



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

FINAL ORDER P-931

Appeals P-9300165 and P-9300166

Ministry of Finance



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NATURE OF THE APPEALS:

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Ministry of Revenue (now the Ministry of Finance) for information relating to the assessment of approximately 300 properties in the vicinity of the Lester B. Pearson International Airport (the Airport).

The first request (which resulted in Appeal Number P-9300165) involves properties which collectively constitute Terminal 2 and the attached Parking Garage. In total, there are two main properties and 115 tenant portions involved in this appeal. The second request (which produced Appeal Number P-9300166) pertains to 178 properties in the vicinity of the Airport Road and to all related tenant portions. The requester represents a tenant which occupies space at the Airport.

The requester specifically sought information about the assessment of his client's property, the assessments levied on the other properties in and around the Airport and the rules which the Ministry applied to fix assessments for all of these properties. Each request had four separate components, which I shall refer to as Parts A through D.

In its decision letter, the Ministry determined that it would not release any of the requested information based on the combined application of section 53(1) of the Assessment Act and section 67 of the Act. The requester appealed this decision to the Commissioner's office.

In Interim Order P-691, I addressed Part B of the requests and those components of Part D where the appellant sought "impact studies for the City of Mississauga on 1980 market value assessments". I reached the conclusion that section 53(1) of the Assessment Act only applies to information furnished to or acquired by an assessor which relates to individual properties. Because the Ministry had purported to apply this confidentiality provision in a much broader fashion, I ordered the institution to provide the appellant with a new decision letter.

The appellant subsequently received this letter and has not appealed the decision which he obtained. On this basis, I need not revisit those components of the requests which were addressed in my previous order.

A Notice of Inquiry which dealt with the remaining issues in these appeals was provided to the appellant and the Ministry. Representations were received from both parties. In its submissions, the Ministry indicated that it also wished to rely on the following exemptions contained in the Act to withhold one or more of the record categories from disclosure:

- tax related information - section 17(2)
- third party information - section 17(1)
- security of a building - section 14(1)(i)
- information received in confidence from another government - section 15(b)
- prejudice to the defence of Canada - section 16

In his representations, the appellant took the position that, despite the application of section 53(1) of the Assessment Act, the Commissioner's office has the authority to order the Ministry to release the information at issue under the discretionary access provision found in section 53(3) of the Assessment Act.

Each party was then afforded the opportunity to comment on the statutory provisions raised by the other.

In his submissions, the appellant also indicated that he no longer wished to pursue Part A of his two requests. There, he had sought information in the custody of the Ministry's Regional Assessment Commissioner regarding his client's property. I shall return to this matter later in the order.

Finally, the parties agreed that the two appeals would be restricted to Part C of the requests and to those portions of Part D of the requests not addressed in my previous order. For greater certainty, the information which remains at issue in these appeals is the following:

- (1) All records in the possession of the Regional Assessment Commissioner with respect to the valuation for assessment purposes of any properties which are similar real property to the Subject property within the meaning of section 60(1) of the Assessment Act, including but not limited to all costcards, valuations, notes, memoranda, calculations or other material whether or not such material forms the basis of assessments made for valuation purposes.
- (2) Any information about 1980 market value assessments found in the individual assessment files referred to in these requests.

At the request of the Commissioner's office, the parties also agreed that the scope of the records at issue in Parts C and D of these appeals would be limited to 10 categories of documents. These record groupings, which consist of industrial tally sheets, appraisal cards, leases, airport plans and the working notes of assessors, pertain to both individual assessed properties and to the tenant portions thereof. The record groupings represent the typical sorts of records found in assessment files of this nature.

Since the two appeals involve similar types of records, relate to properties in the same geographical location and have, to date, been treated in a collective fashion by the parties, I have decided to consider them together for the purposes of this order.

By way of background, I would also note that the appellant has filed a separate appeal with the Assessment Review Board (ARB) where he has challenged the assessment which the Ministry applied to his client's properties. Owing to the complexity of the issues to be considered, the parties agreed to remit this matter directly to the Ontario Municipal Board (OMB). The hearing

to address the assessment issues has yet to be convened. Under the rules adopted by the OMB, the appellant will be entitled to obtain disclosure of those Ministry records which the OMB judges relevant to the matters before that tribunal.

