministry refers to a recent announcement by the Minister of Finance wherein he stated that "[w]e are currently determining how best to expand and manage our highways. As part of this exercise, SuperBuild will examine opportunities for the private sector to contribute to our highway system". The Ministry further submits that subsequent to this announcement the Ministry of Finance/SuperBuild issued RFPs calling on the private sector to complete Highway 407 East. The Ministry also continues to argue that the fees paid by 407 ETR will serve as a critical point of reference to prospective toll highway operators:

> … the Ministry still submits that the fees negotiated with 407 ETR will be relevant to future negotiations of toll highways whether they occur in the near future or after several years. The lease of Highway 407, a highway with totally automated toll imposition and collection, is unprecedented not just in Ontario, but in the world. It is quite reasonable to conclude that the terms and conditions of this agreement, especially the fees negotiated, will be of central interest to the attendant negotiations of future toll highway agreements. Cost comparisons between time periods are common. It would not be difficult for these fees to be adjusted for inflation and used as a benchmark to hamper the Government's ability to negotiate a more favourable agreement for the public. The fact that the

> Government holds a monopoly position is immaterial to the injury it could reasonably suffer if it had to bargain constrained by its past negotiated results.
>
> It is also worth remembering that the fees negotiated are in consideration of the administrative costs the Government incurs to facilitate toll collection for 407 ETR. These fees could also be relevant to a multitude of other contexts outside of highway tolling where the Government enters into an agreement with a private party where it will provide administrative services during the term of the agreement.

The Ministry relies on Orders P-1026, P-1022 and M-712 in support of its position that section 18(1)(d) is applicable in the circumstances of this case. The Ministry also points out that the fees under consideration are not the amounts paid by the private sector for the highway asset, but rather they are fees paid for the Ministry to provide services. The Ministry therefore submits that while each toll highway may be different, the services provided for the purposes of toll enforcement will be similar.

Findings

As described above, Schedule 18 to the CGLA is an Electronic Data Transfer Agreement, pursuant to which the Ministry granted 407 ETR a licence to access and use certain Ministry "information products". The only information at issue within this agreement are the fees outlined in Schedule C, which consist of connectivity fees to access certain information and a base fee for access to the "information products". Schedule 23 to the CGLA is a record entitled "Toll Collection/Enforcement Procedures" which stipulates that the Crown may charge 407 ETR certain fees for services in connection with the collection of outstanding toll charges by the Ministry. It also outlines the cost for the Ministry to provide 407 ETR with certain information concerning commercial vehicles. Finally, this record specifies the service fees for the distribution of transponders by the Ministry.

Section 18(1)(d)

To establish a valid exemption claim under section 18(1)(d), the Ministry 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).

The Ministry is correct in pointing out that Orders P-1026, P-1022 and M-712 found that the economic interests and competitive position of the institution would be prejudiced if the institution could not negotiate the "best possible deal for the province". Further, these orders found that disclosure of the information at issue would inhibit the institution's ability to negotiate the "best possible deal" and applied section 18(1)(c) (prejudice to the economic interest or the competitive position of an institution) of the *Act* to this information.

I am not persuaded, however, based on the representations provided by the Ministry in the present case, that disclosure of the fees in question would inhibit the Ministry's ability to

negotiate the "best possible deal". The Ministry has a monopoly not only on the construction of highways, but also on the services it provides associated with its “information products”. As such, in my view the Ministry is in a strong negotiating position with respect to both the overall sale price of the highway asset, as well as the individual fees to be charged with respect to the services provided for the purpose of toll enforcement.

The fees relating to Highway 407 were likely determined based on a number of different factors such as location, cost of construction, anticipated traffic and potential revenues. In my view, although the services provided by the Ministry for the purposes of toll enforcement may be similar with respect to each toll highway, this does not mean that the unique circumstances relating to each highway would not be taken into consideration when negotiating future fees in this regard. Moreover, the current economic environment would likely also be a significant factor in any future negotiations.

Furthermore, although the Ministry states that the fees in question “could also be relevant to a multitude of other contexts outside of highway tolling where the Government enters into an agreement with a private party”, it provides no further information or explanations in this regard. Based on the material before me, I find that there is insufficient evidence to establish a reasonable expectation of probable harm as described in section 18(1)(d) in the circumstances.

