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

ORDER PO-1973

Appeals PA-000294-1 and PA-000303-1

Ministry of Transportation

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

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 record:

> [t]he contract signed between the province and [named company], [named company] and [named company], a subsidiary of the [named company] re: Highway 407 ETR.

The Ministry identified the "Share Purchase Agreement", as described above, as the record responsive to the request.

Pursuant to section 28 of the *Act*, the Ministry gave notice to 407 International Inc. and 407 ETR Concession Company Limited (407 ETR), seeking submissions with respect to disclosure of the requested record. 407 ETR responded by objecting to disclosure.

Subsequently, the Ministry issued its decision to the requester advising that partial access to the Share Purchase Agreement will be granted upon payment of a $165.00 fee. The Ministry also stated that access to some information will be denied pursuant to sections 21 (invasion of privacy) and 19 (solicitor-client privilege) of the *Act*. The Ministry went on to state the following:

> Please note that the Concession and Ground Lease Agreement and its schedules, is a schedule itself to the Share Purchase Agreement. Since the release of the Concession and Ground Lease Agreement is currently before the Information and Privacy Commissioner under a *Freedom of Information and Protection of Privacy Act* appeal, the Ministry of Transportation is not in a position to make a decision with respect to that information until that appeal has been completed.

On the same day, the Ministry wrote to 407 ETR and advised it of its decision to grant partial access to the responsive record.

The requester later wrote to the Ministry advising that he accepts the Ministry's fee for the requested record and enclosed a cheque for the full amount of the fee estimate.

Subsequently, both the requester and 407 ETR appealed the Ministry's access decision. In turn, this office opened Appeals PA-000294-1 and PA-000303-1, respectively, to deal with these matters. Mediation of the appeals was not possible and a Report of Mediator was issued to the parties for each appeal.

Subsequently, the Ministry issued its decision to the requester and 407 ETR concerning the Highway 407 Concession and Ground Lease Agreement granting partial access to this record. Access to certain portions of this agreement were denied pursuant to sections 21(1), 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).

On the same day, the Ministry also issued its decision to a number of other parties (the affected parties) who were notified by the Ministry pursuant to section 28 of the *Act* concerning the Highway 407 Concession and Ground Lease Agreement.

Subsequently, both the requester and 407 ETR appealed the Ministry's decision concerning the "Highway 407 Concession and Ground Lease Agreement". In turn, these appeals were incorporated into Appeals PA-000294-1 and PA-000303-1, respectively. None of the other affected parties appealed the Ministry's decision.

This order will address the issues raised in both Appeals PA-000294-1 and PA-000303-1.

A Notice of Inquiry was sent to the Ministry, 407 ETR, 407 International Inc. and the 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 made submissions, which were then shared with the Ministry and 407 ETR. At the same time, the Ministry's representations were 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-000294-1 and PA-000303-1 is the Share Purchase Agreement (the SPA), including all of its schedules. Schedule 6.1.3 to the SPA is the Highway 407 Concession and Ground Lease Agreement (the CGLA).

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

The Ministry's position

In response to the Notice of Inquiry, the Ministry consented to the disclosure of Schedules 6.1.4 and 6.3.4 of the SPA, which were previously withheld pursuant to section 19 of the *Act*. The

Ministry also stated that it no longer claims that Schedule 12 to the CGLA contains personal information. Accordingly, the only records to which the Ministry is denying access are as follows:

1. Schedule 4.1(ae) to the SPA, in part, on the basis of section 21 of the *Act*;

2. Schedule 4.1(af) to the SPA, in part, on the basis of section 21 of the *Act*;

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

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

5. 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 both the SPA and the CGLA. 407 ETR maintains its objection to the disclosure of the following records/portions of records only, on the basis of sections 17(1)(a), (b) and/or (c) and section 21 of the *Act*:

1. Sections 2.2, 2.3, 2.4 and 2.6 of the SPA (in their entirety).

2. Schedule 1.1(bl) to the SPA (the two pages of Notes to the Revised Pro Forma Balance Sheet only)

3. Schedule 1.1(bt) to the SPA (in its entirety). See also Item 12 below where the same agreement is found as Schedule 19 to the CGLA

4. Schedule 4.1(af) to the SPA, in part, specifically:

   - All information (excluding the heading "Schedule 4.1(af) – Employees") on the first two pages of Schedule 4.1 (af) – Employees.

   - The handwritten notation at the top of page 2 of the attachment to Appendix A to Schedule 4.1 (af).

5. Schedule 4.1(o)(ii) to the SPA (all dollar amounts only);

6. Schedule 4.1(ae) to the SPA (in its entirety);

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

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

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

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

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

12. Schedule 19 to the CGLA (in its entirety). (See also Item 3 above where the same agreement is found as Schedule 1.1(bt) to the SPA)

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

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

In response to the Ministry's consent to the disclosure of Schedules 6.1.4 and 6.3.4 of the SPA (which were previously withheld by the Ministry pursuant to section 19 of the *Act*), 407 ETR indicated that it denies the Ministry's authority to waive any privilege it has to these "legal opinions", and does not consent to their release.

The requester's position

In response to the Notice of Inquiry, the requester confirmed that he is not pursuing access to Schedule 4.1(af) to the SPA. Accordingly, this record is no longer at issue in these appeals and I will not consider it further.

The requester is pursuing access to all remaining records and/or portions of records to which the Ministry and/or 407 ETR are objecting to disclosure.

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]

The requester concedes that most of the information at issue constitutes financial and/or commercial information. The requester does not agree, however, that the Schedule of Litigation claims (Schedule 4.1(ae) to the SPA) constitutes financial or commercial information regarding 407 ETR.

407 ETR, however, argues that this record contains commercial and financial information concerning litigation claims that have arisen directly out of the operation of its business. 407 ETR submits that "such information is, therefore, 'commercial' and 'financial' because the existence of these civil litigation claims against 407 ETR has an obvious impact on its financial performance".

Schedule 4.1(ae) to the SPA identifies the litigation claims, as well as the possible claims, against the 407 ETR. The information includes the date of each claim, the identity of the third party and a brief description of the claim. There is no information as to the dollar amount of any of these claims.

