



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

# **ORDER P-493**

**Appeal P-9200768**

**Ministry of Municipal Affairs**



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# ORDER

## BACKGROUND:

The Office of the Greater Toronto Area (the OGTA) (now the Ministry of Municipal Affairs), (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information relating to the proposed projects known as Transportation Place and Ontario International Landport. The OGTA located the responsive records and forwarded the request and the records to the Ministry to administer the request. The Ministry denied the requester access to six records in full and thirteen records in part pursuant to sections 13 and 17 of the Act. The requester appealed the decision.

Subsequently, the requester appealed the decision of another provincial ministry in which many of the same records are at issue. During mediation of this appeal, the appellant agreed that only those records that were **not** common to both appeals would be addressed in this order. These records are numbered as Records 7, 8, 9, 10, 11, and 22 according to the Ministry's index.

Further mediation was not possible, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, and a party whose interests may be affected by the disclosure of the information at issue in this appeal (the affected party). Written representations were received from the Ministry only.

In its representations, the Ministry stated that it would now release Records 8 and 11 in their entirety, and make further disclosure of parts of Records 7, 9, and 10. The Ministry has advised this office that these records and parts of records have been disclosed to the appellant.

The remaining records at issue in this appeal, together with the exemptions claimed, can be described as follows:

7. Memo dated August 29, 1989 - access denied in part pursuant to sections 13 and 17 of the Act.
9. Memo dated January 25, 1991 - access denied in part pursuant to section 13 of the Act.
10. Memo dated January 29, 1991 - access denied in part pursuant to section 13 of the Act.
22. Draft memo dated January 21, 1992 - access denied in total pursuant to section 13 of the Act.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 13(1) of the Act applies.

B. Whether the mandatory exemption provided by section 17 of the Act applies to Record 7.

## **SUBMISSIONS/CONCLUSIONS**

**ISSUE A: Whether the discretionary exemption provided by section 13(1) of the Act applies.**

Section 13(1) of the Act reads:

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.

Advice for the purposes of this section must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process (Orders 118, P-304 and P-348). "Recommendations" should be viewed in the same vein (Orders 161, P-248 and P-348).

### **Records 7, 9, and 10**

In my opinion, the information in paragraph 1 on page 3 of Record 7, and the first sentence of of Record 10 after the name, "Brampton" do not contain advice or recommendations for the purposes of section 13(1) of the Act. In my view, this information is a comment on the merits of the proposed project; it does not recommend a specific course of action.

The information in paragraph 1 on page 2 of Record 9 does not contain advice or recommendations as contemplated by section 13. This information outlines some administrative requirements for the project and does not recommend a specific course of action.

I find that the information in paragraph 2 on page 2 of Record 9, and in the first sentence of paragraph 2 of Record 10 does recommend a specific course of action and therefore, qualifies for exemption under section 13(1) of the Act.

### **Record 22**

I have carefully reviewed this record, which consists of a draft memorandum and three attachments. I find that only the information in the last paragraph of the draft memorandum, and the second and third attachments qualify as advice or recommendations detailing a specific course of action for the purposes of section 13(1).

In my view, the remaining portions of the draft memorandum and the first attachment are limited to comments about the merits of the proposed project and the alternatives available should the government decide to support the proposal. It is my opinion that these portions of the record constitute opinion or factual material and do not suggest a recommended course of action. Accordingly, these portions of Record 22 are not covered by the section 13(1) exemption.

As section 13 is a discretionary exemption, it is my responsibility to ensure that the head of an institution has properly exercised his or her discretion when deciding not to disclose a record. In the circumstances of this appeal, I have found nothing to indicate that the exercise of discretion to refuse access to those portions of the records which I have found exempt under section 13(1) of the Act was improper.

**ISSUE B: Whether the mandatory exemption provided by section 17 of the Act applies to Record 7.**

Sections 17(1)(a), (b) and (c) of the Act read as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

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

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

- (2) the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
- (3) the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harms specified in (a), (b), or (c) of subsection 17(1) will occur.

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In addition, information contained in a record would reveal information "**supplied**" by an affected person, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218, P-219, P-228, and P-241).

### **Part One**

In determining whether the first part of the test has been satisfied, I must consider whether disclosure of the information contained in paragraph 2 of page 1 of Record 7 would "reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information."

