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

ORDER PO-2439

Appeal PA-030261-3

Ontario Native Affairs Secretariat

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BACKGROUND:

This appeal arises out of a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records created in the context of land claim negotiations between the Teme-Augama Anishnabai and the Temagami First Nation (the First Nation) and the governments of Ontario and Canada. These negotiations flow from outstanding obligations of the Crown under the 1850 Robinson Huron Treaty (the Treaty).

The Ontario Secretariat for Aboriginal Affairs provides the following information at its website (http://www.aboriginalaffairs.osaa.gov.on.ca/english/negotiate/approach.htm) regarding the province's approach to aboriginal land claims:

> A land claim as defined by Ontario is a formal statement submitted to the federal and/or provincial government in which an Aboriginal community most often asserts that the Crown has not lived up to its commitments or obligations with respect to Aboriginal or treaty rights pertaining to land.
>
> Most Aboriginal land claim negotiations involve the federal government, which has primary responsibility for the resolution of Aboriginal land claims. Provinces may become involved in Aboriginal land claims because of provincial involvement in the historical events giving rise to the claim and because many claims involve the assertion of rights with respect to Crown lands, natural resources and private property.

In Order PO-2277, former Assistant Commissioner Tom Mitchinson provided a useful backdrop to the current land claim negotiation process. He states:

> According to the Ontario Native Affairs Secretariat (ONAS), in 1885, following complaints by members of the [First Nation] community that a reserve had not been set apart for them as promised under the Treaty, Ontario surveyed a reserve but did not transfer lands to Canada for the purpose of establishing it. In 1943, Ontario provided one square mile of land, Bear Island in Lake Temagami, to establish a community, and this land became a reserve in 1971.
>
> In 1973, the Bear Island Foundation, an organization representing members of the [First Nation] and non-status descendants of the original Temagami Indians, placed a caution on all lands covered by the Treaty, claiming that they were not a party to the Treaty and therefore had not ceded their traditional lands. Ontario then brought an action seeking a declaration that the lands covered by the cautions were public lands and not subject to aboriginal title. After a number of hearings in lower courts, the Supreme Court of Canada issued a judgment in August 1991, finding that the Temagami Indians did not have unextinguished title to the lands claimed as their traditional territory and also that the Crown had outstanding treaty obligations owed to [the First Nation] [*Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570].
>
> In what appears to have been a process separate from the Bear Island Foundation litigation, [the First Nation], Ontario and Canada had begun negotiating issues related to the land claim in 1990, prior to the Supreme Court judgment. These

> negotiations continued after the decision was issued. In 1993, the parties concluded an agreement in principle on the settlement of the claim. However, [the First Nation] failed to ratify that agreement and the government of Ontario withdrew the offer in 1995.
>
> In 1997, [The First Nation] commenced proceedings in the Federal Court of Canada and the (then) Ontario Court (General Division) against Ontario and Canada, claiming damages for breach of contract and fiduciary duty based on the outstanding treaty obligations. Following the commencement of these proceedings, the parties agreed to resume negotiations. In 2002, [the First Nation], Ontario and Canada reached consensus on a framework agreement that would settle the land claim as it relates to Ontario. Since that time, the parties have been refining the elements of the settlement. The proceedings commenced in 1997 are being held in abeyance pending the outcome of these negotiations.

In its representations submitted in respect of this appeal, the Ministry of the Attorney General (the Ministry) states that Ontario is currently involved in 21 active land claim negotiations, 34 claims are in pre-negotiations and five claim settlements are being implemented.

The Ministry acts on behalf of the Ontario Native Affairs Secretariat (ONAS) with regard to requests for access to information under the *Act*. ONAS is the institution of record in this appeal.

NATURE OF THE APPEAL:

This appeal concerns the following request made by the requester (now the appellant) to the Ministry under the *Act*:

> All documents related to the Temagami Land Claim settlement, including, but not restricted to the following:
>
> 1. Economic studies relating to the economic impact of having the Aboriginal town site located in an area adjacent to the Town of Temagami referred to as [a named township (the township)].
>
> 2. Economic studies relating to the economic impact of having the Aboriginal town site located in an area referred to as [a named town (the town)].
>
> 3. Terms of the agreement in principle with [a named mining company] regarding the purchase of mining claims held by it that would form part of the [the township] site; in particular, the amount that would be spent to acquire these claims.

4. Copies of engineering studies conducted on the [township] site to determine its suitability as an Aboriginal town site.