PRELIMINARY MATTERS:

THE SCOPE OF THE PRESENT APPEALS

There are three preliminary matters regarding the scope of these appeals which I must consider before addressing the substantive issues. These initial matters involve (1) the status of Part A of these appeals, (2) the time frame for the appeals and (3) the properties that are subject to the appeals.

WHAT IS THE STATUS OF PART A OF THE APPEALS

Within Part A of the two requests, the appellant originally sought access to records pertaining to the assessment of certain buildings and properties occupied by his client. In his initial representations, and after having obtained certain records from the Ministry (including the version of Record Category 1(F) which related to his client's properties), the appellant indicated that he no longer wished to pursue Part A of the two appeals.

Following the issuance of Interim Order P-691 and after having obtained certain additional documents pursuant to an order of the ARB, the appellant took the position that the level of disclosure made by the Ministry in response to Part A of the two requests had been less than complete. On this basis, he has asked that Part A of the original requests be reinstated into the present appeals. This is the first preliminary issue with which I must deal.

Previous orders have held that the Commissioner's office has the power to control the manner in which the appeals process is undertaken. As part of this general authority, this tribunal's policy is that, once an appellant has narrowed the ambit of an appeal, he or she cannot reintroduce the excluded information at a later date.

This approach has been adopted for a number of reasons. First, absent such a policy, there would be no certainty as to the scope of an appeal. Second, unless the exact nature of the records at issue is known at an early stage in the proceedings, it will not be possible to successfully mediate the appeal under section 51 of the Act. Finally, the issue identification and notification functions performed by the Commissioner's office could not be conducted effectively unless the records in question are accurately identified.

I have carefully reflected on the appellant's application. While I appreciate his reasons for wishing to address all of his access-related issues in the context of the present appeals, I believe that it would be unfair to expand the scope of these proceedings at this late stage in the process. In making this determination, I am also mindful of the fact that the appellant would be entitled to make a further access request to the Ministry for the specific information that he is seeking. In addition, the appellant would be free to address the adequacy of the Ministry's document disclosure at the upcoming OMB hearing.

The result, therefore, is that I will not consider Part A of the two requests in the context of the present appeals.

WHAT IS THE TIME FRAME FOR THE APPEALS

In his letters of appeals, the appellant did not specifically state the time period to which his requests relate. Each request, however, had appended to it a schedule of assessment roll numbers "as returned initially on the assessment roll for the 1993 taxation year".

In clarifying the scope of his requests, the appellant subsequently indicated that he was seeking the disclosure of information pertaining to certain named buildings for "each of the taxation years 1992, 1993, 1994 and 1995".

Previous orders have established that a requester's right to access records under section 10(1) of the Act is limited to recorded information that exists at the time that the request is received by the institution. The Act does not impose an obligation on an institution to make a decision with respect to records that do not exist at that point in time (Order 82).

Should a requester wish to receive information that a government institution obtains subsequent to the date of the request, and where this information does not relate to the records produced or issued in a series, the only recourse is for the individual to file a new access request.

After considering all of the circumstances of this case and the approach articulated in Order 82, I find that the scope of these appeals should be limited to that information contained in various assessment files on February 24, 1993, which is the date that the original access requests were filed.

WHAT PROPERTIES ARE SUBJECT TO THE APPEALS

In his requests, the appellant sought access to records which relate to the valuation for assessment purposes of any properties which are "similar real property" to the property occupied by his client. In its representations, however, the Ministry has taken the position that no similar real properties exist. That is the case because the appellant's requests circumscribe the entire Airport, which the Ministry claims is a unique property for which no comparables exist.

In his representations, the appellant has specified that his reference to the term similar real property refers to "real property in the vicinity of the space occupied by [his] clients at Pearson International Airport, namely other space at the airport". Based on this clarification, I believe that the appellant is seeking "raw data" in the form of assessment information from which a list of comparable properties can be established. Since these properties clearly exist in the vicinity of the Airport, I do not accept the argument that the Ministry has advanced.

