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

ORDER PO-2654

Appeal PA06-244-2

Ministry of Public Infrastructure Renewal

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NATURE OF THE APPEAL:

The Ministry of Public Infrastructure Renewal (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> Copies of any audits received from the Ontario First Nations Limited Partnership for 2002-2003, 2003-2004, 2004-2005, 2005-2006.

In response to the request, the Ministry issued a fee estimate decision, and also informed the requester that a number of identified exemptions in the *Act* may apply to information in the records.

Following the resolution of an appeal of the Ministry's fee estimate decision, and after notifying a third party whose interests may be affected by the disclosure of the records (the affected party) and receiving its representations, the Ministry issued a final access decision in which it applied the exemption found in section 17(1) (third party information) of the *Act* to deny access to the audits in their entirety.

The requester, now the appellant, appealed the Ministry's access decision, and this office opened Appeal PA06-244-2, the present appeal.

No issues were resolved during mediation, and this appeal was transferred to the inquiry stage of the process. I decided to send a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry and the affected party, initially.

I also identified for the parties that, in this appeal, the request is for copies of audits received by the Ministry from the Ontario First Nations Limited Partnership, and that similar records were at issue in an earlier appeal, which resulted in Order PO-2328. In that Order, former Assistant Commissioner Tom Mitchinson found that the exemption in section 17(1) did not apply to the records at issue. Those records included audits received by the Ministry of the Attorney General from the Ontario First Nations Limited Partnership. An application for judicial review of Order PO-2328, brought by the Ontario First Nations Limited Partnership, was dismissed by the Ontario Divisional Court on February 16, 2006 (*Ontario First Nations Ltd. Partnership v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 1103, Tor. Doc. 571/04). I invited the parties to address the impact of Order PO-2328 and the subsequent judicial review decision on the records at issue in this appeal.

Both the Ministry and the affected party provided representations in support of their position that section 17(1) applies to the records. In the circumstances, I have decided it is not necessary to hear from the appellant before issuing this order.

RECORDS:

The records at issue are the Ontario First Nations Limited Partnership audited financial statements for the years ending March 31, 2003, March 31, 2004, March 31, 2005 and March 31, 2006.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry and the affected party take the position that the exemptions at sections 17(1)(a), (b) and (c) apply to the records at issue. Those sections state:

> 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;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

The purpose of section 17(1) is set out in the legislative history of the *Act* found in the *Williams Commission Report*. That Report discusses at length the sound policy objectives for imposing a three-part test for this exemption, including a harms test: Commercial and business information should be made available to the public in order to ensure that government is effective, even-handed and accountable in its treatment of similarly situated businesses, except to the extent that overriding concerns can be demonstrated for keeping the information confidential:

> It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequences to the firms. Exemption of all business related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory regimes, to assemble information for planning

> purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.... The ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity....
>
> Two further propositions are broadly accepted as imposing limits on the general presumption in favour of public access. The first is that disclosure should not extend to what might be referred to as the informational assets of a business... The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information.
>
> ... [T]he difficulty is one of identifying the kind of information that constitute a firm's informational assets... Accordingly, we believe that the exemption should refer broadly to commercial information submitted by a business to the government, but should limit the exemption to information which could, if disclosed, reasonably be expected to significantly prejudice the competitive position of the firm in question....
>
> If ... an exemption were to be drafted so as to protect "any information supplied on a confidential basis", existing patterns of secrecy might be preserved on the basis of tacit or express understanding that the government would treat the information as confidential...

For section 17(1) to apply, the institution and/or the third 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 institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The affected party and the Ministry submit that the records contain financial information. That term has been defined in prior orders as follows:

> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I adopt this definition for the purpose of this appeal.

The affected party points out that the requested records consist exclusively of its audited financial statements, and contain detailed information about its assets, revenue and expenses, as well as information about various distributions made by it. The Ministry also takes the position that the records, by their nature, contain financial information, as defined in previous orders. In addition, the Ministry refers to Order PO-2328, upheld by the Divisional Court (*cited above*), which stated that audit reports "by [their] very nature, would include 'financial information' for the purpose of part 1 of the section 17(1) test."