5. Copies of engineering studies conducted on [the town] site to determine its suitability as an Aboriginal town site.

The appellant filed a "deemed refusal" appeal when the Ministry exceeded the time limit provided by the *Act* for issuing a decision in response to an access request. An appeal was opened, which the appellant subsequently withdrew.

The appellant then wrote to this office stating that while he was no longer pursuing the deemed refusal issue he was still interested in the information initially requested and that he wished "to appeal the decision of a named Native Affairs Liaison coordinator not to release information requested by [him] under the *Act*."

The Ministry confirmed that no decision had been issued with respect to the information requested by the appellant. Nevertheless, the appeal proceeded to mediation after which the Ministry agreed to open a new file and use as the request an e-mail written to the ONAS Liaison which the appellant confirmed is essentially identical to his original request.

The Ministry then issued a decision letter granting access to one record in its entirety (responsive to items 4 and 5 of the appellant's request) and denying access in whole to six records (responsive to items 1, 3, 4 and 5 of the appellant's request). With respect to its decision to deny access to the six records, the Ministry cited sections 13 (advice to government), 15(a) and (b) (relations with other governments), 17(1)(a), (b) and (c) (third party information) and 18(1)(d) (economic and other interests of Ontario). With respect to item 2 of the appellant's request, the Ministry advised that there are no responsive records.

The appellant advised this office that his appeal concerns the Ministry's decision to deny him access to the aforementioned information. However, the appellant is not pursuing the issue of whether records exist with regard to item 2 of his request.

During the mediation stage the mediator had discussions with the Ministry and the appellant. The Ministry also provided the appellant with an index of records.

As no further mediation was possible, the file was moved to inquiry.

I first issued a Notice of Inquiry to the Ministry and five affected parties. I sought the Ministry's representations on the application of sections 13, 15(a) and (b), 17(1) and 18(1)(d) to the records at issue. I sought representations from the five affected parties on the application of section 17(1) only. In response, I received representations from the Ministry on the application of sections 13, 15(a), 17(1) and 18(1)(d) and from three of the five affected parties on the application of section 17(1). The Ministry indicated that it was no longer relying on section 15(b), and so the application of this exemption is no longer at issue in this appeal.

I shared the Ministry's non-confidential representations with the appellant along with the complete representations of the three affected parties and sought and received representations from the appellant on sections 13, 15(a) and (b), 17(1) and 18(1)(d). The appellant also raised, for the first time, and submitted representations on the application of section 23 (public interest override) to the records at issue. In light of the appellant's raising of section 23 I decided to seek representations from the Ministry on this issue.

The Ministry submitted representations on the application of section 23. With the Ministry's consent I provided a complete copy of its representations to the appellant and invited the appellant to address the Ministry's representations on section 23. The appellant submitted reply representations on the application of section 23.

As a result of the representations received from the appellant and the Ministry, I then decided to hear from the Government of Canada (Indian and Northern Affairs Canada) (INAC) on the application of section 15(a) and section 23 to the records at issue. INAC submitted representations on these issues, which were shared with the appellant in their entirety. I invited the appellant to respond to INAC's submissions, which he did.

RECORDS:

The following six records have been withheld in full by the Ministry and remain at issue:

Record # - Page #	**Description**	**Sections of the *Act***
Record 1 (pp. 1-0 to 1-66)	"Final Report" on "Economic Development for the Temagami Claim Area", dated June 6, 2001, prepared for the Ministry by a consulting firm	13, 15(a), 18(1)(d)
Record 2 (pp. 2-1 to 2-4)	Letter of intent prepared by ONAS to a mining company, dated January 27, 2003, regarding the acquisition of mining interests for the township	15(a), 17(1)(a), (b) and (c), 18(1)(d)
Record 4 (pp. 4-1 to 4-11)	"Addendum No. 2 to Temagami South and Temagami North Municipal Infrastructure Study", dated May 27, 2003, prepared by an engineering firm for the First Nation	13, 15(a), 18(1)(d)
Record 5 (pp. 5-1 to 5-18)	"Municipal Infrastructure Study for the Communities of Temagami South and Temagami North - Addendum No. 1", dated October 2001, prepared by an engineering consulting firm for ONAS	13, 15(a), 18(1)(d)
Record 6 (pp. 6-0 to 6-7)	Report – "Site Location Study Status Update", dated April 15, 1998, prepared for the First Nation by an engineering consulting firm	13, 15(a), 17(1)(a), (b), (c), 18(1)(d)
Record 7 (pp. 7-0 to 7-8)	"Site Location Study" prepared by an engineering consulting firm for the First Nation	13, 15(a), 17(1)(a), (b), (c), 18(1)(d)

DISCUSSION:

As indicated above, the Ministry has raised the application of the section 15(a) discretionary exemption to the all of the records at issue. I will, therefore, first explore the application of this exemption to these records.