In Order P-1039, former Adjudicator John Higgins found that the dollar amount claimed by the appellant in a lawsuit was not "financial information" in the sense intended by section 17(1) because it did not describe any actual financial obligation, nor one that will necessarily ever come into existence. While some potential liabilities could well be considered financial information, in that case, Adjudicator Higgins found the connection between the dollar figure and any actual liability to be too remote for the purpose of this part of the test. In the case before me, the information at issue contained in Schedule 4.1(ae) to the SPA is even further removed from the nature of financial information as described above. Accordingly, I find that this information does not qualify as "financial information" for the purposes of section 17(1).

I am persuaded, however, that all of the information at issue, including information contained in Schedule 4.1(ae), qualifies as "commercial information" within the meaning of section 17(1). In my view, all of the information at issue directly relates 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 historical revenue data, 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 SPA and the CGLA which 407 ETR continues to object to disclosure of break down broadly into two categories:

> In some cases (Items 2, 4, 5 and 6 [as described above]), the portions of these agreements in issue 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 (items 1, 3 and 7-14 [as described above]) 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 in Items 2, 5 and 6 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.)

The requester's representations

The requester submits that the information at issue was not supplied by 407 ETR/OTCC to the Ministry. In this regard the requester makes the following submissions:

> 407 ETR has submitted that "all of the information in issue was provided by 407 ETR/OTCC to the *Ontario government*". However, later on in its submissions, it specifies that the information was supplied to the *Ministry of Finance*. We do not know why the information was supplied to the Ministry of Finance, when it was supplied and under what circumstances it was supplied.
>
> At no point does the 407 ETR state that the information was supplied to the Ministry of Transportation. Indeed, we do not know how the information got to the Ministry of Transportation. Accordingly, it cannot be said that the information was supplied by 407 ETR to the Ministry of Transportation.
>
> Even if the information was supplied by the 407 ETR to the Ministry of Transportation, which is not admitted but denied, the Requester submits that the 407 ETR should not be treated as a third party for the purpose of the s.17

> exemption. The [OTCC] is the predecessor of the 407 ETR. Section 3(2) of the *Highway 407 Act*, S.O. 1998, c.28 authorized the continuation of the OTCC under the *Business Corporations Act*. Section 3(4) of the *Highway 407 Act* provides that:
>
> > the shares of the corporation shall be legally and beneficially owned by the Crown in the right of Ontario as represented by the Minister of Privatization until transferred by the Minister of Privatization, and the corporation shall be deemed to be an *agent* of the Crown in right of Ontario *until the shares have been transferred by the Minister*. [requester's emphasis]
>
> It is unclear exactly when OTCC ceased being a crown agent, i.e. when the shares of the OTCC were transferred to 407 International Inc. However, according to a Corporation Profile Report obtained by the Requester, the name of the corporation was changed to 407 ETR on April 6, 1999 … In its submissions, 407 ETR indicates that the name change followed the transfer of the shares. Therefore, the shares were likely transferred on or about April 6, 1999. Prior to that date, the 407 ETR was a crown agent.
>
> In its submissions, 407 ETR carefully specifies that the information was supplied to the Ministry of Finance at a time when it was known as OTCC. While we are not told whether this was before or after the share transfer, we do know that the corporation only changed its name to 407 ETR *after* the share transfer. The Requester submits that a reasonable inference can be drawn that the information was supplied before the share transfer, when the corporation was still a crown agent. [original emphasis]
>
> As a crown agent, the Requestor submits that OTCC was not a "third party" for the purposes of s.17. It has been held that information supplied by an *agent* of an institution should not be treated as information that has been supplied by a third party. For example, information supplied to an institution by a consultant in the service of the institution cannot be considered to have been supplied in confidence by a third party in the sense of s. 17(1): Order 204 (Re Stadium Corp. of Ontario; November 19, 1990) … Similarly, the councillors and employees of a municipality are considered to be part of the institution and do not qualify as third parties for the purpose of s.10 of the [*Municipal Freedom of Information and Protection of Privacy Act*]: Order M-183 (Re Village of Morrisburg; September 9, 1993) … As the OTCC was an *agent* of the Crown, we submit that the information in question is more accurately characterized as having been gathered or generated, albeit indirectly, by the government institution and not supplied by a third party.

The requester also submits that information relating to the Agreement Objections was the product of negotiation process between the Ministry and 407 ETR and therefore does not qualify

as having been "supplied". He also disputes 407 ETR's position that the disclosure of the portions of the agreement in issue would permit the drawing of accurate inferences concerning the information supplied.

407 ETR's reply submissions

407 ETR submits:

> A requester submitted that the information was supplied to the Ontario Government and the Ministry of Finance and thus since [the Ministry] is now ceased of the materials, 407 ETR should not be treated as a third party for the purpose of the exemption found in section 17 of the [*Act*]. 407 ETR submits that, in a bid the magnitude of the privatization of Highway 407, various ministries of the Government of Ontario were involved. 407 ETR questions the relevance of to which branch of the government the information was supplied.
>
> A requester submitted that as a crown agent, OTCC was not a third party for the purposes of section 17. 407 ETR submits that as a crown agency, OTCC was created as a separate legal entity that was responsible for its own funding, including servicing and repaying its debt, and reminds the Commission that it was not a ministry of the Government of Ontario. That said, if 407 ETR/OTCC is not to be permitted protection under the Act as a third party, should it then be treated as being part of the government? Surely, 407 ETR/OTCC is not to be completely stripped of the ability to seek refuge under the Act.

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.

I do not accept the requester's submission that, for the purpose of section 17, 407 ETR cannot be considered to have supplied information that was provided to the government by its predecessor, OTCC. I agree that, 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.

With respect to the requester's argument that the information at issue was not supplied to the Ministry, but rather to the Ministry of Finance, I find that this distinction does not render section 17(1) inapplicable.

