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

ORDER PO-2762

Appeal PA07-294

Ministry of the Attorney General

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NATURE OF THE APPEAL:

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

> [T]he planning study conducted in 2006 by the architectural firm [named firm] for the consolidated courthouse project in Kitchener (Waterloo Region).
>
> The final version of the report was presented to the Ministry of the Attorney General on July 31, 2006.
>
> Please also include any draft version of the report.

The Ministry located three records responsive to the request and denied access to them pursuant to section 13(1) (advice or recommendations), sections 14(1)(e) (endanger life or safety), 14(1)(i), 14(1)(j), and 14(1)(k) (security), and section 18(1)(g) (proposed plans of an institution) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision.

During the course of mediation, the Ministry advised that it was claiming additional discretionary exemptions to withhold the responsive records. The additional discretionary exemptions claimed are: section 14(1)(l) (facilitate commission of an unlawful act) and, sections 18(1)(a) (valuable government information), 18(1)(c), 18(1)(d), 18(1)(e) and 18(1)(f) (economic and other interests) of the *Act*.

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

I began my inquiry into this appeal by sending a Notice of Inquiry to the Ministry, initially. The Ministry provided representations in response. I then sent a copy of the Notice of Inquiry, along with a complete copy of the Ministry's representations, to the appellant. The appellant responded with representations. As the appellant's representations raised the possible application of the public interest override provision at section 23 of the *Act*, I then sought reply representations from the Ministry. The Ministry provided representations in reply.

RECORDS:

There are three records at issue in this appeal:

- Record 1 – Facility Planning Study and Business Case, Final Report, July 28, 2006 (pages 1 to 303);
- Record 2 – Facilities Program, Waterloo Consolidated Courthouse, Final Draft, May 2006 (pages 304 to 403);

- Record 3 – Facilities Program and Planning Study for the Region of Waterloo Consolidated Courthouse: Planning and Real Estate Analysis, Draft, April 21, 2006 (pages 404 to 444).

Record 1 is a Facility Planning Study and Business Case in respect of the proposed project to build a consolidated courthouse in the Kitchener (Waterloo) region. Records 2 and 3 are earlier drafts of portions of Record 1; Record 2 is a Facilities Program (the final version is found on pages 62 through 159 in Record 1) and Record 3 is a Planning and Real Estate Analysis (the final version is found on pages 160 through 203 of Record 1).

All of the records have been prepared by an architecture firm retained by the Ministry.

DISCUSSION:

ADVICE TO GOVERNMENT

Section 13(1) states:

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

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations, or

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information,
- analytical information,
- evaluative information,
- notifications or cautions,
- views,
- draft documents, and
- a supervisor's direction to staff on how to conduct an investigation.

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

Representations

Ministry's representations

The Ministry takes the position that the Records 1, 2 and 3 are exempt, in their entirety, pursuant to the discretionary exemption at section 13(1) of the *Act*. The Ministry submits that all of the records contain conclusions and findings of persons employed by it and other stakeholders to the project and that the records contain advice and recommendations within the meaning of the exemption at section 13(1). The Ministry submits:

> The Records at issue are facility program and planning studies prepared by persons employed (experts and consultants) by the Attorney General and other project stakeholders to help define a program for the creation of a consolidated courthouse in the Kitchener (Waterloo) Region. The Records, which are not final plans, detail the potential impact, scope, and parameters of the possible construction of that consolidated courthouse. The Records also detail the needs of the region, how the project could/would address those needs, as well as advice as to possible locations for the facility and the services that could be provided by same. These Records will assist the government of Ontario make decisions and policies based on the advice and recommendations contained within.

…

> Furthermore, because the advice and recommendations could impact and affect existing courthouse facilities and the scope of their operations and staffing, as well as sensitive security matters and procedures to the extent of reasonably putting persons at risk of harm… the disclosure of these Records could inhibit the free flow of advice or recommendations to the government.

The Ministry states that this office has previously held that documents that were not in the form of advice or recommendations, whose disclosure could potentially reveal the advice or recommendations of a public servant or a consultant as to their content and the actions to be taken by the government in managing relations, fall within the ambit of subsection 13(1) [Orders P-1619, P-1620, P-1621]. The Ministry submits that if it is not found that the records contain information that may be considered advice or recommendations, they contain information that "could potentially reveal the advice or recommendations of a public servant as to their content and the actions to be taken by the government" and disclosure would similarly be prohibited under section 13(1).

Appellant's representations

The appellant begins her submissions by quoting from portions of the *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (the Williams Commission Report) that address the section 13 exemption. She first quotes a portion of the report (on page 292) that addresses analytical or evaluative material:

> A second point concerns the status of material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. **In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations.** [Emphasis added by appellant].

The appellant then quotes a portion of the Williams Commission Report (also on page 292) which distinguishes between professional opinions and advice or recommendations that suggest one course of action be taken over another:

> The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government.

The appellant then refers to Order PO-2028, which she submits establishes a relatively narrow interpretation of advice and recommendations, because, in that order, former Assistant Commissioner Tom Mitchinson stated:

> It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

She also refers to Order PO-1631, in which Senior Adjudicator David Goodis found that records containing "pros" and "cons" of various stated options could be considered exempt. She submits that in Order PO-1631, Senior Adjudicator Goods found that "by giving weight to one or more of the options over others, the records could be seen as offering implied recommendations."

Finally, the appellant submits:

> The Ministry [states] that the records contain "conclusions and findings".
>
> To qualify for exemption under section 13 of the *Act* the records must reveal some preferred course of action. They cannot merely evaluate the various options and outline the various facts relating to a proposed project. Conclusions and findings are not akin to advice and recommendations. I request that all portions of the record that do not explicitly or implicitly reveal a suggested course of action by the government must be released.
>
> The Ministry has offered no evidence that the records at issue will reveal advice or recommendations on a preferred course of action, beyond outlining existing factual information, providing some analysis and various options surrounding the possible location, formation and budget of the courthouse.

Analysis and findings

As mentioned by the appellant, the authors of the Williams Commission Report articulated an approach to the "advice and recommendation" exemption claim which became section 13(1). In discussing the policy rationale for including an exemption of this nature, which is commonly present in freedom of information legislation, the report stated, at page 292:

> A second point concerns the status of material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations. Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind [16].

> Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be "advice and recommendations" in the requisite sense. Clearly, there may be difficult lines to be drawn between professional opinions and "advice." Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government.