RELATIONS WITH OTHER GOVERNMENTS

General principles

Section 15(a) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships [Order PO-1927-I; see also Order 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.)].

For this exemption 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)* (1998), 41 O.R. (3d) 464 (C.A.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

Section 15(a): prejudice to intergovernmental relations

In order for a record to qualify for exemption under section 15(a), an institution must establish that:

- the records relate to intergovernmental relations, that is relations between an institution and another government or its agencies; and

- disclosure of the records could reasonably be expected to prejudice the conduct of intergovernmental relations.

[Reconsideration Order R-970003]

Part one: records relate to intergovernmental relations

Ministry's representations

The Ministry has provided extensive representations that address both its view regarding the confidentiality of the land claims negotiation process and the implications that disclosure would have on intergovernmental relations with regard to part one of the test under section 15(a).

The Ministry states that the process of negotiating a land claim settlement is "complex and sensitive" and that for this reason it is the "expectation" of the parties engaged in this process that "information related to positions in the negotiations, or the development of those positions, will remain confidential to that party." The Ministry states further that "most framework negotiation agreements include a negotiation process clause" that reflects the parties' agreement to conduct the negotiations on a "confidential, privileged and without prejudice basis." The Ministry also submits that a party's failure to respect the confidentiality of the process would be considered by the other parties to be "a serious breach, which would prejudice the conduct of the negotiations."

Pointing to several previous orders issued by this office (Orders P-630, P-730 and P-948), the Ministry submits that Canada has "consistently stated the disclosure of records revealing the substance of confidential land claim negotiations would be considered a breach of the confidentiality of negotiations and would have a chilling effect on the negotiation process." The Ministry states further that in order to ensure that the parties freely share information regarding their respective interests, the confidentiality of land claim negotiations is necessary. In order for Ontario to engage in this "interest-based" negotiation process, the Ministry submits that the parties must be confident that the negotiations will be conducted on a confidential basis.

With respect to the application of section 15(a) to all of the records at issue, the Ministry submits that the negotiation and resolution of land claims in Ontario address "complex and detailed matters" and their resolution is of "primary importance to Ontario, Canada and First Nations". The Ministry states that the resolution of these claims can involve "significant expenditures of government moneys", "significant constitutional issues" and the "transfer of Crown lands to First Nations" and "can affect local economies, municipal governments, a variety of third party interests, and social harmony." For these reasons, the Ministry submits that the "resolution of land claims in Ontario are amongst the highest order of government business and intergovernmental relations."

Referring to several orders (Orders 210, P-630, P-908, P-949, P-961 and R-970003), the Ministry submits that this office "has held that relations between Canada and Ontario which are reflected in records relating to a land claim settlement are 'intergovernmental' in nature for the purposes of section 15(a)."

The Ministry acknowledges that with respect to these particular land claim negotiations, and the records relating to them, Canada has not always been present. However, with reference to Order R-970003, the Ministry states that "Canada does not have to be present at all times throughout the land claim negotiations in order for those negotiations, and records relating to those negotiations, to be considered intergovernmental."

With specific reference to the records at issue in this appeal the Ministry states:

- Record 1 was created in the context of tripartite land claim negotiations between Ontario, Canada and the First Nation and contains "the opinions and analyses of a consultant retained by the Ministry to provide advice regarding the current economic characteristics of the Temagami region and the potential for the area." The Ministry states that this work was undertaken for the purpose of "obtaining information regarding the economic development component of the land claim settlement." The Ministry states that at the time the record was created Canada was involved in the negotiations.

- Record 5 was similarly created in the context of the above mentioned tripartite land claim negotiations. The Ministry states that it contains "the opinions and analyses of a consultant retained by the Ministry to provide advice regarding the suitability of a candidate community in terms of municipal infrastructure." The Ministry states that this record was used to "assist with the selection of a new community site" and at the time the record was created Canada was involved in the negotiations.