I have concluded, therefore, that the properties which will form the subject of these appeals are (1) those identified by the appellant in the schedules which accompany his two appeals and (2) the tenant portions of those properties identified in the schedule in Appeal Number P-9300166, other than those occupied by the appellant's client. The relevant schedules and their contents are here set out:

- (1) Schedule "A" contains the appellant's list of properties in the request that resulted in Appeal Number P-9300165.

- (2) Schedule "B" contains the appellant's list of properties in the request that produced Appeal Number P-9300166.
- (3) Schedule "C" describes the additional properties related to those in Schedule "B".

For greater certainty, I have provided the parties with copies of the full text of the schedules in question.

THE SUBSTANTIVE ISSUES RAISED IN THE APPEALS

THE APPLICATION OF SECTION 53(1) OF THE ASSESSMENT ACT

In its representations, the Ministry submits that, by virtue of the combined application of section 53(1) of the Assessment Act and sections 67(1) and (2) of the Act, it is precluded from providing the appellant with the records that he seeks. I will now examine the contents of these statutory provisions in greater detail.

Section 67(1) of the Act specifies that the Act prevails over a confidentiality provision found in any other statute unless section 67(2) of the Act or the other legislation specifically provides otherwise. Section 67(2), in turn, stipulates that section 53(1) of the Assessment Act is a confidentiality provisions which prevails over the Act.

In Order 9, former Commissioner Sidney B. Linden, considered the manner in which the predecessor provision to section 67(1) should be interpreted. He explained his approach as follows:

... Where, as in this case, an institution purports to remove itself from the ambit of the Act through the use of a "confidentiality provision" in another act, it is my responsibility to scrutinize the provision of that other act to ensure that both the subject matter and the person who would be releasing the requested information under that act (i.e. the head of the institution) are covered by the "confidentiality provision" relied on.

...

While the head of an institution must determine at first instance whether a particular statutory provision is a "confidentiality provision" precluding access to the requester, I, too, must be assured of the relevance and application of the provision upon receipt of an appeal.

I regard this duty as fundamental to the effective operation of the Freedom of Information and Protection of Privacy Act, 1987 and the principles of providing a right of access to information and protecting the privacy of individuals.

I agree with this interpretation and adopt it for the purposes of the present appeals. On this basis, the first step in my analysis will be to determine whether section 53(1) of the Assessment Act applies to some or all of the records at issue.

Section 53(1), which is a lengthy and complex provision, states as follows:

Every assessment commissioner or assessor or any person in the employ of a municipality or school board who in the course of the person's duties acquires or has access to information furnished by any person under section 10 or 11 that relates in any way to the determination of the value of any real property or the amount of assessment thereof or to the determination of the amount of any business assessment, and who wilfully discloses or permits to be disclosed any such information not required to be entered on the assessment roll to any other person not likewise entitled in the course of that person's duties to acquire or have access to the information, is guilty of an offence and on conviction is liable to a fine of not more than \$2,000, or to imprisonment for a term of not more than six months, or to both.

This confidentiality provision, in turn, makes reference to two other provisions contained in the Assessment Act -- sections 10 and 11. For the purposes of the appeals, sections 10(1), 10(2) and 11(1) are particularly relevant. The pertinent passages from section 10(1) stipulate that:

An assessor ... shall ... be given free access to all land and to all parts of every building, structure, machinery and fixture erected or placed upon, in, over, under or affixed to the land, for the purpose of making a proper assessment ... or ... business assessment in respect thereof.

Section 10(2) then goes on to state that:

Every adult person present on land when any person referred to in subsection (1) visits the land in the performance of his or her duties shall give to such person all the information in his or her knowledge that will assist such person to make a proper assessment of the land and every building, structure, machinery and fixture erected or placed upon, in, over, under or affixed to the land, to make a proper business assessment thereof, ...