Following a careful review of the records, I find that the majority of the information contained within them does not reveal advice or recommendations within the meaning of section 13(1). The records lay out factual or background information and then engage in an analytical or evaluative discussion and assessment on how to accomplish the goals of the project based on the specific factual circumstances that surround it. The records outline the professional and technical opinions or views on the project reached by the consultant architecture firm by applying the expertise of that profession to the relevant facts. In my view, the majority of the information contained in the records falls squarely within the types of information contemplated by either the Williams Commission or found in prior orders of this office as falling outside of the intended scope of the "advice or recommendations" exemption. Specifically, most of the information at issue is best described as:

- factual or background information,
- analytical or evaluative information, and
- professional or technical opinions.

Although I have found that the majority of the information in Records 1, 2 and 3 does not amount to "advice or recommendations" as those terms have been defined, I find that there is one specific section in the records that contains information that reveals a suggested course of action and qualifies, thereby, for exemption under section 13(1).

Specifically, I find that the section entitled "Recommendations" in Record 1, at page 200, and the corresponding section in Record 3, at page 443, contains information that qualifies as "advice or recommendation". While, in my view, the first three bullet points on that page contain factual or analytical information, the last sentence of that page contains more than mere information of a factual, analytical or evaluative nature. Rather, the last sentence clearly reveals a specific course of action suggested by the architectural firm that prepared the report and put before the Ministry for the decision makers on the project to ultimately accept or reject.

Accordingly, I find that the last sentence on pages 200 and 443 can be properly characterized as "advice or recommendations" within the meaning of the terms and, subject to my discussions on the Ministry's exercise of discretion and the possible application of the public interest override provision at section 23, qualify for exemption under section 13(1).

As I have found that the remainder of the information in Records 1, 2 and 3 does not qualify for exemption under section 13(1) I will now continue my analysis to determine whether any of the other exemption claims apply to that information.

LAW ENFORCEMENT

The Ministry claims that the discretionary exemptions at sections 14(1)(e), (i), (j), (k) and/or (l) apply to Record 1 and 2, in their entirety. The relevant portions of 14(1) read:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention; or
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) of the *Act* as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

Similarly, in the case of "health and safety" related exemptions such as sections 14(1)(i), 16 and 20, which use the words "could reasonably be expected to", the standard of proof is that the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, it must be demonstrated that the reasons for resisting disclosure are not frivolous or exaggerated [Order MO-1832].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Representations

Ministry's representations

The Ministry's position is that the disclosure of Records 1 and 2, in their entirety, could reasonably be expected to endanger the life and physical safety of law enforcement officers as well as others and is, therefore, exempt pursuant to the exemption at section 14(1)(e). The Ministry submits:

> Throughout the entire contents of these records, are detailed discussions of proposed plans for a consolidated judicial courthouse in the Kitcher (Waterloo) Region as well as detailed floor plans of existing Courthouses. These detailed plans indicate layouts, exits, access points, parking facilities, security features, prisoner handling facilities and other sensitive particulars in respect to judicial courthouses that handle, or will be expected to handle, matters involving persons accused and/or convicted of various crimes under the *Criminal Code* and other statutes. These Reports also detail procedures for the transport of prisoners and staffing at the Courthouse(s). The disclosure of these sensitive details and particulars could directly endanger law enforcement officers charged with the handling of prisoners and criminally accused in or around the facilities by hindering the officers' ability to ensure the security of the building and to limit/prevent the access and movement of prisoners and/or other dangerous offenders.

The Ministry also submits that the records contain detailed plans and descriptions of "other areas of the proposed consolidated courthouse and existing courthouses that would be, or are used by persons other than law enforcement officers and who are reasonably seen as vulnerable to the threat of criminal activities." The Ministry identifies these areas as including:

- Courtrooms, including high security courtrooms
- Judges's chambers
- Jury rooms
- Court Staff and Administration offices
- Prisoner and detention zones
- Private zones for judiciary and other Court staff
- Crown Attorney's Offices
- Victim Witness Assistance facilities

Further addressing the possible application of the exemption at section 14(1)(e), the Ministry submits:

> Even those portions of the records that do not contain explicit detailed plans of the proposed courthouse or existing facilities, contain information from which one

> could reasonably infer information that is exempted under the *Act* and could put law enforcement officers and others at similar personal risk.
>
> As a result of all of the above, it is submitted that the classes of persons that could be reasonably endangered by the disclosure of Records 1 and 2 include: law enforcement officers, the Judiciary, Crown Attorneys and other counsel, Court staff, witnesses, prisoners, and the general public.

It is the Ministry's position that in addition to endangering law enforcement officers and others, the disclosure of Records 1 and 2 could also endanger the security of a building and vehicles within the meaning of the exemption at section 14(1)(i). The Ministry submits:

> These records contain explicit detail on the locations and handling of court records and files, exhibits, evidence and other documents used in the general administration of court matters as well as criminal prosecutions. These records include details of how and where these sensitive materials could be transported to and from the proposed consolidated courthouse as well as locations where they could be stored at that courthouse. These records also detail how sensitive materials could potentially be transported between, as well as stored at, existing courthouses in the region. Any tampering or improper handling of these materials and documents could affect ongoing judicial matters and criminal prosecutions as well as the administration of justice. Thus, it is important that the transport and storage of these materials and documents be securely maintained.
>
> Also, these records detail locations, procedures and access points for vehicles carrying prisoners between secure zones and facilities. The disclosure of these records could endanger the security of these vehicles for obvious reasons.

Addressing the possible application of the exemption at section 14(1)(j), the Ministry argues that disclosure of Records 1 and 2 could reasonably be expected to facilitate the escape of a person under lawful detention. The Ministry submits:

> As outlined above, these records contain detailed information including floor plans, staffing, prisoner handling procedures, detention cells, and access and exit points of the project and existing courthouse. The records also detail information about the transfer of prisoners between secured facilities. These details, if disclosed, can reasonably be inferred as information that could assist prisoners escape lawful custody.

Finally, addressing its claim that section 14(1)(k) applies to Records 1 and 2, the Ministry submits:

> [F]or the reasons already outline above, the disclosure of Records 1 and 2 could reasonably be expected to jeopardize the security of centres for lawful detention,

> which includes the proposed consolidated courthouse as well as existing Courthouses detailed in the Records. These facilities maintain, or are expected to maintain, prisoner security and detention zones.

During mediation, the Ministry claimed section 14(1)(l) as an additional discretionary exemption. However, in its representations it does not make any specific submissions on the possible application of that exemption. Nevertheless, as the Ministry's submissions on the other parts of section 14(1) can be said to inform its claim that disclosure of Records 1 and 2 could reasonably be expected to facilitate the commission of a unlawful act or hamper the control of crime, I will nevertheless consider section 14(1)(l) in my analysis.