- Record 2 is "a letter of intent from ONAS to a [mining company] regarding the purchase of mining interests held by the [mining company]." The Ministry states that "Canada was involved in the negotiations at the time the record was created, although this document has not been provided to Canada." The Ministry states that the record relates to a "confidential business arrangement regarding the acquisition of mining interests in Strathcona township (and other areas) for the purpose of making Crown land available to be transferred to the [First Nation]."

- Records 4, 6 and 7 were commissioned by the First Nation and provided by it to Ontario in confidence. The Ministry states that all three records disclose information regarding the suitability of a site location for the First Nation. The Ministry states that "Canada was involved in the negotiations at the time record 4 was created." The Ministry states that Canada "was not involved in the negotiations at the time that [records 6 and 7] were created…" However, the Ministry states that "it was clear" that the Ministry was "actively seeking the involvement of Canada in the negotiation" at the time these records were created.

The Ministry concludes that all of the records at issue were "created in relation to tripartite land claim negotiations among the Temagami Aboriginal Community, Ontario and Canada" and that they "relate to the conduct of intergovernmental relations."

INAC's representations

INAC states that "Canada is a party to the land claim negotiations between Ontario and the […] First Nation." INAC submits that Canada's role in the negotiations is to "address issues related to the creation of reserve land and the issuance of replacement interests under the *Indian Act* to accommodate continued third party use of settlement lands that are to be set aside as reserve lands."

INAC acknowledges that it has "never seen records 1 and 2". INAC submits that records 4, 5, 6 and 7 were shared with its "federal negotiator" by provincial officials and representatives of the First Nation, "in the context of the land claim negotiations, on the condition that the documents remain confidential to the negotiation table."

INAC states that these records were shared with Canada "to advance discussions concerning the options under review for the location of a proposed future mainland community site for the Temagami First Nation." INAC submits that Canada "has an interest in the selection of a mainland community site because the First Nation will seek federal funding for the construction and maintenance of community infrastructure." INAC states that Canada is interested in a community site which is "acceptable to the First Nation, cost effective to develop, provides future economic opportunities to the First Nation and involves a minimum degree of disruption to existing third party interests."

Appellant's representations

The appellant states that section 15(a) "clearly does not apply to records 4, 6 and 7 as they were not prepared by, or for, a government department."

Requirement 1 under section 15(a): Records relate to intergovernmental relations

For the reasons that follow, and based on my careful review of the records and the parties' representations, I am satisfied that all six records at issue relate to "intergovernmental relations", under requirement 1. I concur with the Ministry that this office has consistently found that relations between Canada and Ontario which are reflected in records relating to a land claim settlement are "intergovernmental" in nature for the purposes of section 15(a) [see Orders 210, P-630, P-908, P-949, P-961 and R-970003]. I also agree that Canada does not have to be present at all times during the course of land claim negotiations in order for those negotiations and the records relating to them to be considered intergovernmental [see Order R-970003]. The question under requirement 1 is whether the records "relate to" intergovernmental relations.

In this case, I am satisfied that Canada (represented by INAC) was, at all relevant times, a party to land claim negotiations with Ontario and the First Nation. While Canada may not always participate actively in these negotiations, as stated above, this is not a requirement in order for part one of section 15(a) to be satisfied. I accept that Canada has an important role in these negotiations, including the consideration of issues relating to the establishment of reserve land and the discussion of options under review for the location of a future mainland community site for the First Nation. I also accept INAC's explanation that Canada is interested in these issues

because the First Nation will seek federal funding for the construction and maintenance of a community infrastructure for any site chosen.

With regard to the specific records at issue, I acknowledge that INAC is familiar with records 4, 5, 6 and 7 but has never seen records 1 and 2.

Records 4, 5, 6 and 7 contain information regarding potential community site options for the First Nation. In light of Canada's role in reviewing and discussing site options, I am satisfied that these records are sufficiently connected to relations between Ontario and Canada to satisfy part one of the test under section 15(a).

Record 1 consists of a report that sets out a consulting firm's views regarding the potential for economic development in the Temagami area. The report was submitted to members of a committee comprised of representatives of both ONAS and the First Nation for use during the land claim negotiation process. Record 2 consists of a letter of intent prepared by ONAS for a mining company regarding the proposed acquisition of mining interests for a potential community site location under consideration. In my view, while records 1 and 2 may not be familiar to INAC, their contents are sufficiently related to the tripartite land claim negotiations between Ontario, Canada and the First Nation, that I find that they relate to intergovernmental relations within the meaning of part one of the test under section 15(a).