In Order P-902, former Adjudicator Anita Fineberg made the following comments:

> The procedural scheme established by the *Act* clearly contemplates that the government will speak with one voice with respect to requests for access to government records. The legislation contains various provisions which contemplate that the institution which receives the request may canvass other government institutions, if necessary.
>
> For example, when a request for access to a record is made, the institution which receives the request is required to determine whether or not the record requested falls within its custody or control (section 25 of the *Act*). In the event that the institution to which the request is directed does not have custody or control, the request must then be transferred to the institution that does have custody or control of the record.
>
> Where an institution receives a request for access to a record and the institution considers that another institution has a greater interest in the record, then the request and, if necessary, the record may be transferred to the institution with the "greater interest in the record". In the circumstances where the record affects the interests of more than one institution, the *Act* expressly contemplates and allows for consultations between government institutions, including municipal institutions, before the institution with custody or control of the document makes an access decision. …

The purpose of section 17 of the *Act* is to protect certain third party information in the hands of government institutions. As indicated above, in this case, the Crown was represented by the Minister without portfolio with responsibility for privatisation for the purposes of the sale of Highway 407. I accept that any information that was supplied by OTCC/407 ETR was supplied to the government for the purpose of permitting it to undertake the sale of Highway 407. Given the nature of this undertaking, it is very likely that a number of different institutions were involved and may have been, at one time or another, in possession of various records. In my view, the fact that the information at issue may not have been originally supplied to the Ministry, does not mean that the information cannot be considered "supplied" for the purpose of section 17(1).

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

Information Objections

Schedule 1.1(bl) to the SPA – At issue: Notes to the Revised Pro Forma Balance Sheet (2 pgs)

Schedule 1.1(bl) consists of the Revised Pro Forma Balance Sheet as at December 31, 1998. Based on my review of this schedule, I find that it is reasonable to conclude that the information within the two pages of notes to the Revised Pro Forma Balance Sheet within Schedule 1.1(bl) to the SPA was supplied by the OTCC/407 ETR.

Schedule 4.1(o)(ii) to the SPA – At issue: all dollar amounts

Schedule 4.1(o)(ii) to the SPA is entitled "Historical Revenue Data" and contains 407 ETR's monthly revenues for the time period of October 1997 to February 1999. I accept 407 ETR's submission that it is likely that the information within this record would have been supplied by the OTCC/407 ETR.

Schedule 4.1(ae) to the SPA – At issue in its entirety

As described above, Schedule 4.1(ae) to the SPA identifies the litigation claims, as well as possible claims, against the 407 ETR at the time that this agreement was executed. The information includes the date of each claim, the identity of the third party and a brief description of the claim. Based on the information within this record, and the surrounding circumstances, I find that it is reasonable to conclude that this information was supplied by the OTCC/407 ETR.

Agreement Objections

Share Purchase Agreement

407 ETR is objecting to the disclosure of Sections 2.2, 2.3, 2.4 and 2.6 of the SPA in their entirety.

As indicated above, pursuant to the SPA the Vendor (the Crown) agreed to sell all of the issued shares of the Company (the 407 ETR) to the Purchaser (407 International Inc). Article 2 of the SPA deals with the "purchase and sale of purchased shares". Sections 2.2, 2.3, 2.4 and 2.6 are entitled "Consideration", "Post Closing Audit", "Purchase Price Adjustment", and "Disputes", respectively. As reflected by these titles, these sections of the SPA outline the consideration to be paid by the Purchaser to the Vendor for the purchased shares, the particulars of the post closing audit and the purchase price adjustment and the manner in which disputes in this regard are to be handled.

There is no evidence before me to suggest that the contents of these clauses were "supplied" by either 407 International Inc. or any of the other three companies (the equity participants). 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 SPA 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 1.1(bt) to the SPA

Schedule 1.1(bt) to the SPA 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 SPA, 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.

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, as well as Article 16 in its entirety.

Similar to my findings with respect to the PSA, based on my review of the CGLA and in absence of any evidence to the contrary, I find that the dollar amount in Article 2.6 of this agreement, which specifies the rent payable per annum, was not supplied by the OTCC/407 ETR, but rather constitutes a negotiated term of the agreement.

Article 16 of the CGLA deals with insurance that is to be maintained by the 407 ETR. Based on my reasoning above, I find that this portion of the CGLA was not supplied by OTCC/407 ETR, but rather was prepared as a result of negotiations.

Accordingly, I find that the information at issue within Articles 2.6 and 16 was not "supplied" for the purpose of section 17(1).

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

My findings above under "Schedule 1.1(bt) to the SPA" are equally applicable to this record, since the two records are identical.

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 only the information at issue within Schedules 1.1(bt), 4.1(o)(ii) and 4.1(ae) to the SPA was supplied by the OTCC/407 ETR. Accordingly, I will go on to consider part three of the section 17 test in relation to these records.

Since I have determined that the remainder of the information at issue, specifically information under the category of "agreement objections", was not "supplied" for the purpose of the section 17(1) exemption, the second part of the three-part test for exemption under section 17(1) 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 under the category of "agreement objections" and it does not qualify for exemption under this section of the *Act*.

In Confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

[Order M-169]

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

407 ETR's representations

407 ETR submits as follows:

> All of the information here in issue was provided by 407 ETR/OTCC to the Ontario government 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 the bidding process. This information is confidential commercial and financial information material to the conduct of 407 ETR's business of constructing and operating a toll highway.
>
> …
>
> This information was intended to be kept confidential by the Ministry and to be used only in connection with the privatization of Highway 407. It was, therefore, supplied in confidence as required by section 17(1) of the Act. Furthermore, 407 ETR has at all times kept this information confidential and has not disclosed any of it publicly since privatization. …

Requester's representations

The requester submits:

> There is no evidence that the information was supplied by OTCC/407 ETR to the Ministry of Transportation/Ministry of Finance explicitly in confidence. That is, there is no evidence of a confidentiality agreement entered into between the OTCC/407 ETR and the Ministry of Transportation/Ministry of Finance. There is also no other explicit indication that the information was being supplied in confidence.
> …
>
> The requestor submits that the fact that there was an express confidentiality agreement in place when the Ontario government supplied the information to prospective bidders but not one in place when the OTCC/407 ETR supplied the information to the Ontario government supports the reasonable inference that there was clearly no implicit expectation of confidentiality in the latter situation. Both the Ontario government and OTCC/407 ETR were represented by legal counsel at the time the information was supplied. The Ontario government and OTCC/407 ETR were fully aware of the nature of the information that was going supplied and the consequences of its public release. If they had intended to maintain the confidentiality of this information, they would have entered into an express confidentiality agreement. Indeed, as the OTCC/407 ETR was supplying information to a government institution, as opposed to a private company, it must have been aware of the greater risk of public access to the information through

> the Act and the greater need for an explicit confidentiality agreement. The absence of an express confidentiality agreement in these circumstances indicates that the information was not supplied in confidence.
>
> The Ministry did not accept the 407 ETR's submission that the exemption in s.17 of the Act should apply. We do not know the exact reason why the Ministry rejected the application of the exemption. However, the Requestor notes that where an institution does not regard a particular kind of information to be supplied in confidence, the supplier of information of that kind cannot have a reasonable expectation of confidence in respect of such information: Order P-1276 (Re Ontario Insurance Comm.; October 18, 1996… Therefore, to the extent that the Ministry's refusal to apply the s.17 objection was based on its finding that the information was not supplied in confidence, the Requestor submits that the information was not implicitly supplied in confidence.

Findings

The requester is correct in pointing out that I have no information before me as to why the Ministry determined that section 17(1) is not applicable in this case. However, I am not persuaded that just because the Ministry determined that section 17(1) is not applicable, it is necessarily of the view that the information at issue was not supplied by OTCC/407 ETR in confidence. As outlined above, the information at issue was supplied by OTCC/407 ETR to the government for the purpose of permitting it to undertake the sale of Highway 407. In my view, the OTCC, being a business that was owned by the government, would have had a reasonable expectation that its business information would be treated confidentially, particularly in the circumstances of the sale transaction in question. I further find that the information at issue would appear not to be otherwise available from sources to which the public has access, and that this information was prepared for a purpose that would not entail disclosure to the public.

Furthermore, I do not accept the requester's position that because OTCC/407 ETR was supplying information to a government institution, as opposed to a private company, there was a "greater risk of public access to the information through the *Act*", and that "the absence of an express confidentiality agreement in these circumstances indicates that the information was not supplied in confidence". The basis for the requester's position is not clear, particularly since similar to the Ministry the OTCC was an institution under the *Act* and as such, its records were also subject to the *Act*. Therefore, I am not persuaded that disclosing information to the Ministry would have resulted in a greater risk of public access as both of these institutions were subject to the same provisions of the *Act*.

Accordingly, based on the material before me and the particular circumstances of this case, I am satisfied that the information at issue was supplied by the OTCC/407 ETR with a reasonable expectation of confidentiality.

Part 3: Harms

The Commissioner's three-part test for exemption under section 17(1), and statement of what is required to discharge the burden of proof under part three of the test, have been approved by the Court of Appeal for Ontario. That court overturned a decision of the Divisional Court quashing Order P-373, and restored Order P-373. In that decision the court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "*detailed and convincing*" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [*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 (Div. Ct.)].

In order to discharge the burden of proof under part three of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Orders 36, P-373].

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the phrase "could reasonably be expected to", which appears in the opening words of section 17(1):

> 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.)].

In my view, 407 ETR must provide detailed and convincing evidence to establish a "reasonable expectation of probable harm" as described in paragraphs (a), (b) and/or (c) of section 17(1).

Section 17(1)(a): Prejudice to competitive position

407 ETR's representations

407 ETR makes the following general representations with respect to the exemption under sections 17(1):

> Until the privatization occurs, the government could generally refuse to disclose information of the kind described in the preceding paragraph about its Crown corporation, if it were requested under the Act, on the basis of section 18 of the Act. Logically, the person acquiring the business should equally be able to prevent disclosure of the same information after privatization on the basis of section 17 of the Act. The same information is in issue. The same business is in issue. All that has changed is the identity of the owner of the business.
>
> If it were otherwise, anyone acquiring a business from the government would be exposed to potentially substantial and unwarranted prejudice. After privatization of the business, anyone interested (for example, competitors) could obtain from the government under the Act highly material and confidential information about the business, its operations, its projections, its customers, that could not have been obtained before the privatization because of section 18. If this were the result under the Act, which 407 ETR submits for the reasons that follow, it is not, there would be substantial impediments facing any privatization of any business by the government. Private sector parties might well not be prepared to even consider acquiring businesses from the government if all confidential business information relating to this business in the control of the government could be obtained under the Act by anyone who asked for it following privatization. Privatization could, therefore, easily become difficult, if not impossible, to complete. The continued ability of the government to effect privatizations where and when the government considers it in the public interest to do so is clearly something that is itself in the public interest.

With reference to the harm alleged at section 17(1)(a), 407 ETR submits:

> The Ontario government has announced its interest in the construction of additional privately-operated toll highways in Ontario, for example the 407 ETR

> East Completion Niagara Mid-Peninsula highway, Highway 410/427 extension to Collingwood, Highway 404 north extension to Lake Simcoe, an unnamed highway north of and parallel to Highway 407 ETR and the Gardiner Expressway replacement. As recently as [March 2001], there has also been public discussion of the possibility of the City of Toronto adding four toll lanes to the Don Valley Parkway. 407 ETR is a potential bidder, but by no means the only potential bidder, on additional privately-operated toll highways that may be built in Ontario. Given the various public announcements identified above, there is significant prospect that such highway projects will be undertaken in the reasonably near term.
>
> In any such bidding process, those bidding in competition with 407 ETR could easily make use of the commercial and financial information here in issue to, for example, compete against 407 ETR with valuable information about 407 ETR's business without 407 ETR having any equivalent opportunity to gain access to similar information about its competitor.