Appellant's representations

The appellant submits that she is "less concerned with gaining access to detailed site plans for the courthouse." However she submits that she recognizes that there is "information within the site plans that may be considered to be exempt and other information that should be disclosed." She submits:

> [I]nformation that should be disclosed would include, at minimum, plans relating to portions of the courthouse that are normally open and accessible to the public.
>
> These include, the exterior, court rooms, administrative offices usually located in the front of the courthouse where the public accesses court documents, washrooms. Detailed plans about the configuration of the courtrooms themselves should not be exempt as the public is typically allowed into a courtroom.
>
> Unlike police stations or detention centres or prisons, court houses are public buildings. Any member of the public is free to enter a courthouse, ask for court records, watch bail hearings, trials, sentencing hearings and other court processes with rare exceptions.
>
> Members of the public can use the washrooms, sit on benches, consult with lawyers and Victim Witness Assistance personnel. They can, in some cases, eat in a cafeteria intermingling with judges and lawyers and police officers.
>
> In short, there are many, many aspects to a courthouse that are fully open to the public and this openness strikes at the heart of our judicial system. The openness of courthouses to the public recognizes the importance of public oversight of the judicial system.
>
> It is difficult without seeing the Ministry's record to determine if they have sufficient detail to reasonably endanger the security of the building, system procedure or person, or facilitate an escape from lawful custody.

I submit that if they do not, these records should be released. At minimum, any records relating to the publicly accessible portions of the courthouse should be released.

As well, section 33(1)(b) of the *Act* requires that an institution release:

> Instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public.

Therefore, any portions of the document that contain guidelines for staff procedures, such as prisoner handling and transportation procedures, should be released.

Analysis and findings

Section 14(1)(e)

As noted above, for section 14(1)(e) to apply, the institution must provide evidence to establish a reasonable basis for believing that the life or physical safety of a law enforcement officer or any other person will be endangered if the records at issue are disclosed. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)*].

Unlike the other sections of 14(1), for section 14(1)(e) to apply, the harm must be possible; it need not be probable. However, despite the distinction drawn with other harms based exemptions, the Court of Appeal has held that under section 14(1)(e), the institution must provide "detailed and convincing "evidence of a reasonable expectation of harm. [*Big Canoe v. Ontario (Minister of Labour)* (1999), 181 D.L.R. (4th) 603 (C.A.)].

Based on my review of Records 1 and 2 and having taken into consideration the representations submitted by the parties, I am satisfied that the disclosure of certain portions of Record 1 could reasonably be expected to endanger the life or safety of a law enforcement officer or some other person as contemplated by section 14(1)(e). In addition, I find that the reasons for resisting disclosure of those portions are not frivolous or exaggerated. Specifically, section 3.0 of Record 1 is entitled "Review of Existing Studies and Reports" and contains a review of the three existing courthouse facilities within the Kitchener-Waterloo Region to help determine the operational and functional requirements of the proposed consolidated courthouse. Although, much of this section contains factual information such as the location of the existing courthouses, their square footage, details of the types and number of individual components that make up the courthouse (including courtrooms, public areas, offices for the judiciary, crown attorneys, and court staff),

this section also includes floor plans of all three of the existing courthouses identifying areas that are public, secure (in-custody) and private (judiciary).

Bearing in mind the difficulty of predicting future events in a law enforcement context (see *Ontario (Attorney General) v. Fineberg*, cited above), I accept that disclosure of all of the detailed floor plans of the existing courthouses would reveal details about the secure areas of them, including prisoner handling facilities that, were they disclosed, could reasonable be expected to endanger the life or physical safety of law enforcement officers charged with the handling of prisoners and hinder their ability to ensure the security of the building for staff and the public. I also accept that the disclosure of the detailed plans of other areas of the existing courthouses that are not generally accessible to the public, such as judges' chambers and staff offices, could reasonably be expected to facilitate the commission of breaches of security thereby endangering the life or physical safety of the individuals who use those areas. Accordingly, I find that the Ministry has provided the requisite detailed and convincing evidence to support a conclusion that disclosure of the floor plans of the existing courthouses could reasonably be expected to facilitate the commission of breaches of security in those facilities, thus endangering Court personnel and members of the public.

However, I am not satisfied that the Ministry has provided sufficiently detailed and convincing evidence to demonstrate that disclosure of any of the remaining information in Record 1 or any of the information in Record 2 could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person.

The records are designed to act as a business case for the proposed consolidated courthouse in the Kitchener-Waterloo region. The majority of the information contained in them is factual or analytical information that outlines the needs and requirements for the facility. In doing so, the records identify the people and organizations that will occupy and operate in the courthouse and break the space down into different components where those functions will be performed. The records identify the different types and number of staff that will be working in the various different components of the courthouse and explain in general terms some of their day to day tasks for the purposes of determining the spatial and organizational requirements of the building. The records also contain abstract plans or diagrams and descriptions of different components of the courthouse and the suggested spatial relationship between the different elements. Additionally, the records, which the Ministry has previously stated "are not final plans", outline several different possible options for the layout of the proposed courthouse. The records also contain external and internal photographs of the existing courthouses in the region.

Based on my close review of this information, I do not accept that this information, as it appears in the records, is sufficiently detailed for disclosure to reasonably be expected to result in the endangerment of the life or physical safety of a law enforcement officer or any other person. Moreover, in my view, the Ministry has not provided the requisite "detailed and convincing evidence" to establish the necessary link between the specific information contained in the records to the possibility of the harm contemplated by section 14(1)(e).

In sum, I find that all of the floor plans relating to the existing courthouses in Record 1 are, subject to my review of the Ministry's exercise of discretion and my determination of the possible application of the public interest override provisions at section 23, exempt from disclosure under section 14(1)(e). I find that none of the remaining information in Record 1 or any of the information in Record 2 qualifies for exemption.

As I have found section 14(1)(e) applies to the floor plans of the existing courthouses, it is not necessary for me to determine whether any of the other exemptions claimed to those portions of the records apply. I will, however, continue my analysis to determine whether any of the other exemptions claimed may apply to information that remains at issue in Records 1 and 2.

Section 14(1)(i)

As noted above, the use of the words "could reasonably be expected to" in section 14(1)(i) requires the institution to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to a speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*].

The Ministry takes the position that disclosure of Records 1 and 2 could reasonably be expected to endanger the security of a building, namely the proposed consolidated courthouse as well as the existing courthouses in the region. The Ministry also takes the position that disclosure of the information could reasonably be expected to endanger the security of vehicles that transport sensitive materials such as court records, files, exhibits, and evidence, as well as prisoners, between secure zones and facilities.