In view of the above, I am not persuaded that disclosure of the information at issue would result in the harm contemplated by section 18(1)(d) and accordingly, I find that it is not applicable in the circumstances.

Section18(1)(e)

In order to qualify for exemption under section 18(1)(e), the Ministry must establish the following:

1. the records must contain positions, plans, procedures, criteria or instructions; and

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and

3. the negotiations must be carried on currently, or will be carried on in the future; and

4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

[Order P-219]

In Orders MO-1199-F and MO-1264 Adjudicator Laurel Cropley stated the following with respect to the municipal equivalent of section 18(1)(e) of the *Act*:

> Previous orders of the Commissioner's office have defined "plan" as "... a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Order P-229).
>
> In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding.

Having reviewed the information at issue, namely the dollar amounts, I find that none of it contains positions, plans, procedures, criteria or instructions, as those terms are used in section 18(1)(e), and on that basis alone they do not qualify for exemption under that section of the *Act*.

ENDANGERMENT TO LIFE OR PHYSICAL SAFETY

Section 14(1)(e) of the *Act* reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > endanger the life or physical safety of a law enforcement officer or any other person;

As outlined above, in Order PO-1747, Senior Adjudicator Goodis reviewed the requirements for a record to qualify for exemption under section 14(1)(e). He stated as follows:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the dealing with a wide variety of anticipated "harms". 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 probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].
>
> In Ontario *(Minister of Labour)*, the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at p. 6):
>
> > The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be

> expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety . . . Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [section 14(1)(e)] to refuse disclosure.

> In my view, despite this distinction [between sections 14(1)(e)/20 and other harms-based exemption claims], the party with the burden of proof under section 14(1)(e) still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated.

The Ministry is relying on sections 14(1)(e) with respect to one of the diagrams contained in Schedule 15 to the CGLA, which is the Police Services Agreement. According to this agreement, 407 ETR is responsible for providing a satellite facility either on or in close proximity to Highway 407. The Ministry explains that the diagram in question shows in detail the building floor plan, which will act as an operational Detachment for the OPP. The Detachment will house OPP officers and civilian staff on rotating shifts with varied number of personnel at the facility at any given time. The Ministry goes on to explain that the Detachment is used to house various items gathered during law enforcement activities and submits that disclosing the floor plan of the detachment could endanger the life or physical safety of law enforcement officers or other persons as there is a constant concern of retaliation or efforts to impede ongoing investigations.

The diagram in question includes fairly detailed information concerning the detachment, including various measurements and other details that would not be readily apparent from visiting this detachment. Based on my review of this record, and the Ministry's representations, I am satisfied that disclosure of this record could reasonably be expected to endanger the life or physical safety of the OPP officers and civilian staff working within this Detachment. In my view, the Ministry has demonstrated that the reasons for resisting disclosure do not amount to a frivolous or exaggerated expectation of endangerment to safety. Accordingly, I find that section 14(1)(e) is applicable in the circumstances.

In the circumstances of these appeals, I have also considered the application of section 10(2) of the *Act*. The purpose of this section is to require institutions to try, wherever possible, to sever records so as to remove those parts that do not fall within the scope of the exemptions. Based on my review of the record at issue, however, I find that it is not possible to sever it. The OPP detachment in question is fairly small in size and, in my view, disclosure of any portion of its floor plan could reasonably be expected to result in the harm described under section 14(1)(e). Therefore I find that section 10(2) has no application in the circumstances.

My conclusion with respect to the application of section 14(1)(e) certainly does not imply that the requester himself would be the source of any such harm. However, as has been established in many past orders, disclosure of records to a particular requester is tantamount to disclosing the information contained in the records to the public generally [PO-1944], and this is the basis for my finding that the section 14(1)(e) exemption applies to the record at issue.

PERSONAL PRIVACY

The Ministry claims that Schedule 8 to the CGLA contain personal information which is exempt under section 21 of the *Act*, the mandatory personal privacy exemption. The section 21 personal privacy exemption applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*.