Section 11(1) then provides that:

Where an assessor has visited land for the purpose of making a proper assessment thereof or a proper business assessment in respect thereof and has been unable to obtain all information necessary for such purpose, he or she may deliver or cause to be delivered or mailed to the address of any person, whether resident in the municipality or not, who is or may be assessed in respect of the land, a questionnaire or questionnaires in writing demanding information as prescribed by the regulations.

In Order 23, Commissioner Linden considered the interaction of what are now sections 10, 11 and 53(1) of the Assessment Act along with the categories of information to which these provisions apply. He approached this subject in the following manner:

The language of subsection 57(1) [now 53(1)] of the Assessment Act is clear; it stipulates what sort of information is to be protected from disclosure; identifies the class of persons who provide the information and those who receive it and are entrusted to preserve

confidentiality; provides for the conditions of lawful disclosure to third parties; and outlines the penalties for unauthorized disclosure.

In my view, subsection 57(1) does not make all information collected under sections 9 and 10 [now 10 and 11] of the Assessment Act confidential in all circumstances. These two sections, and relevant regulations (69 and 73), provide government assessors with a right of access to property for the purpose of conducting assessments, and require owners to provide these assessors with all necessary information required to make a proper determination of assessed value in accordance with the Assessment Act. Some, but not all, of the information provided to assessors under sections 9 and 10 is barred from disclosure by subsection 57(1).

In Order P-680, Inquiry Officer Anita Fineberg established that section 53(1) must be analyzed according to its four constituent elements, each of which must be satisfied in order for this provision to apply. This approach was also adopted in Order P-911 and I will similarly apply it to the present appeals.

Constituent Element 1

The confidentiality provision found in section 53(1) of the Assessment Act does not extend to information which must be placed on the assessment roll. Thus, for the Ministry to rely on this section, it must show that:

The information is not required to be entered on the assessment roll.

Section 14(1) of the Assessment Act lists the 20 items which, if applicable to a property or the occupant thereof, must be placed on the assessment roll. I have carefully examined the 10 generic categories of records at issue in this appeal and have identified a number of examples in seven of these documents where the Ministry has purported to withhold information which is publicly available on the assessment roll.

These information categories describe (1) the owner's name, (2) the roll number, (3) the address of the property, (4) the municipality, ward county and/or district in which the property is located, (5) the name of the tenant, (6) the mailing address for the property and (6) the grantable portion of the property not occupied by tenants. I have highlighted the excerpts in question in yellow on the copy of the generic records to be forwarded to the appellant and the Ministry's Freedom of Information and Privacy Co-ordinator.

The result is that the Ministry cannot rely on section 53(1) of the Assessment Act to withhold these categories of information from disclosure.

Constituent Element 2

My discussions regarding constituent elements 2, 3 and 4 will be restricted to those information categories which are **not** required to be entered on the assessment roll.

For the Ministry to rely on section 53(1) of the Assessment Act, it must also establish that:

The information has been acquired by or furnished to an assessor in the course of his duties pursuant to section 10 or 11 of the Assessment Act.

Typically, an assessor will acquire information about a property during a physical visit to the location as contemplated under section 10(1) of the Assessment Act. Based on my review of the records, I find that many of the data elements found in Record Categories 1(A), 1(B), 1(C), 1(E), 1(F), 2 and 4 were obtained in this fashion.

Section 53(1) of the Assessment Act also applies to information furnished to an assessor. The Shorter Oxford English Dictionary (3rd. edition) defines the term "furnished" to mean "to supply with what is necessary". Applying this definition to the assessment context, a property owner or tenant will have furnished information where he or she has taken some positive action to supply these materials to an assessor.

Under section 10(2) of the Assessment Act, an owner or occupant of a property is obliged to provide the assessor with "... all the information in his knowledge that will assist such person to make a proper assessment of the land and of every building ...".

The ambit of information to be supplied in this fashion can be quite extensive. For example, Form 1 of R.R.O. 1990, Reg. 48 made under the Assessment Act specifies that, for income-producing properties, the owner or occupant must provide the assessor with such items as (1) actual operating expenses, (2) the actual gross income received from the property during the year (broken down by different categories) and (3) the estimated loss in income due to vacancy.