From my review of the records and the representations of the parties, I find that the records contain financial information, as the information in them relates to money and its use or distribution. Accordingly, I find that the records meet the requirements for part 1 of the test for the application of section 17(1).

Part 2: supplied in confidence

General

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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 was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

Representations

The affected party and the Ministry submit that the information at issue was supplied in confidence by the affected party to the Ministry.

In support of the position that the information was supplied to the Ministry, both the Ministry and the affected party refer to Article 4.2.3 of the Revenue Agreement (the Agreement), which requires the affected party to deliver to the Province its audited financial statements.

Regarding the issue of whether the information was supplied to the Ministry "in confidence", both the Ministry and the affected party refer to section 12 of the agreement. The Ministry's representations state:

> In order to satisfy the "in confidence" component of part two, it must be established that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. [Order PO-2020]
>
> Article 12.1.2 of the Agreement notes:
>
> > "...Accordingly, except as may be required by applicable law, all such confidential information provided by any party hereto pursuant to or in connection with this Agreement shall be kept confidential by the parties and shall only be made available to such of a party's employees, advisors and consultants as are required to have access to the same in order for the recipient to adequately use such information in accordance with this Agreement."

Article 12.1.4 of the Agreement reads:

> "Without limitation, [the parties to the Agreement] agree that the reports under Article 4 shall, except as may be required by applicable law, be kept confidential by them and not be used by [Ontario Lottery and Gaming Corporation (the OLGC)] or the Province for any purpose other than in accordance with the Agreement."

In Order PO-2328, the IPC found that in accordance with the above noted clauses, the information was supplied to the province "with the express and reasonably held expectation that it would be treated confidentially, pursuant to Article 12 of the Agreement".

The affected party also provides representations in which it takes the position that the records were supplied "in confidence", and provides affidavit evidence in support of its position. The affected party's representations also refer to Article 12 of the Agreement, and state that the affected party considered this information to be confidential, treated it as such, and expected it to remain confidential.

Findings

In Order PO-2328, former Assistant Commissioner Mitchinson found that the audit reports in that appeal were supplied to the Ministry in confidence, although he also acknowledged that Article 12 specifically recognizes that disclosure obligations may exist by law, which would include disclosure under the *Act*.

In the circumstances of this appeal, I am satisfied that the records provided by the affected party to the Ministry pursuant to the requirements of the Agreement were "supplied". As far as the "in confidence" component of part 2 is concerned, the information contained in the records was supplied to the province pursuant to Article 12 of the Agreement. Although both Article 12.1.2 and Article 12.1.4 of the agreement specifically refer to the confidentiality of the records supplied by the affected party, both also specifically recognize that disclosure obligations may exist by law, which would include disclosure under the *Act*. The parties to the agreement accordingly recognized that certain records may not retain their confidentiality, and in my view this would affect the confidentiality expectations of the parties. However, given my decision under the third part of the three part test, below, it is not necessary for me to determine whether or not the records were supplied to the Ministry "in confidence".

Part Three: Harms

Introduction

To meet this part of the test, the institution and/or the affected party 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.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus. [Order PO-2020]

The Ministry provided representations in support of its position that the records qualify for exemption under section 17(1)(a) and (b). The affected party's representations focus on the harms found in section 17(1)(c). I will review each of these sections in turn to determine whether the harms found in them apply in the circumstances of this appeal.