Requester's representations

The requester submits that that "release of the information will not *significantly* prejudice 407 ETR's competitive position or interfere *significantly* with contractual or other negotiations" [requester's emphasis]:

> Each toll highway is different and unique. Characteristics such as location of the land, cost of land acquisition, cost of construction, anticipated traffic, and anticipated revenue will differ for each toll highway. It logically follows that the commercial and financial information relating to the 407 will have minimal relevance to future RFP's for the construction and operation of different highways;
>
> There are no definite plans to construct additional highways. There is, at best, an announced intention by the present government to construct additional highways, not necessarily toll highways. The Requestor submits that "public announcements" unaccompanied by action do not create a "significant prospect" of highway projects being undertaken in the "reasonably near term". It is just as possible that no additional highways will be constructed. Therefore, the Requestor submits that any risk of harm is speculative.
>
> The Premier has himself indicated that future toll highways are at least a decade away. In 10 years, the commercial and financial information that is the subject of this appeal will have minimal relevance. It will clearly be dated. Further, economic conditions in Ontario will likely be different, i.e. cost of land, traffic flows and patterns. Projections and estimates made 10 years earlier are likely to have minimum relevance.

> In 10 years or even in 5 years, the political environment in Ontario may be different. The interest in constructing additional toll highways may no longer be present. There may, instead, be a political interest in high-speed trains. This past March, for example, Federal Transport Minister David Collenette announced that the federal government would assist in the construction of a 100 km/h rail link from Union Station to Pearson International Airport.
>
> Clearly, any prejudice to 407 ETR's ability to compete in future RFP's is minimal and speculative at best.
>
> What should also be noted is that if there should be future RFP's for the construction and operation of toll highways, 407 ETR will likely have a competitive advantage over other private companies. This competitive advantage will come from its experience in operating the world's first fully electronic toll highway. This experience will surely be a factor that the government considers in awarding the contract. The Requestor submits that this competitive disadvantage will compensate for any harm resulting from disclosure of the information.

407 ETR's reply representations

407 ETR states:

> … Although 20 or 30 years may elapse from inception to completion of a major thoroughfare of the scale of Highway 407, complexity of planning and construction ought not be confused with the ability to compete with 407 ETR. It is also worth note that 407 ETR is merely 2 years into a 99 year concession term and that Highway 407 ETR may have Eastern and Western extensions beyond what is in the Concession Agreement in relatively short period of time …

Findings

With respect to 407 ETR's argument that "anyone acquiring a business from the government would be exposed to potentially substantial and unwarranted prejudice", I have already determined above that the fact that 407 ETR used to be a Crown corporation does not preclude it from availing itself of the protection afforded under the section 17(1) exemption. Having said that, however, I also believe that if an organization chooses to do business with the government, it must be prepared to accept the level of public scrutiny contemplated under the *Act*.

As far as the section 18 argument is concerned, 407 ETR is correct in asserting that this exemption is designed to protect the interests of the government. However, whether or not the information at issue would have been exempt under section 18 prior to the sale of Highway 407 is not determinative of the issues in these appeals. The application of section 18 to information concerning Crown corporations may involve factors and considerations significantly different from those in this case. In my view, section 17(1) of the *Act*, being designed to protect the

interests of parties outside the government, is the appropriate exemption to be considered in the context of potential harm to 407 ETR.

Having reviewed all of the representations, together with the information at issue, I am not satisfied that 407 ETR has provided sufficient evidence to demonstrate that disclosure of the information remaining at issue could reasonably be expected to cause the harms described in section 17(1)(a). Although 407 ETR argues that potential competitors "could easily make use of the commercial and financial information here in issue to, for example, compete against 407 ETR with valuable information about 407 ETR's business", other than making these general assertions, it does not refer to any specific portions of the records nor does it provide any supporting details in this regard. Furthermore, it is not evident on the face of the records how disclosure of this information could reasonably be expected to significantly prejudice the competitive position or interfere significantly with any future contractual or other negotiations.

Accordingly, I find that section 17(1)(a) is not applicable here.

Section 17(1)(b): Similar information no longer supplied

407 ETR's representations

407 ETR submits:

> If the information in issue in connection with Schedule 22 is ordered disclosed pursuant to the Act, it would also be the case that much information retained by the government following the privatization of many businesses would very likely be obtainable under the Act. As indicated above, this would seriously jeopardize the government's ability to privatize business.
>
> A possible means of avoiding disclosure under the Act of information in the continuing control of government following privatization of the business of a Crown corporation would be for the Crown corporation not to provide the information to any government institution subject to the Act prior to or in connection with the proposed privatization. Then, the government would not have the information and could not be required to disclose it under the Act following privatization.
>
> But, a necessary consequence of adopting this approach would be that the government would be much less knowledgeable about the business it was privatizing. It would, therefore, be hard-pressed to determine fair market value for the business with the result that it could well sell such business for an amount substantially less than its fair market value. Such a result would clearly not be in the public interest.

Requester's submission

The requester states:

> The Requestor submits there is little if any risk of a Crown Corporation not providing information to the Ontario government so as to permit the Ontario government to complete a privatization in an informed manner. A Crown corporation is ultimately responsible and accountable to the government. Indeed, the OTCC was deemed by the *Highway 407 Act* to be an agent of the Crown. It is inconceivable that the Crown corporation would or could refuse to provide information requested by the government.

Findings

I have already noted that the OTCC was in fact a designated institution under the *Act* and was therefore subject to the provisions of the *Act*. Therefore, as far as any future privatization transactions are concerned, if the Crown corporation in question is already subject to the *Act*, there would be no reason to withhold any information from the Ministry on the basis as argued by 407 ETR.

Even if the Crown corporation was not a designated institution under the *Act*, I agree with the requester that it is unlikely that it would withhold relevant information from the government if it was required for the purposes of completing a similar sale transaction in the future. It is also worthy to note that the Ministry does not appear to share 407 ETR's view in this respect. As stated earlier, the Ministry chose not to make any representations with respect to the application of section 17(1). However, I would assume that if the Ministry felt that there was a reasonable expectation of harm, as described by 407 ETR, it would have asserted that section 17(1)(b) is applicable in this case.

Based on the above, I find that a decision in the present appeals to order the disclosure of the information remaining at issue could not reasonably be expected to result in similar information no longer being supplied.