Based on my review of the records, I find that the leasehold agreement and the map of the Airport properties (Record Categories 3 and 5, respectively) were furnished to the assessor in their entirety. I also find that a number of the data elements found in Record Categories 1(A), 1(B), 1(C), 1(E), 1(F), 2 and 4 were similarly provided to the relevant assessors either by the property owner or the tenant.

Thus far, I have identified three information categories which are found in these records. These are (1) information which is publicly available on the assessment roll, (2) information acquired by the assessor and (3) information furnished to the assessor.

The documents also contain a fourth category of information where the assessor has taken the data acquired or furnished from various sources and, through the application of various approaches and formulae, arrived at a valuation for the properties in question. That fourth category would include (1) the assessor's working notes, (2) the numerical calculations and drawings prepared by the assessor, (3) analytical concepts such as fair market rent and (4) such technical items as the normalized revenue and expense inputs.

The question for me to resolve is whether these intermediary work products have either been acquired by or furnished to an assessor pursuant to section 53(1) of the Assessment Act.

The appellant takes the position that these work products are qualitatively distinct from the original source information. He points out that the assessor's work or analysis represents his or her professional judgment

about the proper assessment for a property. The appellant emphasizes that these views are not derived from any third party. He also notes, in particular, that an assessor's calculations of fair market rent would not reveal actual rents.

To summarize, the appellant argues that since these work products were neither furnished to nor acquired by the assessor, they fall outside the ambit of section 53(1).

The Ministry, on the other hand, submits that the disclosure of the assessor's work calculations would permit knowledgeable individuals to work back to obtain the actual site-specific information derived under sections 10 and 11 of the Assessment Act.

The fact situation in these appeals is not dissimilar from the issues canvassed in a series of orders issued by the Commissioner's office regarding section 17(1) of the Act (the third party information exemption). The question raised in these decisions was whether the release of a record would reveal information supplied to a government organization by a third party. These orders have held that such information would be revealed where its disclosure would permit the drawing of accurate inferences about the information actually supplied to the institution (Orders P-218, P-228 and P-241).

I consider this interpretative approach (which is basically that a requester should not be able to obtain indirectly what he or she cannot secure directly) to be analytically sound. I also believe that it can be usefully extended to evaluate the contents of records for which the section 53(1) confidentiality provision has been claimed.

In the present context, I believe that a record can be said to contain information acquired by or furnished to an assessor where the release of that document would either (1) reveal the information actually obtained by or supplied to the assessor or (2) permit the drawing of accurate inferences about the information which was actually obtained or supplied in this fashion.

I must now determine whether the disclosure of the information categories which I have described as the intermediary work products would disclose either directly or indirectly the information which would otherwise be subject to protection under section 53(1) of the Assessment Act.

I find that the release of drawings prepared by the assessors would, in a direct way, reveal the information acquired by or furnished to the assessor under sections 10 and 11 of the Assessment Act. I am also persuaded that the disclosure of the assessor's working notes, his or her calculations, the notations of fair market rent and any related intermediary work products would either (1) reveal the information actually obtained by or supplied to the assessor or (2) permit the drawing of accurate inferences about the information which was actually obtained or supplied in this fashion. These categories of information circumscribe Record Category 1(D) in its entirety and are also found interspersed in Record Categories 1(A), 1(B), 1(C), 1(E), 1(F), 2 and 4.

Constituent Element 3

In order to rely on the section 53(1) confidentiality provision, the Ministry must also demonstrate that the information was produced for a specific reason. More specifically, it must show that:

The information relates in some way to the determination of the value of any real property or the amount of assessment thereof or to the determination of the amount of any business assessment.

Based on my review of the 10 generic record categories, I find that their contents relate directly to the valuation or assessment of real property. On this basis, the Ministry has satisfied me that the third constituent element of the test applies to these documents.

Constituent Element 4

The final element which the Ministry must establish in order to rely on section 53(1) pertains to the recipient of the assessment information. Specifically, the Ministry must show that:

The information is not being disclosed to any other person entitled in the course of that person's duties to acquire or have access to the information.