Section 17(1)(a)

Concerning section 17(1)(a), the Ministry takes the position that disclosure of the records could reasonably be expected to interfere significantly with the contractual or other negotiations of the affected party. The Ministry states:

> On March 29, 2006, the Ontario Premier signed an agreement-in-principle with [the affected party] that sets out a partnership for sharing the economic benefits of gaming with First Nations. The negotiations for a gaming revenue agreement are currently ongoing.
>
> In the current Agreement, as outlined above, there are reporting and accountability requirements for [the affected party] to the Ministry. It is reasonable to assume, as with most government agreements, that there will be some form of accountability and reporting provision in the new gaming revenue agreement, however it is as yet unclear as to what the requirements will be. There is a possibility that release of these records will affect the negotiating position of [the affected party] in terms of what they agree to report to the Ministry.

The Ministry also provides additional representations in response to the invitation to address the possible impact of Order PO-2328, and the subsequent judicial review decision, on the records and issues in this appeal. Those representations also appear to go to the issue of the possible harm in section 17(1)(a). The Ministry states:

> It is submitted that the current appeal can be differentiated from the records and issues in Order PO-2328 and the subsequent judicial review. At the time of Order PO-2328, as well as the subsequent judicial review, an agreement-in-principle to negotiate a gaming revenue agreement between the Ministry and [the affected party] did not exist. …

The Ministry then states that the agreement-in-principle was entered into after the judicial review of Order PO-2328 was decided and that, as a result, disclosure of the records in that appeal could

not have had an impact on negotiations. The Ministry takes the position that the situation is different in the current appeal, and states:

> … the impact of the release of the records in the current appeal differs greatly from the time of Order PO-2328 and the subsequent judicial review, due to the fact that there are ongoing negotiations for an agreement, which can reasonably be assumed to contain provisions relating to substantially similar information. During the timeline of Order PO-2328 and the subsequent judicial review, the Ministry and [the affected party] were not under an obligation to negotiate a new agreement, which is no longer the case.

Analysis and Findings

On my review of the Ministry's representations, I am not persuaded that the disclosure of the records at issue could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. I find that I have not been provided with sufficiently persuasive representations to satisfy me that the information contained in these records qualify for exemption under section 17(1)(a).

The Ministry's representations focus on the impact that disclosure of the records may have on the future negotiations which the Ministry and the affected party will engage in. However, the Ministry's representations on this are far from "detailed and convincing"; nor do I find that they establish a "reasonable expectation of harm".

The Ministry's representations state that "It is reasonable to assume … that there will be some form of accountability and reporting provision in the new gaming revenue agreement, however it is as yet unclear as to what the requirements will be." The Ministry also states: "There is a possibility that release of these records will affect the negotiating position of [the affected party] in terms of what they agree to report to the Ministry." Although I accept the Ministry's position that it is reasonable to assume that there will be some form of accountability and reporting provision in the new gaming revenue agreement, and that those requirements are as yet unclear, the Ministry's reference to the "possibility that release of the records will affect the negotiating position of [the affected party]" does not represent the kind of detailed and convincing evidence of harm to the affected party which is required by section 17(1)(a). It merely identifies that the disclosure of this information may be a factor in future negotiations.

In order to meet the requirements under section 17(1)(a), the Ministry and/or the affected party must establish that the disclosure of the records could reasonably be expected to interfere *significantly* with the contractual or other negotiations of a person, group of persons, or organization. Accordingly, I am not satisfied that the Ministry has established that the harms set out in section 17(1)(a) will result from the disclosure of the records.

With respect to the Ministry's position that Order PO-2328 and the subsequent judicial review are distinguishable for the circumstances in this appeal, I am not persuaded by the Ministry's representations. Although the Ministry refers to the agreement in principle which now exists,

and which did not exist at the time of Order PO-2328 and the subsequent judicial review, in my view the distinction is not significant. Given the nature of the relationships between the parties and the subject matter of the Agreement, in my view further negotiations would have been reasonably anticipated by the parties prior to the agreement in principle being entered into by the parties.

Additionally, I find it significant that the affected party, whose interests section 17(1)(a) are meant to protect, does not provide representations on this section.

Accordingly, I find that the records do not qualify for exemption under section 17(1)(a).