I have already found that the floor plans of the existing courthouses that outline secure areas as areas not generally known to the public are exempt under section 14(1)(e). From my review of the remaining portions of the records, I do not accept the Ministry's argument that they contain "explicit detail" about "how sensitive materials could potentially be transported between, as well as stored at" either existing courthouses in the region or the proposed consolidated courthouse. I also do not accept that they provide sufficient detail about "locations, procedures and access points for vehicles carrying prisoners between secure zones and facilities" to reasonably be expected to give rise to the contemplated harm. In my view, the Ministry has not provided me with the requisite "detailed and convincing evidence" to establish that the disclosure of the information that remains at issue could reasonably be expected to endanger the security of a building or the security of a vehicle carrying items, or of a system of procedure established for the protection of items, for which protection is reasonably required.

Accordingly, I find that section 14(i) does not apply to the information that remains at issue in Records 1 and 2.

Section 14(1)(j)

The Ministry submits that the disclosure of Records 1 and 2 in their entirety could reasonably be expected to facilitate the escape from custody of a person under lawful detention.

The appropriate meaning ascribed to the word "facilitate", as it is used in section 14(1)(j) is "to make easier or less difficult" [Order P-187].

As I have already found that the floor plans of the existing courthouses that describe secure areas are exempt under section 14(1)(e), it is not necessary for me to determine whether the exemption at section 14(1)(j) applies to those portions of the records. However, in my view, the remainder of the information contained in Record 1 and all of the information in Record 2 does not qualify for exemption under section 14(1)(j). As noted above, the majority of that information is factual in nature and although portions of Record 1 and Record 2 contain abstract plans or diagrams outlining the suggested spatial relationships between different elements of the various components of the proposed courthouse and a number of different proposed layouts for the plan of the proposed consolidated courthouse, in my view, this information is not specific enough in nature to reasonably be expected to facilitate the escape from custody of a person under lawful detention. Moreover, I find that the Ministry has not provided the type of "detailed and convincing evidence" required to establish the necessary link between the harm contemplated in this section with the disclosure of the remainder of the information at issue.

Accordingly, I find that section 14(1)(j) does not apply to the information that remains at issue in Records 1 and 2.

Section 14(1)(k)

The exemption at section 14(1)(k) is closely related to section 14(1)(j). Section 14(1)(k) exempts records that could, if disclosed, "jeopardize the security of a centre for lawful detention." For the reasons that I have outlined above, I find that the Ministry has failed to provide the requisite "detailed and convincing evidence" to demonstrate that disclosure of the information that remains at issue could reasonably be expected to jeopardize the security of a centre for lawful detention.

Accordingly, I find that section 14(1)(k) does not apply to the information that remains at issue in Records 1 and 2.

Section 14(1)(l)

The exemption at section 14(1)(l) applies where disclosure could reasonably be expected to "facilitate the commission of an unlawful act or hamper the control of crime." This provision is also closely related to section 14(1)(j). For the reasons that I have outlined above, I find that the Ministry has failed to provide the requisite "detailed and convincing evidence" to demonstrate

that disclosure of the information that remains at issue could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

Accordingly, I find that section 14(1)(l) does not apply to the information that remains at issue in Records 1 and 2.

Summary conclusion

In sum, I find that section 14(1)(e) applies to all of the floor plans of existing courthouses found in Record 1 from disclosure. I also find that none of the exemptions at section 14(1)(e), (i), (j), (k), or (l) apply to the information that remains at issue in Records 1 and 2. Accordingly, I will continue my analysis to determine whether any of the other exemptions claimed apply to that remaining information.

ECONOMIC AND OTHER INTERESTS

The Ministry has applied the discretionary exemptions at sections 18(1)(a), (c), (d), (e), (f) and (g) to Records 1, 2, and 3. The relevant portions of section 18(1) state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (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;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

The purpose of section 18 is to protect certain economic interests of institutions. The Williams Commission Report explains the rationale for including a "valuable government information" exemption in the *Act*:

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

For sections 18(1) (c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*].

Section 18(1)(a): monetary value

In order for Records 1, 2, or 3 to qualify for exemption under section 18(1)(a) of the *Act*, the Ministry must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information, and

2. belongs to the Government of Ontario or an institution, and

3. has monetary value or potential monetary value [Orders 87, P-851].

Part 1: Type of information

The types of information listed in section 18(1)(a) have been discussed in prior orders. Those that might be relevant in the circumstances of this appeal have been defined as follows:

> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have

> monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

The Ministry submits that Records 1, 2 and 3, contain costs and budget estimates for "multiple options in regards to configuration, layout and programs and services for the government to consider and choose from the proposed consolidated Courthouse." The Ministry further submits that the information in these records is confidential technical information "in respect of the exact requirements and goals of the government and how those requirements and goals are met by the different configuration and location options."

Based on my review of all three of the records, which are components of a planning study prepared for the Ministry by an architectural firm, I find that they clearly contain technical information prepared by a professional in the field of architecture and describe the construction and operation of a proposed consolidated courthouse in the Kitchener-Waterloo Region. As Record 1 contains several estimates for the construction of the proposed project I also find that that record contains information which qualifies as both "financial and commercial information" as those terms have been defined in relation to section 18(1)(a).

Accordingly, I find that part 1 of the section 18(1)(a) test has been met.

Part 2: belongs to

With respect to the second element, previous orders of this office have found that the term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business-to-business mailing lists [Order P-636], customer or supplier lists, price lists, or other types of confidential business information [PO-1763, PO1783, PO-2226, PO-2433].

In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential

manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others [Order PO-1805 and Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.)].

The Ministry submits that the planning studies that are Records 1, 2, and 3 were commissioned and paid for by the Government of Ontario. As a result, I accept that the information contained in the records at issue "belongs to" the Ministry and I find that part 2 of the section 18(1)(a) test has been met.

Part 3: monetary value

To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information [Order M-654]. The fact that there has been a cost to the institution to create the record [PO-2166, P-1281] does not mean that it has monetary value for the purposes of this section. Additionally, the fact that the information has been kept confidential does not, on its own, establish this exemption [PO-2724].

In its representations, the Ministry does not specifically address whether the records at issue have "monetary or potential monetary value", but does submit that the disclosure of the records, "especially in light of the cost and budget estimates detailed therein, could reasonably be expected to result in the tainting of contract tenders prepared for the possible construction of the consolidated Courthouse." The Ministry further submits that this could negatively affect the government's ability to negotiate contracts for its construction and affect the cost-efficiency of the entire project.

The Ministry has not identified whether these records have intrinsic value within the marketplace, nor whether the information in the records has any current or potential commercial value which may be exploited. Based upon its representations, the Ministry's main concern does not appear to be that the information in the records at issue has monetary or potential monetary value, as required by section 18(1)(a). Rather, the Ministry's main concern seems to be that the disclosure of the information may negatively affected the government's ability to negotiate contracts for the construction of the proposed courthouse. In my view, this argument is better applied to the possible application of the exemptions at section 18(1)(c) and (d), and I will consider it in my analysis of those sections.