Section 17(1)(c): Undue loss or gain

407 ETR's representations

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

> Disclosure of the information here in issue to, for example, those bidding against 407 ETR in anticipated RFP processes for additional privately-operated toll highways in Ontario would give such competitors valuable information about 407 ETR's business, its projections and historical financial information. 407 ETR's competitors have no legitimate basis for obtaining this information and would not, in normal circumstances, be able to obtain such information

> concerning a private-sector competitor. Undue loss to 407 ETR would be likely to result from disclosure of such information to 407 ETR's competitors and undue gain would accrue to its competitors if they were able to obtain access to such information since such competitors would, thereby, gain access to and acquire a valuable knowledge base concerning 407's ETR's business expertise and its operating procedures, all without 407 ETR having any equivalent opportunity to gain access to similar information about its competitors. The loss to 407 and its shareholders and the gain to its competitors that would result would be particularly "undue" because it would occur merely because 407 ETR/OTCC was previously owned by the government with the result that the government has control of the information in issue.

More specifically, with respect to the two pages of Notes to the Revised Pro Forma Balance Sheet within Schedule 1.1(bl) to the SPA 407 ETR submits:

> In addition, section 17(1)(c) applies to the information in Item 2 because disclosure of the Notes to the Pro Forma Balance Sheet would disclose that the current financial statement of 407 ETR now are prepared on a somewhat different accounting basis than that used in 1998 (… Both approaches are acceptable under applicable accounting principles. Disclosure of the change might, however, lead to confusion in the marketplace with the real potential to adversely affect the ability of 407 ETR's parent (407 International Inc.) to raise capital in the market.)

With respect to the dollar amounts within Schedule 4.1(o)(ii) to the SPA, "Historical Revenue Data", 407 ETR submits:

> With respect to Item 5, 407 ETR has never publicly released revenue data from the period prior to the privatization of Highway 407 in May, 1999. In addition, 407 ETR publicly releases quarterly revenue information for the period since May, 1999 but not monthly revenues. The manner in which 407 ETR currently calculates its revenues is somewhat different from the way in which 407 ETR/OTCC calculated revenues prior to privatization. Disclosure of the monthly revenue amounts in Item 5 would, therefore, result in the disclosure of financial information that has never previously disclosed, that is more detailed than the information now publicly disclosed and that is calculated on a different basis than the revenue information disclosed by 407 ETR. The likely result of the disclosure of this information would be confusion in the marketplace on the part of those trying to reconcile various financial data concerning 407 ETR prepared on different bases. As a result, the ability of 407 International and/or 407 ETR to raise money in the market could reasonably be expected to be adversely affected. Confusion in the financial market concerning the revue generating history of Highway 407 can reasonably be expected to lead to uncertainty in the financial market and such uncertainty generally leads either to a reduced willingness to lend money or a willingness to lend only at a higher price. Either result would have adverse consequences for 407 International and 407 ETR.

With respect to Schedule 4.1(ae) to the SPA, "Litigation", 407 ETR submits:

> With respect to Item 6, 407 ETR is concerned that individual members of the public, if they become aware of the various types of claims that have been asserted against it, would be encouraged to commence similar types of claims against 407 ETR. It is particularly concerned that "copycat" claims could be commenced on a frivolous and unsubstantiated basis by some individuals in hopes of achieving the financial benefit of a nuisance settlement. The costs which 407 ETR would be obliged to incur in defending itself against such unmeritorious claims would clearly result in undue loss to 407 ETR for the purposes of section 17 ("undue" because the claims in question are frivolous and without merit)

Requester's representations

The requester states:

> In its submissions, 407 ETR submits that release of the information would have those "bidding against 407 ETR in anticipated RFP process for additional privately-operated toll highways in Ontario … valuable information about 407 ETR's business, its projections and historical financial information". In response, the Requestor repeats and relies on its earlier submissions as to the minimal relevance of this information to future RFP's. Even if some gain would be given to competitors of 407 ETR, the Requestor submits that this gain would not be undue.
>
> 407 ETR has also submitted that release of the financial information could result in "confusion" in the marketplace with the "real potential to adversely affect 407 ETR's *parent* (407 International Inc.) to raise capital in the market" [requester's emphasis]. This submission is questionable. There is nothing illegal or improper about corporations changing the way in which they prepare financial statements. 407 ETR has not submitted that such changes are unusual. If there has been a change in how financial statements are prepared, and if these changes result in confusion, which is not admitted but denied, the 407 can explain the changes to its potential investors and thereby avoid any confusion in the market place.
>
> As for the concern about "copycat claims", the Requestor submits that his concern is purely speculative and fanciful. There is no evidence that 407 has been the subject of "copycat" claims. There is also no evidence of 407 being subject to any more "frivolous or vexations claims" than an ordinary business of its size. Further, if anyone wished to know about claims that had been commenced against 407 ETR, they could simply conduct a litigation search and attend at a local court office to review the pleadings.

Findings

Based on the material before me, I am not persuaded that disclosure of the notes to the Pro Forma Balance Sheet or the historical revenue data would result in the types of harms as described by 407 ETR. In Order MO-1452, Adjudicator Dora Nipp concluded that the fact that a record may contain information which could be misleading does not alone fit within the harms described in section 10(1)(a) or (c) of the *Municipal Freedom of Information and Protection of Privacy Act*, which are equivalent to sections 17(1)(a) and (c) of the *Act*. Similarly, in this case, I am not persuaded that simply because the 407 ETR now prepares its financial statements on a somewhat different accounting basis than that used in 1998 and calculates its revenues somewhat differently from the way in which 407 ETR/OTCC calculated revenues prior to privatization could reasonably be expected to result in the harms envisioned by section 17(1)(a) or (c) if these records were disclosed. I also agree with the requester that 407 ETR could explain the changes to its potential investors in order to avoid any potential confusion.

With respect to Schedule 4.1(ae) to the SPA, "Litigation", I agree with the position of the requester with respect to the speculative nature of the possible harm associated with the disclosure of this record. In my view, 407 ETR has not established a reasonable expectation of harm occurring from disclosure of the information within this record. Accordingly, I find that section 17(1)(c) is not applicable.