"Personal information" under the *Act* is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

Once it has been determined that a record contains personal information and the requester seeks personal information of an individual other than him/herself, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) of the *Act* reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Schedule 8 to the CGLA is entitled "Highway 407 Lands Availability Schedule" and consists of "Property Acquisition Status Charts" setting out particulars concerning property ownership and remarks outlining the status of the negotiations concerning any 407 ETR property that remains to be acquired, particulars of various leases, as well as certain sale agreement conditions. Based on my review of the information within this record, I am satisfied that the names and in some cases property descriptions which may serve to identify these individuals qualifies as personal information pursuant to the definition in section 2(1) of the *Act*. (See Orders M-536, M-800, P-559, PO-1631 and PO-1754, PO-1786-I). Once this personal identifying information is removed, however, the remainder of the record no longer contains the personal information of these individuals since they are no longer "identifiable". I have highlighted the information that qualifies as personal information within the record, a copy of which will be provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with this order.

As outlined above, section 21(1) of the *Act* prohibits the disclosure of personal information, unless one of the exceptions listed in that section is applicable. In this appeal, the only exception which could apply is section 21(1)(f), which permits disclosure if it "... does not constitute an

unjustified invasion of personal privacy". Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. I have reviewed all of the factors in section 21(2) that favour disclosure of the personal information, and find that none apply in the circumstances. Accordingly, I find that disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy, and it is therefore properly exempt under section 21.

FEE ESTIMATE

Introduction

The charging of fees is authorized by section 57(1) of the *Act*, which states:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

Section 6 of Regulation 460 also deals with fees. It states, in part, as follows:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
> ...
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

Under section 57(5) of the *Act*, my responsibility is to ensure that the amount charged by the Ministry is reasonable in the circumstances.

Submissions

As indicated above, the Ministry originally issued a fee estimate totalling $165.00, which included a charge for search and preparation costs totalling $135.00. The remaining $30.00 relates to photocopying charges. In recognition that there have been several access requests for similar records, the Ministry subsequently revised its fee estimate to $60.00.

In its representations, the Ministry advised that the $60.00 includes a one hour charge for preparation time ($30.00) and photocopying of 150 pages ($30.00). The Ministry explained that in reaching the revised fee calculation, it considered that the search for records had already taken place and therefore was no longer charging for this activity. The Ministry submits, however, that it took one hour to prepare the records, "as the requests are not identical". The Ministry does not, however, provide any further explanations in this regard. The Ministry's view is that, based on the amount of work required and the volume of records being disclosed, $60.00 is fair and reasonable.

In its representations, the requester argues that if the record had been previously located and prepared, then there ought not be search and preparation fees levied against it, as the work had already been done.

Findings

"Preparing the record for disclosure" under subsection 57(1)(b) has been construed by this office as including (although not necessarily limited to) severing exempt information from records (see, for example, Order M-203). To my knowledge, the Ministry has received at least four separate requests, in and around the same time period, that include the record that is at issue in these appeals. At least one of those requesters paid the Ministry's original fee estimate of $165.00, which included both search and preparation costs, and did not appeal the Ministry's decision in this respect. Although the Ministry states that the requests are not identical, the record at issue in this appeal is simply a portion of the larger record at issue in the other appeals. Therefore, I see no basis for the Ministry to charge a fee for preparation in the circumstances.

Having said that, however, I note that the Ministry is only charging the appellant $30.00 for photocopying in this case, even though the actual number of pages is substantially larger than that charged for by the Ministry. Since the the photocopy charges available to the Ministry in this case far exceed the $60 fee which it ultimately charged, I accept that the Ministry's fee is fair and reasonable in the circumstances.

ORDER:

1. I uphold the Ministry=s decision to deny access to the highlighted portions of Schedules 8 and 15 to the CGLA, which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order. For greater certainty, the highlighted portions of these records should **not** be disclosed.

2. I order the Ministry to disclose the remainder of the records at issue to the requester, no later than **January 14, 2002**, but not earlier than **January 7, 2002**.

3. I uphold the Ministry's revised fee decision.

4. I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the requester pursuant to Provision 2.

December 5, 2001

Irena Pascoe
Adjudicator