I find that the Ministry's representations do not support a conclusion that the information itself has intrinsic monetary or potential money value as required by section 18(1)(a). In order to qualify for exemption under section 18(1)(a), all three parts of the test set out above must be established. As the Ministry has failed to establish that the third part of the test applies, the exemption in section 18(1)(a) does not apply to the records.

Section 18(1)(c): economic interests or competitive position

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

As noted previously, in order to establish a reasonable expectation of the harm section 18(1)(c) seeks to avoid, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.

The Ministry submits that disclosure of all of the information in Records 1, 2, and 3 would result in prejudice to its economic interests within the meaning of section 18(1)(c) and states:

> Records 1, 2, and 3 are detailed planning studies paid for by the government of Ontario and which both inform and advise the Attorney General on the possible costs and location of a consolidated Courthouse in the Kitchener (Waterloo) region. These costs and budget estimates include multiple options in regards to configuration, layout, and programs and services for the government to consider and choose from for the proposed consolidated Courthouse. These options include substantial technical and confidential information in respect of the exact requirements and goals of the government and how those goals and requirements are met by the different configuration and locations options. The disclosure of these records, especially in light of the cost and budget estimates detailed therein, could reasonably be expected to result in the tainting of contract tenders prepared for the possible construction of the consolidated Courthouse. This could negatively affect the government's ability to negotiate contracts for the construction of the courthouse, and affect the cost-efficiency of the entire project, thereby prejudicing the economic interest and competitive position of the province.

The Ministry also submits that Record 3 in particular contains detailed discussions and recommendations about the proposed location of the consolidated courthouse which consider the current property values and rental market prices in and around the proposed locations, as well as the projected economic impact of the project on those areas. It submits that if this information was disclosed prematurely, property values for those sites could be inflated, which would

increase the cost of the project and jeopardize its feasibility due to the resulting financial loss and prejudice to the government's economic interests.

The appellant makes the following submissions that relate to the Ministry's representations on its section 18(1)(c) claim:

> Based on discussions during mediation and the Ministry's submission to the adjudicator, I understand the documents relating to potential locations for a new courthouse are primarily contained in the Record 3 under the "Real Estate Analysis."
>
> Information on existing Crown land holdings and surplus property in the Region is not secret. Nor is information on the available undeveloped land, or surplus properties in Waterloo Region.
>
> An inventory or analysis of available real estate should not be seen as a particularly sensitive document as it should be generally understood by the public what kind of potential real estate is available (either crown or municipal) and what isn't.
>
> The Ministry submits that revealing a list of potential, available locations for a courthouse (presumably some locations could later be ruled out as the configuration, programs and other considerations are worked out) could lead to land speculation around all the various locations for the courthouse.
>
> In absence of any indication of **which one** of the several proposed locations the Ministry plans to pursue if and when the courthouse is built, it would be difficult to expect land speculation or price fixing around all of the proposed locations.
>
> That would be risky business for land owners to begin to increase their real estate prices as the Ministry will presumably eventually rule out most of those locations when it chooses a final location. Such a document could reasonably be exempt under section 13, but not the real estate analysis that precedes it.

The appellant also submits that from the Ministry's descriptions of the records, it does not appear that they contain a "detailed bargaining strategy for negotiations with contractors." She submits that:

> Presumably, when the Ministry has made a final decision on the location, size, configuration, and budget of the courthouse, it will put out a public tender for its construction and will take the most appropriate bidder. I submit that releasing a planning document containing various options for the courthouse does not jeopardize any future negotiations with contractors if and when the Ministry makes a final decision on the courthouse.

I have carefully considered the representations of the parties along with Records 1, 2 and 3 and find that while some of the information in Record 1 qualifies for exemption under section 18(1)(c) of the *Act*, the remainder of the information in Record 1, and all of the information that remains at issue in Records 2 and 3 do not.

Specifically, I accept that disclosure of the details about cost and budget estimates for the consolidated courthouse could reasonably be expected to result in the Ministry being hampered in its ability to negotiate the best possible deal for the province in its negotiations for the construction and operation of that facility. I also accept that this would ultimately affect the cost efficiency of the project. Record 1 contains two estimates for the construction of the proposed consolidated courthouse: a "Class D" estimate and a "Class C" estimate. The Class C estimate actually provides three separate estimates based on three possible options for the layout of the courthouse previously detailed in the records. The specific information that I find could reasonably be expected to impact the Ministry's negotiations with contractors are, as follows:

- the dollar figures reflecting the estimated project costs for both the Class D and Class C estimates outlined in the executive summary of Record 1, the Facility Planning and Business Case, on pages 12 and 13;

- the dollar figures listed in the cover letters to the estimates prepared for the Ministry by a consultant company. The cover letter to the Class D estimate is found at page 237 and the cover letter to the Class C estimate is found at page 250; and

- the Master Plan Estimates, in their entirety, for both the Class D and C estimates. The Class D Master Plan Estimate is found on pages 245 through 248 and the Class D Master Plan Estimates for all three options are found on pages 259 through 301.

Having reviewed this information, I am satisfied that the Ministry has provided the requisite "detailed and convincing evidence" to establish that its economic interests and competitive position could reasonably be expected to be prejudiced, if this information were to be disclosed.

However, I find that the remainder of the information in Record 1 and all of the information in Records 2 and 3, which does not contain cost and budget information, does not qualify for exemption under section 18(1)(c). Based on my review of those portions of the records and the submissions of the parties, I do not accept that the Ministry has established that disclosure of that information could reasonably be expected to result in the "tainting of contract tenders." Nor do I agree that disclosure could reasonably be expected to "negatively affect the government's ability to negotiate contracts for the construction of the courthouse, and affect the cost efficiency of the entire project." I also find that the Ministry has not established that the disclosure of the information related to the numerous options for the possible location of the courthouse in Record 3 could reasonably be expected result in the inflation of the property values for those sites. In my view, the Ministry's representations do not provide sufficient evidence to demonstrate

specifically how any negotiations it may enter with respect to the construction and operation of the consolidated courthouse could reasonably be expected to be adversely affected by the disclosure of the particular information that remains at issue and give rise to the harms it alleges.

I find that the evidence and submissions tendered by the Ministry in support of its argument that this exemption applies are not only speculative, but also are not sufficiently detailed about how the disclosure of the remaining information in Records 1, 2, and 3 could reasonably be expected to result in the harm envisioned by section 18(c). The generalized statements made by the Ministry in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario* (*Workers' Compensation Board*), cited above.