Requirement two under section 15(a): Reasonable expectation of prejudice as a result of disclosure

Ministry's representations

The Ministry states that disclosure of the information at issue will "jeopardize the integrity of Ontario's negotiations with Canada and the [First Nation]" with respect to the Temagami land claim negotiations in addition to jeopardizing the integrity of other current and future land claim negotiations. The Ministry submits that "compromising the integrity of these negotiations with Canada" will give rise to "a reasonable expectation of prejudice to the conduct of intergovernmental relations."

The basis for the Ministry's position is that the parties involved in a land claim negotiation participate on the "assurance that the negotiations will remain confidential." The Ministry states that disclosure of the records at issue would be considered by both the First Nation and Canada as a "breach of the confidentiality of the negotiations, and will likely lead to less frank disclosure and co-operation in the negotiation of this land claim." In effect, according to the Ministry, disclosure would have a "chilling effect" on the "open flow and current extent of information disclosure", serving to "compromise" Ontario's ability to successfully conclude these negotiations.

Of broader import, the Ministry suggests that disclosure in this case would "likely create a serious chilling effect upon all the other land claim negotiations in Ontario." The Ministry states that First Nation communities may be concerned about submitting future land claims for negotiation if confidentiality cannot be assured. As well, the Ministry suggests that the preferred

method of resolving land claim disputes through negotiation, rather than litigation, "will be lost." The Ministry states that if negotiation is no longer a viable option, the parties will turn to litigation, which it views as a less desirable form of dispute resolution due to the "damaging effects of adversarial processes to intergovernmental relations." The Ministry states that negotiation allows the parties to adopt "more co-operative, creative and flexible approaches" to dispute resolution and achieve "more balanced and satisfying" outcomes. The Ministry submits that negotiation "can also be less costly for governments, and ultimately, for taxpayers."

In evaluating the legislative intent of the drafters of section 15(a), the Ministry submits that they would have recognized the "desirability of [achieving] negotiated solutions to intergovernmental disputes, as well as the importance of protecting the integrity, trust and confidentiality that are essential for open communications in intergovernmental relations…"

The Ministry submits that its "expectation of prejudice to intergovernmental relations is reasonable." In addressing this point the Ministry references the following passage from former Assistant Commissioner Tom Mitchinson's decision in Order R-970003:

> 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 bulk of the records at issue could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada, including the tripartite discussions between Ontario, Canada and the First Nation, as well as relations involving future land claim negotiations.

The Ministry states that in this case, as in Order R-970003, "ongoing negotiations will be required to reach a final agreement and then will be required to implement the agreement that is reached."

The Ministry states further that "[t]hese particular negotiations have a lengthy history that includes litigation." The Ministry submits that the negotiations are "sensitive and complex" and are at a "critical stage (the resolution of several difficult outstanding matters and the drafting of the Final Agreement)." The Ministry states that disclosure of the records at issue "could reasonably be expected to compromise the integrity of those negotiations and compromise the integrity of information sharing within the negotiations." The Ministry suggests that if the First Nation and Canada can "no longer be confident that the information shared among the parties is confidential […], they can reasonably be expected to be reluctant to share such information in the future." As mentioned above, the Ministry refers to this prospect as a "chilling effect" and believes that it would prejudice the ability of Ontario and Canada to resolve this land claim through negotiation as opposed to litigation. The Ministry concludes that disclosure of these records "can reasonably be expected to prejudice the intergovernmental relations between Ontario and Canada."

With respect to evidence of prejudice in regard to the particular records at issue, the Ministry states:

- Records 1 and 5 "reflect work that was undertaken to develop certain elements of the land claim settlement." The Ministry states that disclosure of this information "can reasonably be expected to prejudice the conduct of the ongoing negotiations with Canada and the [First Nation]" since disclosure will be viewed as "a breach of confidentiality" and will "likely lead to less frank disclosure and co-operation in the negotiation of this land claim" and in future land claims.

- Record 2 is a letter of intent from ONAS to a mining company regarding the proposed purchase of mining interests located in the township, a potential site for the First Nation. The Ministry states that the arrangement was entered into when the township was being considered as a potential site for the First Nation community. The Ministry states that its lead negotiator assured the mining company that "discussions related to the land claim negotiation would be kept confidential." The Ministry states that the arrangement was terminated when it was determined that the township would not be the new community site. The Ministry states that if this record is disclosed, Ontario will "no longer be able to assure third parties that its dealings with them, in the context of a land claim negotiation, will be kept confidential." The Ministry states that this would "compromise its ability to effectively deal with third party interests", impacting negatively on its ability to negotiate a resolution of this land claim. The Ministry again submits that disclosure would have a "chilling effect" on future land claim negotiations.