In the context of section 53(1), I am satisfied that the appellant is not a person who is entitled to receive this information as part of his duties. On this basis, the Ministry has met the fourth and final aspect of the test.

To summarize, I find that the contents of the assessor's working notes, the leasehold agreement and the map of the airport properties (Record Categories 1(D), 3 and 5, respectively) are subject in their entirety to the section 53(1) confidentiality provision. Section 53(1) similarly applies to the information categories contained in the industrial tally sheet and five of the appraisal cards (Record Categories 1(A), 1(B), 1(C), 1(E), 2 and 4) which are **not** required to be entered on the assessment roll.

DISCRETION TO RELEASE ASSESSMENT RELATED INFORMATION

The appellant takes the position that, despite the application of the section 53(1) confidentiality provision to a category of information, the Commissioner's office nonetheless has the authority to disclose this information under section 53(3) of the Assessment Act. This provision specifies that:

Despite [section 53(1)], upon the request of a person assessed under this Act, an assessor may provide sufficient information on similar real property in the vicinity, other than actual income and expense information on individual properties, to enable the person to determine the fairness of that person's assessment.

The Ministry, for its part, takes the position that the authority to release information under this provision may only be exercised by a Ministry assessor and that the Commissioner's office has no jurisdiction to order disclosure under this section.

I have carefully reflected on the competing arguments. It is important to note that, in these sorts of appeals, the obligation of the Commissioner's office to interpret section 53(1) of the Assessment Act arises only because this confidentiality provision is referred to specifically in the Act. On this basis, the Commissioner's office is required to scrutinize this section to ensure that it actually applies to the information for which it has been claimed.

The disclosure provision outlined in section 53(3) of the Assessment Act, however, is not mentioned in the Act. In addition, it is clear from the wording of this provision that the discretion contemplated under this section is to be exercised exclusively by an assessor. For these reasons, I find that the Commissioner's office does not have the authority to override the application of section 53(1), where this provision has been validly claimed, by ordering disclosure of the relevant information under section 53(3).

The result of this analysis is that, with the exception of the information extracted from the assessment roll, all the information categories found in the 10 record categories at issue satisfy the four constituent elements of the test for the application of section 53(1) of the Assessment Act. The Ministry is, therefore, not required to disclose these records to the appellant.

TAX RELATED INFORMATION

In its representations, the Ministry also argues that section 17(2) of the Act applies to exempt the entire contents of the records from disclosure. I have previously determined that the confidentiality provision found in section 53(1) of the Assessment Act applies to the non-public information contained in these records. On this basis, my discussion of section 17(2) will be limited to the information which must be entered on the assessment roll.

Section 17(2) of the Act specifies that the head of an institution shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

In its representations, the Ministry advances two distinct arguments to support its position that section 17(2) of the Act applies to the record categories at issue. First, the Ministry submits that:

Where one Act prevails over another, it does not necessarily bar the application of the other Act. Where two Acts are in conflict, and one prevails, it prevails only to the extent of the conflict ...

The Ministry states that this argument is based on the paramountcy doctrine which the courts have applied to constitutional issues where federal and provincial statutes are in apparent conflict. I do not know of any cases, however, where this approach has been extended to the interpretation of two provincial statutes, nor has the Ministry directed me to any such authorities. On this basis, I find that the paramountcy doctrine is not a rule of statutory interpretation which applies in the context of the present appeals.

The Ministry next submits that the information contained in the records was specifically gathered for the purpose of determining tax liability. The Ministry points out, in this respect, that when the assessment

obtained for a particular property is multiplied by the applicable mill rate, the tax liability for that property is established. For this reason, the Ministry argues that the assessment related information falls squarely within the ambit of section 17(2).

The appellant, for his part, states that the compilation of assessment related information to establish a property assessment does not determine tax liability. Rather, he maintains that this liability is only fixed when a municipality or school board establishes its annual mill rate under the Municipal Act or the Education Act, respectively. It is only at this latter point in time that the actual amount of the taxes for a property or business will be established. The appellant reinforces this point by referring to section 3 of the Assessment Act which requires that an assessment be prepared even though the subject property is exempt from property taxes.