Section 17(1)(b)

The Ministry also takes the position that the records are exempt under section 17(1)(b), as disclosure of them could reasonably be expected to result in similar information no longer being supplied to the Ministry, where it is in the public interest that similar information continue to be so supplied. The Ministry relies on an argument similar to the one made under section 17(1)(a) above, and states:

> Should the records at issue be released, there is a distinct possibility that [the affected party] will not agree to provide these types of reports to the Ministry, meaning that this information would no longer be supplied to the government. As this is tied into the issue of accountability, it is the taxpayers' money that is being spent, and therefore it is arguable that it is in the public interest that similar information continue to be so supplied. If this information is not supplied, the government would not be viewed as being open and transparent, and there would not be a way for the Ministry to ensure that the monies received under a revenue agreement would be disbursed in accordance with the agreement.

Analysis and Findings

The paragraph of the Ministry's representations set out above are the only representations made by any of the parties in support of the position that section 17(1)(b) applies to deny access to the requested records.

As set out above, the Ministry and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [See *Ontario (Workers' Compensation Board), supra*].

The Ministry's statement that there is "a distinct possibility" that the affected party will no longer agree to provide these types of reports to the Ministry is not supported by any other argument or supporting material. In addition, the affected party does not make representations on this issue.

On my review of the Ministry's representations, I am not persuaded that the disclosure of the records at issue could reasonably be expected to result in similar information no longer being

supplied to the institution. I have not been provided with sufficiently persuasive representations which satisfy me that the information contained in these records qualify for exemption under section 17(1)(b). Accordingly, I find that the requirements for section 17(1)(b) have not been met.

Section 17(1)(c)

The affected party's representations focus on the harms set out in section 17(1)(c), and take the position that disclosure of the records could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. The affected party states:

> … disclosure of the … Records will cause harm to [the affected party] and its … First Nation partners in two ways. First, it will permit third parties to calculate approximately the amount of [identified] revenues any particular First Nation receives in a given year. That information is itself confidential, is not disclosed to the Ministry, and is not subject to the *Act*. Secondly, it will expose [the affected party's] First Nations partners to frivolous law suits by parties seeking access to [identified] revenues in the possession of First Nations.
>
> The Records do not contain information with respect to these specific distributions of [identified] revenues to individual First Nations in any given year. That information therefore forms no part of the information at issue in this appeal. It is confidential to [the affected party] and its First Nations partners and not disclosed to Ontario.
>
> However, disclosure of the information contained in the Records would make it possible for third parties to determine approximately how much an individual First Nation receives from [identified] revenues in any given year.
>
> Disclosure of the Records could therefore in principle allow a party to calculate private financial information belonging to individual First Nations that is not itself disclosed to the Ontario government in any form. Such disclosure is harmful in and of itself. Individual First Nations have never consented and do not consent to the disclosure of such information to members of the public. Disclosure of the Records could therefore result in disclosure of confidential information that is not otherwise subject to the provisions of the *Act*.

The affected party then refers to the Federal Court decision of *Culver v. Canada (Minister of Public Works and Government Services)*, [1999] F.C.J. No. 1641, in which the Federal Court examined the possible harms to an identified company if certain information relating to its costs and revenues were disclosed. The affected party states:

> The Courts have held that disclosure of confidential information which would permit a competitor to calculate cost and profit data of an affected party by working back from the disclosed information is harmful to the affected party.

> Evidence of the possibility of such calculation is sufficient to establish a reasonable expectation of probable harm; *Culver v. Canada (Minister of Public Works and Government Services),* [1999] F.C.J. No. 1641.
>
> The *Culver* decision was rendered under the *Federal Access to Information Act*, but it is submitted that the test under the federal act for "reasonable expectation of probable harm" is substantially similar to the harm test under [the *Act*].
>
> While the *Culver* decision concerns the risk of disclosure to competitors of the affected party, [the affected party] submits that the same considerations should apply to the potential risks that would apply to disclosure of the Records at issue in this appeal, given that there is evidence of parties who wish to access [identified] revenues in the possession of First Nations.
>
> Furthermore, the ability to calculate the amount of revenues received by any particular First Nation could expose that First Nation to frivolous law suits by parties who are unable to advance claims against a First Nation by virtue of the provisions of s. 89(1) of the *Indian Act*, R.S.C. 1985, c. I-5, which limits the availability of First Nation property to satisfy judgments and other claims.