- Records 4, 6 and 7 are consultant reports that were commissioned by the First Nation to determine the suitability of a site location. The Ministry states that disclosure of these records will be seen as "a breach of the confidentiality of the negotiations by the [First Nation] and Canada, and will likely lead to less frank disclosure and co-operation in the negotiation of this land claim. In the Ministry's view, disclosure will create a "perception that land claims cannot be conducted in confidence and this will likely "create a serious chilling effect upon all other land claims in Ontario." The Ministry concludes that disclosure of these records "could reasonably be expected to prejudice Ontario in its conduct of intergovernmental relations" in respect of this and other land claim negotiations.

In support of its representations, the Ministry has included the affidavit of "Ontario's Chief Negotiator in the Temagami Negotiations", in which he states:

> All of the records at issue were created or provided to Ontario in the context of confidential land claim negotiations. I believe, based on my experience in land claims, that the disclosure of any of the records at issue, and the resulting perception that land claims cannot be conducted in confidence, will likely create a serious chilling effect upon all the other land claim negotiations in Ontario and lead to less frank disclosure and cooperation in the negotiation of those land claims. Therefore, the disclosure of any of the records at issue in this inquiry could reasonably be expected to prejudice Ontario in its conduct of intergovernmental relations with respect to other land claim negotiations currently underway in Ontario.

INAC's representations

INAC states:

> Land claim negotiations are both challenging and tenuous. In successful negotiations the parties spend a lot of time establishing and maintaining productive and respectful working relationships. Trust is an essential element of respectful working relationships. With trust comes the willingness to engage in frank and open discussion and the sharing of documentation that reveals complex issues and the interests of the parties. The parties trust each another [sic] to respect and protect the confidentiality of negotiations. If the confidentiality of information sharing is compromised there will be an overall negative impact on land claim negotiations and intergovernmental relations. There will be decreased willingness to share documentation, less trust and increased risk that negotiations will fail.

It is INAC's view that

> … disclosure of the records, which were shared in the context of land claim negotiations and which were received as confidential to the negotiations, could reasonably be expected to prejudice relations between Canada and Ontario and the First Nation, undermine the confidentiality of the negotiation process, compromise the ability of the parties to successfully conclude negotiations, and negatively impact other land claim negotiations.

Appellant's representations

The appellant submits that disclosing the records at issue "will not affect present or future land claim negotiations." With apparent reference to record 2, the appellant states that "[i]f fair market value was offered for the mining claims then documentation supporting that would provide confidence in the government's performance." With possible reference to record 1, the appellant states that "[t]he economic study would let local people in on future plans for the area and remove the danger that a few parties will have an unfair advantage in the area's future development." With apparent reference to records 4, 5, 6 and 7, the appellant states that "[e]ngineering studies provide hard data about the suitability of a site for development and should be available to the general population with an interest in the area."

With regard to the evidence provided by Ontario's Chief Negotiator, the appellant submits that the "recurring theme" in his affidavit is that disclosure of the information at issue "will lead to a perceived (not actual) breach of confidentiality and jeopardize future negotiations." The appellant states that the information he is seeking "would normally be acquired independently and supplied by the party with whom one is negotiating." The appellant submits that "[a]t worst, releasing the information would require ONAS to gather such data independently in the future."

Responding specifically to INAC's representations, the appellant states that the information contained in records 4, 6 and 7 "is not information that could only have been obtained through

the [First Nation]." The appellant submits that these studies "could have been prepared for any other interested party" but "the decision was made to share the documents among the negotiating team." In the appellant's view, this decision "should not be the basis for declining to release the records to the public."

The appellant submits that "[the township] is no longer under consideration as a community site" and therefore releasing the information "will not compromise the ability of the parties to successfully conclude negotiations." The appellant emphasizes that he is "not requesting release of particulars of the negotiations, but only of documents used in the process."

The appellant goes on to say that section 15(a) "clearly does not apply to records 4, 6 and 7 as they were not prepared by, or for, a government department." The appellant submits that disclosing information that "was not prepared by another government department but which has been made available to them at the negotiating table will not prejudice intergovernmental affairs."