The appellant then indicates that, under the Act, the issue of whether assessment related information can be disclosed is governed by the confidentiality provisions found in sections 67(1) and (2) of the Act with specific reference to section 53(1) of the Assessment Act. On this basis, he goes on to state that it could not have been the intention of the Legislature to also protect this information under section 17(2) of the Act which is a much more general exemption.

Even if I were to find that data obtained to calculate property assessments constitutes "information gathered for the purpose of determining tax liability", I would still have to apply this conclusion to the information categories which remain at issue in these appeals. As indicated previously, the narrow issue which I must decide is whether section 17(2) of the Act applies to protect information which, by virtue of section 14(1) of the Assessment Act, must be entered on the assessment roll. In my view, it could not have been the intent of the Legislature to shield from disclosure in one statute information which must be made public in another.

I conclude, therefore, that the Ministry cannot rely on section 17(2) of the Act to withhold the information categories contained in the records which are also found on the assessment roll.

THIRD PARTY INFORMATION

The Ministry also submits that section 17(1) of the Act applies to prohibit the disclosure of the information contained in the leasehold agreement (Record Category 3) and in the appraisal cards (Record Categories 1(B), 1(C), 1(E), 1(F), 2 and 4).

I have previously determined that entire contents of the leasehold agreement and most of the information found in the appraisal cards are subject to the confidentiality provision contained in section 53(1) of the Assessment Act. On this basis, my analysis of the third party information exemption will be restricted to those information categories in the appraisal cards which are publicly available on the assessment roll.

For a record to qualify for exemption under section 17(1), the Ministry must satisfy each element of the following three-part test:

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 the harms outlined in sections 17(1)(a), (b) or (c) will occur.

I will move directly to the second part of the test. To satisfy this aspect of the test, the Ministry must establish that the information contained in the evaluation cards was supplied to the Ministry in confidence either implicitly or explicitly.

In Order M-169, Inquiry Officer Holly Big Canoe indicated that this aspect of the test will be established where it is shown that the supplier of the information had a reasonable expectation that the information would be treated in confidence. In Order P-561, I adopted the approach outlined in Order M-169. I went on to state that, in determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case including whether the information is not otherwise available from sources to which the public has access.

As indicated previously, the only categories of information which remain at issue in these appeals are those which, by virtue of section 14(1) of the Assessment Act, must be entered on the assessment roll. Thus, this information is already in the public domain and can be accessed

by any member of the public. Given the public availability of this data, I believe that it would not be reasonable for a third party which supplied such information to expect that it would be treated in confidence.

For this reason, I find that the second part of the section 17(1) test has not been established and that the Ministry cannot rely on the third party information exemption to withhold the information in question from disclosure.

In addition, since the information which I will order the Ministry to release is already publicly available, it will not be necessary for either the Ministry or the Commissioner's office to notify the relevant owners and tenants of the properties to which this information relates that such disclosure has been made.

THE EXEMPTIONS RELATING TO SECURITY OF BUILDINGS, INFORMATION RECEIVED IN CONFIDENCE FROM ANOTHER GOVERNMENT, AND PREJUDICE TO THE DEFENCE OF CANADA

In its representations, the Ministry has claimed that the exemptions relating to law enforcement records, information received in confidence from another government, and prejudice to the defence of Canada apply to portions of the Airport plans (Record Category 5). Since I have previously determined that the information contained in this record category is excluded from the ambit of the Act because of section 53(1) of the Assessment Act, I need not consider the application of these exemptions to these documents.