In summary, I find that section 17(1) is not applicable to any of the information at issue in these appeals.

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.

The requester on the other hand relies on Order P-1348, which dealt with certain severance agreements, to support his position that disclosure of the negotiated fees will not limit the flexibility of the government to negotiate a fee that is in the best interest of the Province of Ontario:

> The details of the fee relating to the 407 Highway are unique to the circumstances relating to this particular highway. Among other things, it was likely determined based on factors such as the location of the highway, the cost of constructing it (including land acquisition costs), anticipated traffic and potential revenues. For different highways, these factors will undoubtedly be different. That is, a toll highway constructed in Northern Ontario will be significantly different than one that runs though the Greater Toronto area. Therefore, even if a private company learns of the fee negotiated in respect to the 407 Highway, this will not limit the flexibility of the Government of Ontario to negotiate a fee that is in the best interest of the Province of Ontario. Indeed, in response to a demand for "identical terms", the Ministry need only point to the fact that the two highways are different and that for sound business reasons, identical terms cannot be provided.

The requester further argues that if additional toll highways are to be constructed, such construction will only take place some significant time in the future. He submits that the Ontario Government has not made any firm plans to construct additional toll highways, but merely announced an "intention" to do so. He argues that the fact that no highways will be constructed in the foreseeable future further minimizes any risk associated with the disclosure of the fee information:

> … In 10 years, the economic environment in Ontario will undoubtedly be significantly different than it was when the 407 Highway was constructed and when the fee was negotiated. The Requestor submits that what the fee was over 10 years ago will have little if any relevance to what the fee will be 10 years in the future under different economic conditions. Again, the Ontario Government will certainly have a sound business reason for refusing to be bound by the fee negotiated a decade earlier.

Finally, the requester submits that the government has a monopoly on the construction of highways in the province and that if a private company wishes to participate in the construction or operation of a toll highway, it must negotiate with the government. By virtue of this monopoly position, the requester argues, the government is in an exceedingly strong negotiating position and will be able to obtain the best terms possible from a private company.

In response to the above, 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:

> Even accepting the requester's time line for future toll agreement, 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.

With respect to the requester's reliance on Order P-1348, the Ministry argues that negotiations regarding employee severance packages are markedly different in nature from large commercial venture negotiations and relies on Orders P-1026, P-1022 and M-712, which are referenced in P-1348. 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, I agree with the requester that 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.

I also agree with the requester that 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 requester submits that there is no basis for denying access to the entire building floor plan. He states that there will undoubtedly be areas in the Detachment to which the public will have access or be in plain view from these areas. Based on this, the requester argues that no further harm, if any, would result from disclosure of the portions of the floor plan relating to these areas and that these "public areas" of the floor plan should be released. The requester also indicates that he does not deny that that there is always the risk of retaliation against law enforcement agents. However, he argues that there is no reason to believe that this risk is increased in any material respect, if at all, by disclosure of the floor plan.

The diagram in question includes fairly detailed information concerning the detachment, including various measurements and other details that would not be readily apparent from simply 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 as proposed by the requester. 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 4.1(ae) to the SPA and 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, sections 21(1) (c) and (f) of the *Act* read as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
>
> > (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
> >
> > (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Schedule 4.1(ae) to the SPA

As previously described, Schedule 4.1(ea) to the SPA identifies the litigation claims, as well as possible claims, against the 407 ETR at the time that this agreement was executed. The information includes the date of each claim, the identity of the third party and a brief description of the claim. The requester argues that the mere fact that a person has commenced a claim for personal injury does not constitute personal information, but rather is public information, and states that the claims themselves are readily available at local court houses. The requester further submits that even if this schedule contains personal information, individuals who commence lawsuits should have no reasonable expectation that the details of that lawsuit remain confidential, as court documents are presumptively public documents. He further argues that

such information is not highly sensitive and its disclosure does not constitute an unjustified invasion of privacy.

I do not agree with the requester's position. Firstly, the particulars of the various litigation claims commenced by individuals is clearly information "about" the individuals in question and therefore qualifies as "personal information" pursuant to the definition in section 2(1) of the *Act*. I should note that the only information being withheld by the Ministry from this record is the names of the individuals in question. I agree with the Ministry that once the names of the individuals are removed, the remainder of the information can not be considered to be about "identifiable" individuals.

In asserting that the information is available to the public through court records the requester appears to be arguing that the exception under section 21(1)(c) is applicable in the circumstances of this appeal.

Previous orders of this office have stated that in order to satisfy the requirements of section 21(1)(c), the information must have been collected and maintained specifically for the purpose of creating a record available to the general public (for example, Order P-318). Section 21(1)(c) has been found to be applicable where, for example, a person files a form with an institution as required by a statute, and where that statute provides any member of the public with an express right of access to the form (for example, Order P-318, regarding a Form 1 under the *Corporations Information Act*). On the other hand, this office has found that where information in a record may be available to the public from a source other than the institution receiving the request, and the requested information is not maintained specifically for the purpose of creating a record available to the general public, section 21(1)(c) does not apply.

It is clear that the information at issue in the present case is not being maintained by the Ministry specifically for the purpose of creating a record available to the general public. Accordingly, section 21(1)(c) is not applicable here.

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 other 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 is therefore properly exempt under section 21.

Schedule 8 to the CGLA

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.

The requester takes the position that to the extent that the charts merely relate to property that an individual owns, such information would not be considered personal information. The requester further submits that to the extent that the negotiations between the Ministry and property owner were not successful, the information relating to a failed transaction does not qualify as personal information pursuant to paragraph (b) (financial transactions) of the section 2(1) definition. The requester also notes that personal information can only relate to natural persons and not to other entities, i.e. sole proprietorship, partnership, corporation, etc.

I agree with the requester that information relating to entities other than natural persons in this case, i.e. companies, associations, etc., does not constitute personal information pursuant to section 2(1). The Ministry also appears to be in agreement in this respect as it is only withholding information concerning individuals. 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, as it reveals information about the individuals in their personal capacities, including information about various negotiations involving the Ministry and their status, as well as particulars of certain leases. (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".