Accordingly, I find that the exemption at section 18(1)(c) applies to the details of cost and budget estimates found in Record 1, but that it does not apply to the portions of Records 1, 2 and 3 that remain at issue.

Section 18(1)(d): injury to the financial interests of the Government of Ontario or its ability to manage the economy

To establish a valid exemption claim under this section, the Ministry must demonstrate a reasonable expectation of injury to the financial interest of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario. The harm addressed by section 18(1)(d) is similar, but broader, than section 18(1)(c). Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review [1999], 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.)].

The Ministry does not make any specific representations on the application of section 18(1)(d). However, as noted above, it does submit generally that the cost and budget estimates detailed in the records could negatively affect the government's ability to negotiate contracts which would prejudice the province's economic interest and competitive position.

The appellant submits that the records at issue relate to a specific project in a specific community, rather than the broader interest of the province, and, as such, the exemption at section 18(1)(d) should not apply.

Having reviewed the general representations that the Ministry has made, in my view, the Ministry has failed to provide sufficiently detailed and convincing evidence to establish a reasonable expectation of harm to the "financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario." Accordingly, I find that the Ministry has failed to satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario* (*Workers' Compensation Board*), cited above.

Therefore, I find that the records do not qualify for exemption under section 18(1)(d).

Section 18(1)(e): positions, plans, procedures, criteria or instructions

In order for section 18(1)(e) to apply, the Ministry must establish that:

1. the record contains positions, plans, procedures, criteria or instructions, and
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations, and
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution. [Order PO-2064]

Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

The Ministry submits that section 18(1)(e) applies to exempt the records at issue from disclosure:

> The Records also contain references to positions, plans, procedures, criteria and instructions in respect to the goals the project and the desired parameters of the consolidated courthouse, all of which are intended to be applied to any negotiations that may be carried out in respect of the construction, supply, and staffing of the proposed consolidated courthouse (Orders PO-2064, PO-2034). The disclosure of the Records could jeopardize the government's economic interest in these negotiations.

The appellant submits:

> Order PO-2064 establishes that section 18(1)(e) was "intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation."
>
> These documents are closer to "developing policy with a view to introducing" a new project, than they are to specific "financial, commercial, labour, international" negotiations. These records are planning studies. No site has been selected, no final programs and services and budget have been selected.

> The Williams Commission Report recommendations, page 323, adopt the position taken by the Australian Minority Report Bill:
>
> > I submit that these records are unlikely to contain specific "instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations."

Part 1: plan, position, procedure, criteria or instructions

For the purposes of section 18(1)(e), previous orders have established that a "plan" is a formulated and especially detailed method by which a thing is to be done, or a design or scheme [Order P-229]. Similarly, "position", "procedures", "criteria" and "instructions" have been established as pre-determined courses of action or ways of proceeding [Order MO-1199-F and MO-1264].

Having reviewed Records 1, 2, and 3 in the context of this exemption, I accept that they contain a "plan" as that term has been defined by this office. The records outline a detailed method or course of action for the Ministry to follow in order to accomplish the construction of a consolidated courthouse in the Kitchener-Waterloo region that meets the Ministry's needs.

Accordingly, part 1 of the section 18(1)(e) test has been met.

Part 2: intended to be applied to negotiations

Once it has been established that the records at issue contain "plans", it must be shown that the plan applies to negotiations. The Ministry submits that the plans outlined in the records are "intended to be applied to any negotiations that may be carried out in respect of the construction, supply, and staffing of the proposed consolidated courthouse."

The authors of the Williams Commission Report commented on the reasoning behind the exemption at section 18(1)(e).

> There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage . . .
>
> . . . . .
>
> [T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments. Disclosure of bargaining strategy

> in the form of instructions given to the public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively (page 321).

With respect to the types of "negotiations" to recognize under this exemption claim, the Williams Commission Report recommended at page 323:

> The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:
>
> > An agency may refuse to disclose:
> >
> > > A document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial, commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.
>
> We favour the adoption of a similar provision in our proposed legislation.

In keeping with these comments, previous orders have found that section 18(1)(e) does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflected mandatory steps to follow [Order PO-2034].

Additionally, background information that may form the basis for positions taken during negotiations is not exempt from disclosure under section 18(1)(e) [Order M-862].

Having considered the records in light of the comments made by the Williams Commission Report and previous orders that have addressed this exemption, I do not agree with the Ministry that the plans outlined the records were intended to be applied to negotiations within the meaning of part 2 of the section 18(1)(e) test. The records identify the needs and requirements of the consolidated courthouse and outline a plan to ensure that those needs and requirements are met. I accept that in order to realize that plan, the Ministry will be required to enter into various negotiations for the construction and operation of the courthouse and that some of the

information in the records may form the basis for positions taken during any such negotiations. However, I do not accept that any of the plans outlined in the records reveal any information that could be considered a strategy or approach to be applied to any of those negotiations.

Accordingly, I find that none of the information that remains at issue in Records 1, 2 and 3 contains plans "to be applied to negotiations" within the meaning of this section as required in order to satisfy the section 18(1)(e) test, and this section, therefore, does not apply.

Section 18(1)(f): plans relating to the management of personnel

In order for section 18(1)(f) to apply, the institution must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:

   (i) the management of personnel, or
   (ii) the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

The Ministry submits:

> In addition, Records 1 and 2 contain detailed information as to the proposed staffing, management, and administration of personnel at the proposed consolidated courthouse, which has not yet been put into operation or made public. As such, these records ought to be excluded pursuant to section 18(1)(f) (Order P-348).

The appellant does not make any specific representations addressing the possible application of the exemption at section 18(1)(f).

As in section 18(1)(e), previous orders of this office have found that the word "plan" means a formulated and especially detailed method by which a thing is to be done [Order P-229]. The records must contain a specific course of action for accomplishing a particular objective or thing.

For the same reasons that I described in part 1 of the section 18(1)(e) test, I accept that both Records 1 and 2 contain a plan within the context of that term as established by prior orders. The records detail a specific course of action that the Ministry can follow to accomplish the construction of a consolidated courthouse that will meet its needs.

However, I do not accept that the plan outlined in the records relates to either the "management of personnel" or the "administration of an institution." I have reviewed Records 1, 2, and 3 closely and although portions of Records 1 and 2 do identify the number of types of staff that will be working in the courthouse, and, in some circumstances explain, in general terms, some of their day to day tasks, in my view, this information is included in the records in order to determine the spatial and organizational requirements of the project, including the size, number and location of different areas within the building including courtrooms and staff workspaces. In my view, the records do not, in and of themselves, describe a plan to manage personnel at the courthouse; nor do they detail a plan on how the courthouse will be administered when it is built. Rather, Records 1, 2 and 3 simply outline a plan to manage space and design a courthouse that will meet the needs of the various different stakeholders.

