



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

FINAL ORDER PO-1902-F

Appeal PA-990442-1

Ontario Realty Corporation



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NATURE OF THE APPEAL:

On March 27, 2001, I issued Interim Order PO-1887-I which disposed of most of the issues raised in Appeal PA-990442-1. This appeal stemmed from a request submitted to the Ontario Realty Corporation (the ORC) for access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to records relating to the sale of certain identified lands in the Town of Milton.

In that Order, I was unable to deal with the section 17(1) exemption claim as it related to seven records and the remaining portion of an eighth record, because these records related to a party whose interests might be affected by the appeal (the affected party), and this party had not been notified concerning these eight records. The section 17(1) exemption claim was identified with respect to these records for the first time by the ORC during the course of my inquiry.

After issuing Interim Order PO-1887-I, I provided the ORC and the affected party with a Supplementary Notice of Inquiry concerning the eight remaining records. The affected party and the ORC both asked me to consider their section 17(1) representations previously submitted with respect to the other records in this appeal. Because of the manner in which I will be dealing with the remaining issues in this appeal, it is not necessary for me to seek representations from the appellant.

RECORDS:

The following records remain at issue:

- Record 6A - September 1998 letter from the ORC to the affected party confirming the extension of the vendor's conditions for the proposal sale of the property.
- Record 7A - September 1998 letter from the affected party to the ORC confirming another extension of conditions.
- Record 8A - July 1998 letter from the ORC to the affected party referencing a small error in the conditional agreement of purchase and sale.
- Record 13A - July 1998 letter from the ORC to the affected party referencing the signing of the conditional agreement.
- Record 18A - June 1998 letter from the ORC to the affected party referencing the conditional agreement.
- Record 12B - April 1999 letter from the ORC to the affected party confirming extension of conditions.
- Record 18B - Portions of a November 1998 letter from the ORC to the affected party confirming the extension of conditions.

Record 23B - July 1998 letter from the affected party to the ORC confirming an error in the conditional agreement.

DISCUSSION:

Sections 17(1)(a), (b) and (c) 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;

For a record to qualify for exemption under any of these sections, the parties resisting disclosure (in this case, the ORC and the affected party) must satisfy each part 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 ORC in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

(Orders 36, P-363, M-29 and M-37)

Part one: Type of information

For the same reasons as outlined in Interim Order 1887-I, I find that all of the remaining records which reflect discussions between the ORC and the affected party relating to the proposed purchase of the property, contain “commercial information”, as that term is used in section 17(1). None of the remaining records contain “financial information”.

Part two: Supplied in confidence

In order to meet the second part of the test, the ORC and/or the affected party must establish that the information at issue was supplied in confidence to the ORC by the affected party. Previous orders of this Office have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis (Orders M-169 and P-1605).

The ORC submits that:

... it is implicit in commercial relations that the negotiation of terms between vendor and purchaser regarding the sale of land are intended by the parties to be confidential. As a matter of practice, such communications are treated as confidential, in part to preserve the confidentiality of information shared by the parties and in part to avoid prejudicing the parties' interests by letting other parties know what their positions are.

...

It must be noted that some of the records ... are not supplied to the ORC by [the affected party] but the records contain references to information, particularly proposed terms or bargaining positions, which had been supplied by [the affected party]. To disclose the record, would therefore disclose the confidential information supplied by [the affected party] to the ORC.

The affected party simply states that it supplied the information relating to the purchase of the property in confidence.

Although I determined in Interim Order PO-1887-I that certain purchase price figures provided to the ORC as part of the bidding process for the purchase of the property were "supplied in confidence" for the purpose of section 17(1), in my view, this finding does not apply to the records that remain at issue in this appeal, none of which contain any specific financial information relating to the bids.

As set out in my description of the remaining records in Order 1887-I, the records at issue relate either to time extensions for certain conditions of an agreement (Records 6A, 7A, 12B and 18B); the reference to a minor correction in the wording of a standard clause of an agreement (Records 8A and 23B); or details concerning meetings held to discuss an agreement (Records 13A and 18A). All of this information relates to a conditional agreement entered into between the ORC and the affected party.

The information in an agreement is typically the product of a negotiation process between two parties, and therefore the content of agreements involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 17(1) of the *Act*. Records of this nature have been the subject of a number of past orders of this Office. In general, the conclusions reached in these orders is that for such information to have been "supplied", it must be the same as that originally provided by the affected party, not information that has resulted from negotiations between the institution and the affected party. If disclosure of

a record would reveal information actually supplied by an affected party, or if disclosure would permit the drawing of accurate inferences with respect to this type of information, then past orders have also found that this information satisfies the requirements of the “supplied” portion of the second requirement of the section 17(1) exemption test (see, for example, Orders P-36, P-204, P-251, P-1105 and MO-1370).

Applying the reasoning in past orders dealing with negotiated agreements, I find that the information contained in the records at issue, which make reference to a few aspects of the agreement between the ORC and the affected party, was not “supplied” for the purposes of section 17(1) of the *Act*.

Accordingly, I find that the second requirement for exemption under section 17(1) of the *Act* has not been established. Because all three requirements must be present in order for records to qualify for exemption under sections 17(1)(a), (b) or (c), all seven remaining records, and the severed portion of the eighth record do not qualify for exemption and should be disclosed to the appellant.

FINAL ORDER:

1. I order the ORC to disclose Records 6A, 7A, 8A, 13A, 18A, 12B, 23B and the remaining portions of Record 18B to the appellant. I have attached a highlighted copy of Record 18B with the copy of this order sent to the ORC’s FOI Co-ordinator which identifies the portion of this record that should not be disclosed. Disclosure under this provision is to be made by **June 13, 2001** but not before **June 8, 2001**.
2. In order to verify compliance with the provision of this order, I reserve the right to require the ORC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ May 8, 2001