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

ORDER P-908

Appeal P-9400365

Ontario Native Affairs Secretariat

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NATURE OF THE APPEAL:

The Ontario Native Affairs Secretariat (ONAS) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to certain letters and photographs which were referred to in two reports concerning a particular First Nation's land claim. In its initial decision letter ONAS denied access to the photographs and one of the letters on the basis that they didn't exist.

ONAS notified the First Nation of the request as it had an interest in the records. After considering the objections of the First Nation to disclosure, ONAS provided a further decision letter to the requester, an individual representing an interest group located in the area of the land claim. ONAS denied access to two remaining letters based on sections 15(a) and (b) of the Act - relations with other governments.

The requester appealed this decision.

Given the nature of the exemption, the Notice of Inquiry was sent to the appellant, ONAS, the First Nation and Indian and Northern Affairs Canada on behalf of the federal government. Representations were received from all parties.

After reviewing the representations and the records, I determined that further information was required in order to clarify certain aspects of the representations submitted by ONAS. A supplementary Notice of Inquiry was sent to ONAS and all other parties were notified of this request for further information. ONAS provided supplementary representations.

The records at issue are:

1. a letter from the Chief of the First Nation to the Office of Indian Resource Policy (Ontario), dated September 9, 1982, with attachments (15 pages)

2. a letter from the Chief of the First Nation to the Minister of Natural Resources (Ontario), dated September 14, 1983, with attachments (65 pages)

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

I will first consider the application of section 15(a) to the records at issue. For the records to qualify for exemption under section 15(a), ONAS must establish that:

1. disclosure of the records could give rise to an expectation of prejudice to the conduct of intergovernmental relations; **and**

2. the relations which it is claimed would be prejudiced must be intergovernmental, that is relations between an institution and another government or its agencies; **and**

3. the expectation that prejudice could arise as a result of disclosure must be reasonable.

[Order 210]

In the course of preparing this order I reviewed the wording of the test for exemption established in Order 210. Having done so, I feel that it would be appropriate to restate the test to make it more straightforward.

Section 15(a) requires that the relations involved be intergovernmental, otherwise the exemption isn't available. Therefore, I feel that the present Part 2 of the test should be the first matter addressed when considering the application of this exemption. Furthermore, it appears to serve no useful purpose to have Part 3 of the present test separate from Part 1.

These changes do not affect the substantive requirements of the test for exemption under section 15(a) which will now be stated as follows:

1. the relations must be intergovernmental, that is relations between an institution and another government or its agencies; **and**

2. disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

The two records at issue were created in 1982 and 1983 in the context of the First Nation's land claim respecting the location of the northern boundary of the First Nation's reserve. These records were submitted by the First Nation to the government of Ontario and the government of Canada.

ONAS indicates that the government of Ontario considers the resolution of land claims with First Nations "... to be an important and priority policy matter for the province." First Nation land claim negotiations involve complex historical, legal and policy issues. They also involve consideration of interests beyond those of the negotiating parties such as those of persons or organizations that may be affected by the terms of any settlement.

For a number of reasons ONAS submits that negotiating settlements, as opposed to resorting to courts, is the preferred approach to the resolution of land claims. Negotiation is seen as providing the necessary flexibility to permit the parties to the negotiations to construct creative solutions to historically complex

problems while also allowing for increased opportunities to balance the interests of those who might be affected by a land claim settlement.

Part One of the Test

ONAS contends that the relations which would be prejudiced by disclosure of the records are intergovernmental, because land claims can provide for:

> ... the amendment or alteration of existing legal regimes ... and the agreement reached at the conclusion of the negotiations can involve significant constitutional issues, and become enshrined in the Constitution under section 35(3) of the Constitution Act, 1982.

It also notes that the resolution of land claims can involve the transfer of Crown lands to First Nations. ONAS indicates that these matters are of national and provincial import.

Having reviewed the representations of ONAS and Indian and Northern Affairs Canada, I am satisfied that the relations between Ontario and Canada which are described in the records are intergovernmental. Therefore, part one of the test has been satisfied.

Part Two of the Test

ONAS submits that disclosure of the records would jeopardize the integrity of Ontario's intergovernmental relations with Canada and the First Nation. It states that Ontario's relationship with Canada is an ongoing one, both generally, with respect to their long-term interactions and specifically, with respect to this land claim and the ongoing negotiations regarding its implementation.

Indian and Northern Affairs Canada submits that disclosure of the records would prejudice the conduct of intergovernmental relations with the province of Ontario, because Canada would be less willing in the future to share material with Ontario, which is related to the negotiation and settlement of land claims.

ONAS also submits that Canada's involvement in the negotiation of land claims is crucial in developing a complete settlement package, since Canada has primary responsibility for First Nation peoples pursuant to the Constitution Act, 1867.

ONAS further submits that the expectation of prejudice to its intergovernmental relations with Canada is reasonable, given that Canada has consistently taken the position that prejudice would result, in the context of other land claim negotiations considered in previous orders of the Commissioner's office (Orders P-630 and P-730).

Given the sensitive and complex nature of land claim negotiations generally and the particular circumstances in this appeal, including the need for ongoing negotiations to implement the agreement which was reached, I

am persuaded that disclosure of the records at issue could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada. Therefore, the records are exempt from disclosure pursuant to section 15(a) of the Act.

In light of this finding, it is not necessary for me to consider the application of section 15(b).

ORDER:

I uphold the decision.

Original signed by: April 19, 1995
Tom Wright
Commissioner

POSTSCRIPT:

The issues arising from land claims involving First Nations are some of the most difficult and complex faced by governments in Canada today. Achieving a fair resolution of these claims, which balances a wide array of interests, is a delicate, sensitive and often lengthy process. The need for confidentiality and an atmosphere of trust among the negotiating parties is understandable. At the same time, land claim negotiations touch upon matters which are of concern to all residents of this province, such as the expenditure of public funds by way of compensation and the possible transfer of Crown lands.

As the appellant indicates in his representations, these are matters of significant public interest. In my opinion, involvement of the public at large must be viewed as an essential part of the negotiation process. To achieve this participation, in my view the public should be consulted and be given an opportunity to provide input before a final agreement is concluded. However, public consultation will only be meaningful if the public has adequate access to information about the claim and the negotiation process itself.

In the circumstances of the land claim to which this appeal relates, it appears that the government of Ontario made considerable information available through public meetings, disclosure of background documents and fact-finders' reports, internal government position papers, press releases, information flyers and through a public information office. In addition, once the negotiating parties had reached a proposed settlement of the

land claim, the draft agreement was disclosed to the public for comment. In response to input received from the public, the proposed settlement was significantly altered.

It is my hope that the Ontario government will learn from and build on the experience gained from this set of negotiations and ensure that in future land claim negotiations the public is given every reasonable opportunity to be an informed participant.

Finally, in response to the Notice of Inquiry, ONAS made extensive submissions in support of the position that the First Nation was a "government" for purposes of section 15 of the Act. Although it was not necessary for me to consider this issue in order to resolve this appeal, I believe that it will have to be directly addressed at some point.

Accordingly, I feel that it would be helpful if the provincial Legislature clarified its intention with respect to whether relations between First Nations and the government of Ontario are to be considered intergovernmental for the purposes of section 15 of the Act. For example, section 16 of British Columbia's Freedom of Information and Protection of Privacy Act (which corresponds to section 15 of the Act), specifically provides that "aboriginal governments" are included for purposes of the exemption.