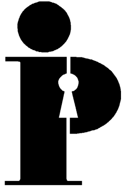

ORDER PO-2906

Appeals PA08-31 and PA08-38

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BACKGROUND:

These appeals involve a series of complex real estate transactions. The Ontario Realty Corporation (the ORC) provided background information in the representations it submitted in regard to this inquiry. In my view, this information is helpful in understanding the circumstances surrounding these appeals, and I have summarized the relevant portions below.

The ORC is a Crown corporation organized pursuant to the *Capital Investment Plan Act, 1993* and is designated as an institution subject to the *Freedom of Information and Protection of Privacy Act* (the *Act*). The ORC manages the real estate holdings of the Province of Ontario (the Province).

In 1988, the Ministry of Government Services (MGS) leased certain lands (the "golf course lands") to the Town of Richmond Hill (the Town). The Town then entered into a sublease with a named golf club (the golf club) to operate a golf course on these lands. The lease and sublease were set to expire in 2013.

In June 1988, the golf club entered into a subsequent lease with Management Board Secretariat (MBS) to lease the golf course lands from 2013 to 2063 with an option to purchase that could be exercised prior to March 1, 2003. An Order-in-Council approving the lease and providing for an option to purchase was passed by Cabinet in March 1998. Subsequent to the Order-in-Council, in a related transaction, another piece of land known as the "club house lands" was conveyed from the Town to MBS.

In June 1999, MBS entered into an Agreement of Purchase and Sale to transfer the golf course lands and the club house lands (together called "the subject property" or the "subject lands") to the golf club. In October 1999, a new Order-in-Council was obtained to approve the sale of the club house lands. An Agreement of Purchase and Sale, transferring the subject lands from MBS to the golf club, was signed on January 24, 2000, and the subject lands were subsequently conveyed to a company representing the golf club.

NATURE OF THE APPEAL:

A request was submitted to the ORC under the *Act* for access to information relating to the subject lands, including the sale of those lands by the ORC.

The ORC identified 46 responsive records. Pursuant to section 28 of the *Act,* the ORC notified the third parties involved and sought their views regarding disclosure of records affecting their interests. One third party objected to disclosure.

The ORC issued an access decision on January 9, 2008, together with its index of responsive records. (The index listed Records 1-45, but there were in fact 46 records, due to the inclusion of Record 5.1.)

The ORC's decision was to grant full access to 36 records and to deny access to the remaining records, citing the application of section 19 (solicitor-client privilege) of the *Act*.

The original requester (now the requester appellant) appealed the ORC's decision to deny access to the withheld records and Appeal PA08-31 was opened (the requester appeal).

One third party, a numbered company (now the third party appellant), appealed the ORC's decision to grant access to the 36 records. As a result, Appeal PA08-38 was opened (the third party appeal).

At the time the appeals were filed all of the information in the responsive records was at issue. It is my understanding that none of this information had been disclosed to the requester appellant at that time.

The appeals were assigned to a mediator and during the course of mediation, the following events occurred:

- The requester appellant maintained that the ORC's search was inadequate and that additional records exist.
- The ORC conducted additional searches and located a large number of additional records.
- The ORC issued three revised access decisions together with revised indexes of records on April 2, 2008, June 26, 2008 and August 1, 2008 regarding the disclosure of additional information to the requester appellant.
- The ORC claimed the application of the exemptions in sections 12 (cabinet records), 13 (advice to government), 19 (solicitor-client privilege) and 21 (personal privacy) of the *Act* with respect to some of the additional records.
- The requester appellant asserted the existence of a public interest in the records, thereby raising the possible application of the public interest override in section 23 of the *Act*.
- The third party appellant confirmed it is objecting to the disclosure of all records and cited the application of sections 17 (third party information), 19 and 21 to some of the records. The third party appellant also suggested that the request initiated by the requester appellant is an "abuse of process."
- The ORC inadvertently released a number of records (Records 5.1, 22-23, 29-30, 32, 36-39, 42-45) to the requester appellant, which were at issue in Appeal PA08-38. As a result of their disclosure, these records are no longer at issue.

The parties were unable to resolve the appeals during the mediation stage of the appeal process and the files moved to the adjudication stage for an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the ORC on all issues, namely, the application of the exemptions in sections 12, 13, 17, 19 and 21 to the records at issue, the application of the section 23 public interest override, the reasonableness

of the ORC's search and whether the request process initiated by the appellant requester is an abuse of process.

I also sought representations from the third party appellant and from seven affected parties on the application of the exemptions in sections 17, 19 and 21 and the application of the public interest override. In addition, I sought representations from the third party appellant on whether the request process initiated by the appellant requester is an abuse of process.