The Ministry submits that this paragraph contains "commercial" information.

Although previous orders have dealt with the issue of whether information is "commercial" information, no one definition has been adopted.

The Concise Oxford Dictionary (8th ed.) defines "commercial", in part, as follows:

"of, engage in, bearing on, commerce"

"Commerce" is defined, in part, as:

"exchange of merchandise or services ... buying and selling"

Black's Law Dictionary (5th ed.) defines "commercial" as:

relating to or is connected with trade and traffic or commerce in general; is occupied with business and commerce; generic term for most aspects of buying and selling.

In line with the narrow construction of the various categories of information contained in section 17, the term "commercial" should be interpreted as being distinct from the term "financial" or "trade secret".

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

The information withheld from Record 7 describes in general terms the services to be provided by the affected party should the proposed project be implemented. I agree with the Ministry's position that this is "commercial" information and find that the first part of the section 17 test is established with respect to the information found in paragraph 2, page 1 of this record.

## **Part Two**

The second part of the section 17 test raises the question of whether disclosure of the information at issue in Record 7 would "reveal" information that was "supplied in confidence implicitly or explicitly".

In my view, the comments made by Inquiry Officer Asfaw Seife in his discussion of this issue in Order P-393 are applicable to the facts of this appeal. In that order, he stated:

... In my view, to satisfy the "supplied" part of the test, it is not necessary to show that the record itself was supplied to the Ministry. The requirements of the test will be satisfied if it can be demonstrated that information contained in the record was originally supplied to the Ministry. In my opinion, the format in which the information is presented is not determinative of the issue of whether it was supplied.

It is apparent that Record 7, an intragovernmental memorandum, was not supplied directly to the Ministry by the affected party. However, it is my opinion that the information which has not been disclosed describes the details of the project which were submitted to the Ministry in the form of the affected party's proposal. Accordingly, disclosure of this information would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry.

In its representations, the Ministry submitted a letter from counsel for the affected party to an employee of the Ministry. That letter states that:

The proposal and associated economic indicators and other related facts and figures were given in strict confidence and should continue to be so treated.

The Ministry also indicates that the information was supplied in confidence.

I am prepared to accept that the severed information contained in paragraph 2, page 1 of Record 7 was supplied by the affected party, in confidence to the Ministry. The second part of the section 17 test is therefore satisfied.

### **Part Three**

In order to meet the third part of the section 17 test, the party resisting disclosure must demonstrate that disclosure of the information at issue could reasonably be expected to result in one of the types of harms specified in (a), (b) or (c) of section 17(1). Detailed and sufficient evidence setting out the facts and circumstances that could lead to a reasonable expectation that harm could occur if the severed information at issue was disclosed is necessary to satisfy the "harms" test (Order P-246).

As far as part three of the section 17 test is concerned, the Ministry's representations are as follows:

Release of this information could prejudice significantly the competitive position of [the affected party] as it could reveal the plans of a major development not yet built.

Section 17(1)(a) (the basis of the Ministry's submission) is designed to protect the interests of affected persons, not the Ministry. If, as the Ministry submits, release of the severed information could prejudice significantly the competitive position of the affected party, representations from the affected party to that effect would have been expected. However, despite being afforded the opportunity to do so, the only information I have received from the affected party is that referred to above concerning the confidentiality issue.

In the absence of any evidence on this matter from the affected party and because it is not apparent to me on the face of the record, I find that the Ministry has not established a reasonable expectation of harm as specified in sections 17(1)(a), (b) or (c) of the Act should the severed information at issue be disclosed. In my view, the third part of the section 17 test has not been met.

As all parts of the section 17 test have not been satisfied, the severed information contained in paragraph 2, page 1 of Record 7 does not qualify for the exemption provided by section 17 of the Act.

### **ORDER:**

1. I order the Ministry to disclose Record 7 in its entirety and Records 9, 10, and 22 **with the exception** of those portions highlighted on the copy of the record which I have

provided to Freedom of Information and Protection of Privacy Co-ordinator of the Ministry with this order. The highlighted portions should **not** be disclosed.

2. The records that I have ordered to be disclosed in Provision 1 should be disclosed within 35 days following the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which were disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ July 9, 1993