Analysis and findings under requirement two of section 15(a)

Having carefully considered the parties representations and reviewed the records at issue, I am satisfied that disclosure of these records could reasonably be expected to prejudice the conduct of intergovernmental relations, namely ongoing and future land claim negotiations involving Ontario and Canada.

I acknowledge the appellant's desire for transparency and accountability in regard to the negotiation process, in order to gauge government performance and inform members of the public who have an interest in the status of this negotiation. I also note the appellant's point that the site that is the subject of these records is no longer under consideration. However, in my view, the evidence before me establishes that the parties involved in these land claim negotiations entered them with the understanding that the information shared and the discussions themselves would be held in confidence.

I concur with the Ministry that negotiation is the preferred method of dispute resolution when it comes to land claim matters. In the circumstances of this appeal, I have concluded that a reasonable expectation of prejudice to the negotiations is sufficient to support a reasonable expectation of prejudice to intergovernmental relations. In my view, these are highly sensitive, complex and at times emotionally charged matters involving a multitude of interests and negotiation allows the parties to adopt a collaborative, creative and cost effective approach to resolving these disputes, which encourages outcomes that achieve the parties' needs and interests. I agree that a key factor in establishing a negotiation atmosphere that is conducive to settlement is one in which the parties believe in the process and feel comfortable working with their negotiating partners. I concur with INAC that trust is an essential ingredient in establishing and maintaining productive and respectful working relationships. INAC put it well: with trust comes the willingness to engage in frank and open discussion and the sharing of documentation that reveals complex issues and the parties' interests. In my view, if the expectation of confidentiality is dashed, along with goes the trust that is crucial to productive negotiations.

Both the Ministry and INAC have provided me with detailed and convincing evidence that disclosure of the records could reasonably be expected to lead to an erosion of trust and a decreased willingness to share documentation, which would seriously compromise the willingness of the parties to participate in land claim negotiations now and in the future.

It may be the case that the township is no longer under consideration as a site location. However, this is not determinative in assessing whether or not disclosure could reasonably be expected to prejudice the conduct of intergovernmental relations. In my view, by ordering disclosure, a clear message would be sent to participants in this negotiation and to those who may participate in future land claim negotiations that confidentiality will not be honoured. I am satisfied that this could reasonably be expected to undermine these ongoing negotiations and the negotiation of other land claims.

With regard to the records themselves, in my view, it is irrelevant who prepared them and how they got to the negotiating table. I have already found above that they relate to intergovernmental relations under my discussion of requirement one of the test under section 15(a). Based on the foregoing analysis, I also find that disclosure of these records could reasonably be expected to prejudice the conduct of intergovernmental relations between Ontario and Canada. Therefore, I am satisfied that requirement two of the test under section 15(a) has been met.

Since both requirements under section 15(a) are met, I find that it applies to exempt the records at issue in this appeal from disclosure.

Having found that section 15(a) applies to exempt all of the information at issue in this appeal, I do not need to consider the application of sections 13, 17(1) and 18(1)(d).

EXERCISE OF DISCRETION

As stated above, the section 15(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example:

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

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

In this case, the Ministry submits that it considered the "highly sensitive and confidential nature of the records in question" in deciding not to disclose the information at issue to the appellant.

The Ministry states that it also considered:

- the major purposes and objectives of the *Act*

- the major purposes and objectives of section 15 of the *Act*, as well as various factors relevant to the discretionary exemption
- the benefits of disclosure of the records
- the importance of the records to the requester and
- the possibility of severing the records

The appellant did not make representations that specifically addressed the Ministry's exercise of discretion in this case.

I am satisfied that the Ministry properly exercised its discretion in applying the section 15(a) exemption to the records at issue in this appeal. I find that the Ministry considered relevant factors in deciding not to disclose the information at issue to the appellant, including weighing factors for and against disclosure as set out above. I am satisfied that the Ministry did not err in the exercise of its discretion by taking into account irrelevant considerations or failing to take into account relevant considerations.

PUBLIC INTEREST IN DISCLOSURE

As stated above, the appellant takes the position that there is a compelling public interest in the disclosure of the records at issue, and that section 23 of the *Act* applies to override the application of the section 15(a) exemption. Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 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 the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)]. In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.
>
> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been

> requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

In addition, the existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

As alluded to in his representations above under part two of the test under section 15(a), the appellant takes the position that there is a compelling public interest in the disclosure of these records in order to promote transparency and accountability in regard to the negotiation of this particular land claim. Referring vaguely to unnamed "access to information guidelines", the appellant states that there is "a compelling public interest in openness, to ensure the government is fully accountable for its goals and that its performance can be measured against these goals."