Once again, I have reviewed all of the factors in section 21(2) that favour disclosure of personal information, and find that none apply in the circumstances of this case. Accordingly, I find that disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy, and is therefore properly exempt under section 21 of the *Act*. I have highlighted the exempt information within the record, a copy of which will be provided to the Freedom of Information and Protection of Privacy Co-ordinator with this order.

SOLICITOR-CLIENT PRIVILEGE

Introduction

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, it must be established that one or the other, or both, of these heads of privilege apply to the records at issue.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> … the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client … Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> (*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P1409)

Waiver of solicitor-client communication privilege

The actions by or on behalf of the institution and/or another party may constitute waiver of solicitor-client communication privilege or litigation privilege. As stated in Order P-1342:

> ... [C]ommon law solicitor-client privilege can also be lost through a waiver of the privilege by the client. Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762, 45 B.C.L.R. 218, 35 C.P.C. 146 (S.C.) at 148-149 (C.P.C)]. Generally, disclosure to outsiders of privileged information would constitute waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669. See also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Strictly speaking, since the client is the "holder" of the privilege, only the client can waive it. However, the client's waiver of the privilege can be implied from the actions of the client's solicitor. Legal advisors have the ostensible authority to bind the client to any matter which arises in or is incidental to the litigation, and that ostensible authority extends to waiver of the client's privilege. [J. Sopinka et. al., *The Law of Evidence in Canada* at p. 663. See also: *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211 (S.C.C.); *Derby & Co. Ltd. v. Weldon (No. 8)*, [1991] 1 W.L.R. 73 at 87 (C.A.)].

Findings

As stated earlier in this order, the Ministry had previously relied on section 19 of the Act with respect to Schedules 6.1.4 and 6.3.4 to the SPA. In its representations, however, the Ministry consented to the disclosure of these two records. In its reply representations, 407 ETR indicated that it denies the Ministry's authority to waive any privilege it has to these "legal opinions", and does not consent to their release. 407 ETR does not provide any further representations in this respect.

Article 6 of the SPA sets out the pre-conditions to closing. Section 6.1.4 of the SPA, stipulates that "[t]he Purchaser shall have received a legal opinion dated the Closing Date from the Vendor's counsel substantially in the forms set forth in Schedule 6.1.4". Section 6.3.4 of the SPA, stipulates that the Vendor shall receive same from the Purchaser's and each of the Equity Participants' counsel in the form set forth in Schedule 6.3.4.

Based on my review of Schedules 6.1.4 and 6.3.4, I find that they cannot be considered a privileged communication between a lawyer and a client made for the purpose of giving or receiving legal advice. As outlined above, the two schedules in question are not the actual legal opinions, but rather set out the form in which the required legal opinions should be set. Even if I were to find that the content of these records was created by the solicitors as part of their

working papers relating to the giving of legal advice, the fact that these records formed part of the SPA is clear evidence of an intention to waive privilege on behalf of the clients.

Additionally, the Ministry has also clearly waived privilege in Schedule 6.1.4 by consenting to its disclosure to the requester. As far as Schedule 6.3.4 is concerned, in Order MO-1338, Senior Adjudicator Goodis stated the following:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the Act's provincial counterpart . . .
>
> Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter. …

In this case, there is no evidence before me to establish a "joint interest" between 407 International Inc. and the Crown for the purposes of solicitor-client privilege. Accordingly, I find that the records in question are not exempt under section 19 of the *Act*.

PUBLIC INTEREST OVERRIDE

Section 23 of the *Act* reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 20.1 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

I have found above that certain information qualifies for exemption under sections 14(1)(e), and 21(1) of the *Act*. The law enforcement exemption provided by section 14 of the *Act* is not one of the sections mentioned in section 23. Accordingly, section 23 cannot apply to override this exemption. Section 23 can, however, apply to override section 21 and I will consider this below.

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance)* v. *Ontario (Information and Privacy Commissioner)*, (1999), 118 O.A.C. 108 (C.A.), leave to appear refused (January 20, 2000), Doc. 27191 (S.C.C.].

In order to find that there is a compelling public interest in disclosure, the information contained in a 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).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

The requester provides lengthy submissions on what he views as the compelling public interest in disclosure of the information at issue in these appeals. In my view, the requester's arguments have some persuasive value to the extent that they would apply to a finding that the information at issue qualified for exemption under sections 17 and/or 18 of the *Act*. However, I have determined that the information withheld pursuant to these sections do not qualify under these exemptions. I am not persuaded, however, by the requester's submissions that there is a compelling public interest in disclosing the information that falls under the mandatory section 21 exemption claim.

In this respect, the requester argues that "*the fee and other financial arrangements* negotiated with 407 ETR … will allow Ontarians to judge whether privatization is in Ontarians' best interest or whether the province should continue to operate toll highways" and will allow the public to fully scrutinize and evaluate the "deal" entered into with the 407 ETR. The requester goes on to state that "[*t]he land acquisition costs* are similarly relevant to public debate and discussion on whether to construct and privatize additional toll highways" and that "the public should know what *premium*, if any, the government had to pay landowners in order to acquire their land". [emphasis added]

As described above, the information that qualifies under the section 21 exemption consists of names of individuals involved in civil litigation with 407 ETR (Schedule 4.1(ae) to the SPA), as well as names and other identifying information of individuals involved in negotiations concerning 407 ETR property (Schedule 8 to the CGLA). I note that neither of these records contains any financial information as described by the requester. Therefore, in the absence of a demonstrated public interest in disclosure of the personal information at issue in these appeals, I find that the requirements of section 23 have not been established.

ORDER:

1. I uphold the Ministry=s decision to deny access to the highlighted portions of Schedule 4.1(ae) to the SPA and 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 to the requester, no later than **January 14, 2002**, but not earlier than **January 7, 2002**, with the exception of Schedule 4.1(af) which should **not** be disclosed as the requester is no longer seeking access to this record.

3. 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.

Original signed by: December 5, 2001
Irena Pascoe
Adjudicator