As I have found that part 2 of the section 18(1)(f) test has not been established and all three parts of the test must be met, I find that section 18(1)(f) does not apply to exempt the remaining portions of Records 1, 2 and 3 from disclosure.

Section 18(1)(g): proposed plans, policies or projects of an institution

In order for section 18(1)(g) to apply, the institution must show that:

1. the record contains information including proposed plan, policies or projects on an institution; and

2. disclosure of the records could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or
   (ii) undue financial benefit or loss to a person.

[Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis,* [2000] O.J. No. 4944 (Div. Ct.].

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

Although the Ministry claimed the exemption at section 18(1)(g) in its original decision letter for all three of the records, in its representations, it did not specifically identify that section when it listed the relevant clauses of section 18(1). However, the Ministry did make the following submission that appears to relate to its original claim of the application of section 18(1)(g):

> [T]he disclosure of the records could not only result in the premature disclosure of a pending policy decision on whether to consolidate Courthouses in the Region, but could result in undue financial benefit to possible contractors for the project as well as property and business owners in or around the proposed locations.

In response to this submission made by the Ministry, the appellant submits:

> Contrary to the Ministry's statement [in its representations], these records will not result in the "premature disclosure of a pending policy decision on whether to consolidate Courthouses in the Region."
>
> It is important to note that the province has already publicly announced its plans to consolidate the region's courthouses. This information was made public in a press conference with Kitchener-Centre MPP (Lib) John Milloy in June 2005.

The appellant also enclosed several newspaper articles from the Waterloo Region Record that discuss the proposed consolidated courthouse dating back to June of 2005.

Part 1: proposed plan, policy or project

For the purposes of the first part of the test under this section, a "proposed project" means a planned undertaking that has not already been completed [Order P-772].

Records 1, 2 and 3, are components of a planning study prepared for the Ministry detailing the construction of a proposed consolidated courthouse in the Kitchener-Waterloo region. Construction on the courthouse has not yet begun. I find that the information contained in the records can accurately be described as a "proposed project" in that it is a planned undertaking that has not already been completed. Accordingly, part 1 of the section 18(1)(g) test has been met.

Part 2: harms

Once it has been established that part 1 of the section 18(1)(g) test has been met, under part 2, the Ministry must then establish that disclosure of the proposed project could reasonably be expected to result in one of the following harms: the premature disclosure of a "pending policy decision" or the "undue financial loss or benefit to a person."

Part 2 of the section 18(1)(g) test speaks to the harms component of the exemption. To meet this part of the test, the Ministry must provide "detailed and convincing" evidence to establish "reasonable expectation" of the harm considered by the exemption. Evidence amounting to a mere speculation of possible harm is not sufficient [*Workers' Compensation Board*].

The term "pending policy decision" has been found, in previous orders, to contemplate a situation where a decision has been reached, but has not yet been announced, rather than a scenario in which a policy matter is still being considered by an institution [Order M-182].

In the circumstances of this appeal, the Ministry submits that disclosure of Records 1, 2, and 3 could reasonably be expected to result in "the premature disclosure of a pending policy decision on whether to consolidate Courthouses in the Region." Although this may have been the case at

the time the Ministry submitted its representations, at the time of the writing of this order, it has been publicly disclosed that the project has already been approved and its location has been announced. As a result, I find that disclosure of the records at issue could not reasonably be expected to result in "the premature disclosure of a pending policy decision" as contemplated by section 18(1)(g).

To complete the analysis of whether section 18(1)(g) applies, I must now consider whether the disclosure of the information contained in the records could reasonably be expected to result in the "undue financial benefit or loss to a person." The Ministry submits that disclosure could reasonably be expected to result in undue financial benefit to possible contractors for the project, as well as property and business owners in or around the proposed locations. In its submissions, the Ministry has identified who might be harmed by the disclosure of the records, however, it does not provide any further explanation as to how disclosure of the specific information in the records could reasonably be expected to result in the undue financial loss or benefit to any of these individuals. As a result, I find that I have not been provided with the requisite "detailed and convincing" evidence to establish the link between the disclosure of the information that remains at issue in the records and the reasonable expectation that the harm could occur were the information disclosed.

Since the Ministry has failed to provide the "detailed and convincing" evidence to establish that either the first or second aspects of the second part of the section 18(1)(g) test have been met, it follows that this exemption does not apply to the information in Records 1, 2 or 3 that remain at issue in this appeal.

EXERCISE OF DISCRETION

The exemptions at section 13(1), 14(1) and 18(1) are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the Ministry failed to do so.

I may also find that the Ministry erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant consideration
- it fails to take into account relevant considerations.

In all these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

In the circumstances of the present appeal, I have found that the discretionary exemptions at section 13(1), 14(1), and 18(1) apply to portions of the records at issue. I must now determine

whether the Ministry properly applied its' discretion to withhold those portions which I have found to be exempt under those sections.

Relevant Considerations

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

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Ministry makes the following submissions about its exercise of discretion:

> Upon receipt of the file, the Attorney General reviewed the file and exercised its discretion in terms of determining whether documents should be released. After careful consideration of all of the relevant factors, the records have been withheld, as it is clear on their face that they fall within the exemptions claimed.
>
> Given the significant potential financial and economic loss that the government would reasonably suffer if the records were disclosed, particularly Record 2, the Attorney General has acted entirely reasonably.
>
> Most importantly, because of the serious consequences and personal risk of harm that would arise to the safety of law enforcement officers, counsel, witnesses, Judges, Court staff and the public in general if the records were disclosed, the Attorney General has acted reasonably in the exercise of its discretion.

In response to the Ministry's submissions, the appellant submits that the following four considerations are relevant in the circumstances of this appeal:

- that public bodies should make information available to the public;
- whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;
- the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body.

> I submit that the Ministry has erred in exercising its discretion to deny all the records. I don't believe the Ministry did so in bad faith or for an improper purpose. I do believe the Ministry failed to take into account the relevant factors listed above.

With careful consideration of the representations of the parties, as well as the circumstances of this appeal, I am satisfied that the Ministry exercised its discretion properly.

I find that in regard to the information that I have found to be subject to the discretionary exemptions at section 13(1), 14(1), and 18(1) of the *Act*, the Ministry has properly taken into account the purpose of those exemptions and balanced the harm in the disclosure of that information against the purposes of the *Act*; specifically, that the principles that information should be available to the public and that exemptions from the right of access should be limited and specific.