The affected party supports its position with confidential affidavit evidence, which provides details about the manner in which third parties may be able to calculate approximately the amount of identified revenues any particular First Nation receives in a given year, and also provides details supporting the position that frivolous lawsuits might be brought against First Nations as a result of disclosure of the information at issue.

Analysis and Findings

I have carefully reviewed the representations of the affected party regarding the section 17(1)(c) harms. In the circumstances of this appeal, I am not satisfied that the disclosure of the records could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency, and that their disclosure would result in the harms identified in section 17(1)(c).

In its representations, the affected party relies on two suggested ways in which the "harms" specified in section 17(1)(c) could reasonably be expected to occur.

The first reason identified by the affected party is simply its position that the disclosure of the records will permit third parties to calculate approximately the amount of identified revenues any particular First Nation receives in a given year. The affected party then states: "That information is itself confidential, is not disclosed to the Ministry, and is not subject to the *Act*". This statement, however, which simply makes these assertions, is not "detailed and convincing" evidence to establish a "reasonable expectation of harm". Previous orders have clearly stated that all three parts of the test established under section 17(1) must be met in order for a record to qualify for exemption. One part of the test is whether or not the record was supplied in

confidence to the Ministry; however, the affected party must also meet the harms part of the test, and simply asserting that the harms are met does not satisfy part three of the test.

The affected party refers to the Federal Court decision of *Culver* in support of its position that disclosure of information which would allow parties to calculate the approximate amount of revenues a First Nation receives in a given year will result in harm. The Federal Court in that decision determined that disclosing an affected party's "costs and profits" in that case would prejudice the affected party's competitive advantage. However, the Federal Court made that finding on the basis of the information provided to it regarding the effect of the disclosure of the information to competitors in a "fiercely competitive global industry". The Court stated:

> I am satisfied, following my review of all of the evidence in the record, … on a balance of probabilities, that [the affected party] has a "reasonable expectation of probable harm." In his evidence [the affected party] indicated that the information in question would enable its competitors "to calculate various pricing scenarios in order to undercut" it on the contract with the Department "or on other contracts". Furthermore, the release of the information would provide its competitors, in a fiercely competitive global industry, with "an important piece of financial and commercial information and intelligence".

In the *Culver* decision, the Court did not merely state that the disclosure of information regarding "costs and profits" automatically resulted in the harms identified in the federal *Access to Information Act* (the federal *Act*). Rather, it reviewed the specific circumstances of the disclosure, and determined that the requirements under the federal *Act* were met.

Even if I were to find that the requirements under the federal *Act* and the analysis in the *Culver* decision directly applied to the *Act*, the *Culver* decision is clearly distinguishable from the circumstances in this appeal. The finding in *Culver* was directly based on the concerns that competitors would have access to the records. In this appeal, the affected party acknowledges that there are no "competitors" in the same way there were in the *Culver* scenario, but states that "the same considerations should apply" to the potential risks it proceeds to identify.

I do not accept the affected party's position. *Culver* does not stand for the proposition that the disclosure of "costs and profits" will invariably result in the identified harms. The specific circumstances of each request, and the consequences of the disclosure of the records, are what determine whether the harms have been established.

In this appeal, the only specific arguments relating to possible harms identified by the affected party are the ones in support of the second argument raised by the affected party, that is, that disclosure of the information in the records will expose First Nations partners to frivolous lawsuits by parties seeking access to identified revenues in the possession of First Nations.