The Ministry states in it representations that while the land claim negotiation process may "rouse strong interest and attention" the information at issue in the records "does not". The Ministry states further that the information at issue "does not serve the purpose of informing the citizenry about the activities of the government." In response to the appellant's statement that there is a compelling public interest in openness, the Ministry submits that the appellant does "not indicate why there is a compelling public interest in disclosure of the particular information in the records at issue."

The Ministry states that there is a "strong public interest" in maintaining the confidentiality of the records at issue as confidentiality is both "expected by all parties involved in the negotiation" and is "essential for the effective resolution of this and other land claims through negotiations."

The Ministry states that Ontario engages in "an extensive public consultation process" in order to ensure that "the public is kept informed about land claim negotiations." The Ministry submits that "[t]here was, and continues to be, such a consultation process in the Temagami negotiations." In support of this statement the Ministry submits that there are "four advisory committees to address various interests and local issues". In addition, the Ministry states that "newsletters, fact sheets and information kits have been distributed to approximately 1300 interested parties" and "four open houses [have been held] since November 2000 to provide the public with an opportunity to discuss the negotiations." The Ministry adds that in the summer of 2004 there were "drop in sessions held by the negotiators" to answer questions related to the land claim. The Ministry submits that "the public consultation process" provides the "appropriate balance between the information that is provided to the public and the level of confidentiality required to ensure the successful completion of negotiations."

INAC submits that it sees "no compelling public interest in the disclosure of the records at issue." INAC also argues that "any public interest in the disclosure of the records at issue is clearly outweighed by the purpose of section 15(a) which is to allow governments to decline to

disclose information which could prejudice and undermine its ability to conduct important business with other levels of government."

As well, INAC states that the parties involved in this land claim negotiation "engaged in open houses and stakeholder meetings intended to make available a significant amount of the information contained in records 4, 5, 6 and 7." However, this is contradicted by the appellant, who submits in his reply representations that while this may have been the intention, "the fact is the information I am seeking under this appeal was requested at two public meetings […] and the requests were declined." In my view, the evidence on this point is inconclusive.

The appellant also asserts that "[the township] is no longer under consideration as a community site" and therefore releasing the information "will not compromise the ability of the parties to successfully conclude negotiations."

In my view, the appellant's representations focus primarily on two reasons for disclosure: the achievement of government openness, transparency and accountability through disclosure and the assertion that the site that is the focus of the records is no longer under consideration and accordingly its release will not affect the current land claim negotiations.

I acknowledge the appellant's passionate appeal for access to the information at issue.

Government openness and transparency are key values underlying the access to information provisions of the *Act* [see *Public Government for Private People, The Report of the Commission on Freedom of Information and Individual Privacy (the Williams Commission)*]. In addition, it would appear that neither the Ministry nor INAC dispute the appellant's assertion that the site under consideration in the records is no longer an option.

Nevertheless, in the circumstances of this case and in view of the contents of the records, I am not satisfied that there exists a compelling public interest in the disclosure of *these* records. Of the six records at issue, records 2, 4 and 5 address the site location that is no longer under consideration (i.e. the township) while records 1, 6 and 7 can be described as generic site location studies and reports. In my view, if the township is no longer being considered then, in my view, whatever public interest might have existed in the disclosure of records 2, 4 and 5 has been diminished. In my view, the value of these records and records 1, 6 and 7 flows from their connection to the fabric and evolution of this ongoing land claim negotiation and the parties' expectations regarding the confidential status of such documentation in this and other land claim negotiations, and the public interest therefore favours non-disclosure.

I am also satisfied that the Ontario government has engaged in an extensive public consultation process through various committees, publications, open houses and drop in sessions with a view to keeping interested members of the public informed about the status of this particular land claim process. While I agree that public accountability is critical, I agree with the Ministry and INAC that it must be balanced against the need to retain confidentiality in the negotiation of this and other land claims in order to give the land claim negotiation process the best chance for success. In the circumstances, I am satisfied that any public interest in disclosure is satisfied by the Ontario government's efforts in that regard.

Accordingly, I find that a compelling public interest in the disclosure of the records at issue is not established, and section 23 does not apply.

ORDER:

I uphold the Ministry's decision not to disclose the records at issue in this appeal.

Original signed by: December 23, 2005
Bernard Morrow
Adjudicator