Accordingly, I conclude that, with respect to the information that I have found to qualify for exemption, the Ministry exercised its discretion in good faith and based on proper considerations. I am not persuaded that it acted in bad faith, failed to take relevant factors into account or that it considered irrelevant factors in exercising its discretion to apply the exemptions at sections 13(1), 14(1) and 18(1) of the *Act* to the portions of the records that remain at issue. I find, therefore, that the Ministry's exercise of discretion was proper.

PUBLIC INTEREST OVERRIDE

As noted above, in her representations, the appellant claimed the possible application of the "public interest override" found at section 23 of the *Act* applies to the information at issue. This section reads:

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

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

Public Interest

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

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

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

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

Purpose of the exemption

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

Representations

The appellant, a member of the media, submits:

> The decision to close a courthouse and consolidate court programs across an entire region will have a profound effect on our community of more than 500,000 residents. Not only does it affect the day-to-day operations of the judicial system on a local level, but the location, layout and functions of a courthouse can have a significant impact on public access to services, records and to the courthouse itself.
>
> Currently our courthouses are located in a central area in the city's downtown. They are close to public transit routes, city and regional government headquarters, lawyers' officers, social service agencies, a mall, a hotel and restaurants. As well, they are within walking distance of a significant downtown residential area. They are accessible by much of the population, either by walking or public transit. So too are the ancillary services and community agencies nearby.
>
> For example, what if the province is considering undeveloped areas on the outskirts of the community not serviced by public transit and far away from the other support legal and social agencies and services that currently exist within walking distance of the existing two courthouses? That would have a profound impact on the ability of accused, victims, witnesses, their friends, relatives and lawyers to access the legal system.
>
> The plans, including proposed locations and configurations for the new courthouse are a significant public issue. In this sense, needs of the community in understanding, debating and having a say in the location of a new courthouse must outweigh the needs of the Ministry to keep this information private in case of any potential negotiations that could be influenced by these records.

In its reply to the appellant's representations on the application of the public interest override provision, the Ministry submits:

> The Attorney General submits that there is no inherent or obvious compelling public interest in the information contained in these records. While the decision

> to consolidate courthouses may have an impact on the community, the Attorney General respectfully submits that the appellant has not provided any evidence to support her argument that there is either a general or compelling public interest in the disclosure of the records themselves.
>
> The crux of the appellant's public interest argument is her concern that while the two current Kitchener courthouses are centrally located and accessible by transit, the province could be considering locating the new courthouse in "undeveloped areas in the outskirts of the community." She has provided no evidence that there is actual concern by the public about such a prospect. Indeed, the media reports she has attached to her submissions speculate that the province is considering central locations in downtown Kitchener. It is respectfully submitted that the appellant's submission with respect to the public interest is simply her own speculation. An expression of a personal concern is not evidence of a public concern or interest for the purposes of section 23 (*John Doe v. Information and Privacy Commissioner et al.* (1993), 13 O.R. (3d) 767 at 784 Gen. Div. (Div. Ct.)).
>
> Further, even if there were a compelling interest in knowing various locations that were being considered for the courthouse, it would not be satisfied by disclosing the majority of the documents at issue, which deal with various aspects of the proposed new facilities and existing courthouse facilities. It is submitted that much of this information is technical, which would be prejudicial to the economic interests of the government (as set out below), and in any event, would not satisfy the expressed interest of knowing the possible locations of the proposed courthouse.
>
> In the event that the [Information and Privacy Commissioner/Ontario] were to find that there is a compelling public interest in the disclosure of these records, the Attorney General submits, in addition, that the interest expressed by the appellant does not clearly outweigh the purposes of the exemptions upon which the Attorney General has relied.

Analysis and findings

In Order P-1190, former Assistant Commissioner Tom Mitchinson commented on the burden of establishing the application of section 23. He stated as follows:

> The *Act* is silent as to who bears the burden of proof in respect of section 23. The burden of proof in law generally is that a person who asserts a position must establish it. However, where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention

> that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant. Accordingly, I have reviewed the records with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the section 18(1)(c) exemption.

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

In order for me to find that section 23 of the *Act* applies to override the application of the exemptions at sections 13(1), 14(1) and 18(1), I must be satisfied that there is a *compelling* public interest in the disclosure of the *particular information at issue* that *clearly outweighs* the purpose of that exemption.

Based on the parties' representations and the circumstances of this appeal, in particular, the nature of the information that I have found *not* to be subject to any of the claimed exemptions, I am not satisfied that a compelling public interest exists in the disclosure of the information that remains at issue and I find that section 23 does not apply.

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

The appellant takes the position that the construction of the consolidated courthouse will have an impact upon members of the community and that a public interest exists in assessing the impact of this project, specifically, to ensure that its chosen location and configuration meet the public's needs. Although I accept that the media attention that the construction of this consolidated courthouse has received reflects a public interest in this matter and that generally speaking, the public has an interest in the construction of a public facility such as the courthouse, I find that the appellant has failed to establish that any public interest in the construction of the consolidated courthouse is *compelling* in nature. Having reviewed the records and the representations, and having considered the degree of disclosure that will be granted to the appellant as a result of this order, I find that there is no compelling public interest in the disclosure of the information that I have found to qualify for exemption under sections 13(1), 14(1) and 18(1) of the *Act*.

Moreover, even if there was an interest in the disclosure of the information at issue which could be said to be compelling, in my view, the appellant has not established that the interest clearly outweighs the purpose of any one of the discretionary exemptions at section 13(1), 14(1) or 18(1) of the *Act*.

In sum, I find that the public interest override at section 23 does not apply in the circumstances of this appeal and I uphold the Ministry's decision to withhold the information that I have found to be exempt under sections 14(1), 13(1) and 18(1) of the *Act*.

ORDER:

1. I uphold the decision of the Ministry to withhold access to the following information:

    - the last sentence on pages 200 and 443;
    - all floor plans of existing courthouses;
    - the dollar figures reflecting the estimate projects costs for both the Class D and Class C estimates outlined in the executive summary of Record 1, the Facility Planning and Business Case, on pages 12 and 13;
    - the dollar figures listed in the cover letters to the estimates prepared for the Ministry by a consultant company. The cover letter to the Class D estimate is found at page 237 and the cover letter to the Class C estimate is found at page 250; and
    - the Master Plan Estimates, in their entirety, for both the Class D and C estimates. The Class D Master Plan Estimate is found on pages 245 through 248 and the Class D Master Plan Estimates for all three options are found on pages 259 through 301.

2. I order the Ministry to disclose the remaining portions of the records at issue to the appellant by **April 2, 2009** but not before **March 27, 2009**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed pursuant to order provision 2 above.

Original signed by: February 25, 2009
Catherine Corban
Adjudicator