In my view, the possible harms identified by the affected party – that is – the possibility of frivolous lawsuits, is not sufficient to satisfy me that the disclosure of the records will result in undue loss or gain to any person, group, committee or financial institution or agency.

In the first place, I do not accept that the disclosure of the records could reasonably be expected to expose First Nations partners to frivolous lawsuits. The representations of the affected party, including the confidential material contained in the affidavit provided by it, do not satisfy me that there exists sufficient connection between the disclosure of the records and the possibility of lawsuits. In fact, a different interpretation of the material provided in the affidavit might suggest the disclosure of the records would have no impact on the possibility of lawsuits.

In any event, even if I were to accept that lawsuits (frivolous or otherwise) might arise as a result of the disclosure of the records, previous orders have examined this type of argument, and have rejected the "possibility of lawsuit" argument as sufficient evidence to support a finding that the harms in section 17(1)(c) could reasonably be expected to result from disclosure.

In Order MO-1481, Adjudicator Pascoe reviewed this argument in the context of a request for information to the Regional Municipality of Hamilton. The affected party who was resisting disclosure argued that the information at issue was sought by the requester to "either establish or strengthen an anticipated claim for damages", and that the harms in section 10(1)(c) of the *Municipal Freedom of Information and Protection of Privacy Act* (the equivalent to section 17(1)(c) of the *Act*) would result. In rejecting that argument, Adjudicator Pascoe stated:

> In Order PO-1912, Assistant Commissioner Mitchinson considered whether disclosure of certain records which may be relevant to a particular civil action would result in unfair exposure to pecuniary or other harm, pursuant to section 21(2)(e) of the *Freedom of Information and Protection of Privacy Act* (equivalent to section 14(2)(e) of the *Act*). He concluded that any determination of personal liability would be based on a finding to that effect by a court and, therefore, could not accurately be described as being "unfair".
>
> Although the wording of section 10(1)(c) is somewhat different from section 14(2)(e), both provisions address similar types of harms, and therefore the Assistant Commissioner's comments are also relevant in this case. *In my view, since any damages that may be awarded as a result of the potential legal proceedings in this case would be based on a finding by a court, in my view, this cannot be characterized as an "undue" loss.* Accordingly, I find that section 10(1)(c) is not applicable in the circumstances. [emphasis added]

I agree with the approach taken in Order MO-1481. The possibility that lawsuits (frivolous or otherwise) may be brought if records are disclosed is not sufficient to establish that disclosure of the records could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. In the event that legal proceedings are commenced as a result of the disclosure of the records, those matters would proceed through the court process, and presumably be resolved through court findings. Should such findings eventually result in any loss to the affected party, any such loss could not be characterized as an "undue".

Accordingly, I find that the records do not qualify for exemption under section 17(1)(c).

Having found that none of the harms set out in section 17(1)(a), (b) or (c) have been met, I find that the records do not qualify for exemption under section 17(1), and will order that they be disclosed.

Additional matters

As an additional matter, the representations of both the affected party and the Ministry argue that Order PO-2328 and the subsequent judicial review decision (*Ontario First Nations*, cited above) are not dispositive of the issues in this appeal, as the information at issue in that order was broader, and the evidence provided by the parties was different. The records at issue in the current appeal are distinguishable from some of the ones in Order PO-2328 only by virtue of the time period to which the records relate. As is apparent from the discussion above, having reviewed the representations in this appeal, I am not satisfied that the findings in Order PO-2328 should be different for the records in this appeal. This finding is also consistent with the outcome of the judicial review of that order.

Finally, in its representations the affected party briefly refers to its position that, given the nature of the records at issue, these records should not to be accessible under the *Act*, and that disclosure of these records pursuant to an access request would result in a "fundamental lack of fairness." In my view, the excerpt from the *Williams Commission Report* set out above directly addresses these concerns.

ORDER:

I order the Ministry to disclose the records at issue in this appeal to the appellant by **May 5, 2008** but not before **April 30, 2008**.

Original signed from March 31,2008
Frank DeVries
Adjudicator