ORDER:

1. I uphold the Ministry's decision to deny access to the information categories contained in Record Categories 1(D), 3 and 5 in their entirety and to those information categories found in Record Categories 1(A), 1(B), 1(C), 1(E), 1(F), 2 and 4 which have **not** been highlighted in yellow in the copy of the generic records provided to the Ministry's Freedom of Information and Privacy Co-ordinator and the appellant along with this Final order.
2. I order the appellant to indicate to the Ministry within 21 (twenty-one) days of the receipt of this order whether he wishes to obtain access to the information categories outlined in Provision 3 of this order.
3. In the event that the appellant provides the Ministry with the requisite notice under Provision 2, I order the Ministry to disclose to the appellant those information categories found in Record Categories 1(A), 1(B), 1(C), 1(E), 1(F), 2 and 4 which have been highlighted in yellow within 30 (thirty) days of receiving such notice. This provision applies to every property identified in Schedules "A", "B" and "C" which are annexed to this order with the exception of those properties occupied by the appellant's client. For greater certainty, the highlighted information categories constitute those which have been entered on the assessment roll.
4. For the purpose of complying with Provision 3, the Ministry shall have the option of presenting the information to be disclosed in an alternative format to that contained in the 10 generic record categories provided that the information is adequately linked to the relevant property.
5. In view of the length of time that has transpired since the filing of these requests, I order the Ministry to comply with Provision 3 without recourse to the transfer provision found in section 25(2) of the Act or the discretionary exemption referred to in section 22(a) of the Act.
6. In order to verify compliance with the provisions of this order, I reserve the right to require that the Ministry provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ May 19, 1995

POSTSCRIPT

In these appeals, the appellant has sought access to information about properties in the vicinity of the Lester B. Pearson International Airport to assist his client to pursue several appeals filed under the Assessment Act. These latter cases were originally considered by the ARB and are presently awaiting disposition before the OMB.

In his representations, the appellant indicates that he has been obliged to file access requests under the Act because the Ministry has refused to provide him with the information that he seeks under the disclosure provisions of the Assessment Act. The Commissioner's office has also received appeals from other requesters who have expressed similar concerns.

As indicated previously, section 53(3) of the Assessment Act confers extensive discretion on Ministry assessors to disclose information on similar real properties to persons who have been assessed under that statute. Under this section, the assessor is entitled to disclose information, other than that relating to actual income and expenses "to enable the person to determine the fairness of the person's assessment".

While this provision allows the Ministry to provide individuals with full and early access to information, it is the experience of the Commissioner's office that the provision is often applied in a restricted and inconsistent fashion. That view is also shared by the Ontario Fair Tax Commission which has expressed its position as follows:

More information should be provided to ratepayers who file appeals. Although it is a policy of the Assessment Division of the Ministry of Revenue to assist ratepayers in preparing their appeals, the amount of help they actually receive is completely dependent on the assessor assigned to the case. Some are genuinely helpful, while others can be obstructive because of the adversarial nature of the appeals process.

The product of this uneven approach to disclosure is that individuals will often decide to seek the information that they require under the Act.

In my view, it is counter-productive for the Act to serve as a primary disclosure mechanism in these situations. That is the case for several reasons.

First, the focus of the Act is on the characteristics of the records at issue and not why a requester needs them. For this reason, the question of whether a document should be disclosed will typically turn on how the record is classified, whether it contains certain types of information and whether other parties have proprietary or personal interests in the documentation. Unlike the situation which prevails in issue based legal systems (such as property assessment schemes), the relevance of a document to the matter to be decided is usually **not** a factor which is considered under the Act.

It is clear that, where the owner or tenant of a property seeks information on the assessment of similar real properties, the relevance of the records to the assessment of the individual's own property is a crucial consideration. On this basis alone, it is essential that the Assessment Act, rather than the Act, serve as standard disclosure mechanism for these sorts of requests.

Second, by enacting section 53(3) of the Assessment Act, the Legislature recognized that Ministry assessors are in the best position to provide information which property owners require to understand the fairness of their assessments.

Finally, should an assessment matter proceed to an appeal before the ARB or OMB, each of these tribunals has the authority to order disclosure to an appellant's counsel subject to an undertaking of confidentiality. The Commissioner's office, on the other hand, has ruled that access provided under the Act constitutes disclosure to the public at large.

For the reasons which I have outlined, I would urge Ministry officials to review the policies and procedures in place for the disclosure of information where disputes over property assessments arise. The thrust of these revisions should be to ensure that property owners and tenants can obtain early and complete access to relevant information under the disclosure provisions which already exist under the Assessment Act.