The ORC, the third party appellant and three affected parties submitted representations. Four affected parties chose not to submit representations. In its representations, the ORC indicated that it is no longer relying on the exemption in section 13 to deny access to the withheld portions of Records 155 and 180. The ORC also advised that it is no longer relying on the exemption in section 19 to deny access to the withheld information in Records 99 and 155. However, Records 99, 155 and 180 continue to remain at issue in this appeal since the third party appellant has asserted an abuse of process argument to deny access to these records in their entirety and has made representations on this issue. The third party appellant also submitted representations on the application of the exemptions in sections 17, 19 and 21 to various records.

I then issued another Notice of Inquiry and sought representations from the requester appellant. I enclosed with this second Notice of Inquiry a complete copy of the ORC's representations and a severed copy of the third party appellant's representations. Portions of the third party appellant's representations were severed due to confidentiality concerns. I chose not to include copies of the representations received from the three affected parties since, in my view, their representations do not add significantly to the views expressed by the ORC and the third party appellant. One affected party is a principal with the third party appellant and his representations mirror those submitted by the third party appellant. A second affected party simply states her view that the information concerning her is personal in nature and its disclosure would represent an invasion of her personal privacy. A third affected party is a law firm that represented the third party appellant. It states that the information at issue that concerns it is solicitor-client privileged as between it and its client.

The requester appellant submitted representations in response.

RECORDS:

Between the two appeals there are 106 records at issue. The records at issue and the exemptions that could apply to them are set out in the Appendix to this order. However, for some records listed in the Appendix an exemption has not been claimed. As alluded to above, the third party appellant has raised abuse of process as an overarching issue. Therefore, due to the raising of the abuse of process issue by the third party appellant, all records, including those for which an exemption has not been claimed, have been listed in the Appendix as being at issue.

DISCUSSION:

CABINET RECORDS

The ORC takes the position in its representations that portions of Records 175, 190, 191 and 201 qualify for exemption under the introductory wording of section 12(1), as well as the exemptions in sections 12(1)(a) and/or (b). These exemptions state:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

Previous decisions of this office have established that the use of the word "including" in the introductory language of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of 12(1)), qualifies for exemption under section 12(1) [See Orders P-22, P-1570, PO-2320]. It is also possible for a record that has never been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if an institution can establish that disclosing the record would reveal the substance of deliberations of Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations [Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707, PO-2725].

In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations [Order PO-2320].

Section 12(2) provides two exceptions to the application of the exemption in section 12(1). Section 12(2) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> (a) the record is more than twenty years old; or
>
> (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

Representations

The ORC submits that Records 175, 190, 191 and 201 qualify for exemption under the introductory wording of section 12(1) "since their content reveals the substance of Cabinet deliberations."

The ORC describes all four records as "Cabinet briefing notes." The ORC adds that it is "clear from the structure and content" of the information contained in these records that they were prepared by "[MBS] for submission to Cabinet for consideration, deliberation and approval." The ORC states that the manner in which the information is organized in the records is consistent with its deliberative purpose, with each broken down into the following sections: issue, recommendation, key comments and impact/analysis. With regard to Record 201 specifically, the ORC points out that attached to a briefing note is a "draft Order-in-Council," which outlines the specific Cabinet approval sought based on the detailed recommendation contained in the briefing note.

The ORC adds that the briefing notes directly relate to the issue considered and discussed by Cabinet. The ORC states that "[p]roof of Cabinet deliberations and its decision or approval of this matter is evident by the fact that Record 54, the approved Order-in-Council (which ORC has decided to release but is subject to third party appeal)" has the same date and content as portions of Record 201.

The ORC also made representations regarding the application of the exceptions in section 12(2). The ORC states that section 12(2)(a) does not apply since the records are not more than 20 years old. With regard to the application of the exception in section 12(2)(b), the ORC asserts that it has the discretion to seek Cabinet's consent to the disclosure of records exempt under section 12 and that in exercising this discretion it is only required to address the issue of whether such consent should be sought in a particular case. The ORC states that in responding to the appellant's request, it "held consultations with various stakeholders and affected ministries, including Cabinet Office." The ORC states that it then "considered whether consent should be sought from the Executive Council" and decided that "this is not an appropriate case for seeking the relevant Executive Council's consent" to the four Cabinet briefing notes. The ORC submits that it considered the following factors in reaching this decision:

- the Cabinet for whom the records were made is no longer in place and cannot be consulted
- the records are not merely appendices or attachments to Cabinet records
- the information is not of interest to a significant portion of the public and, as such, the interest in these records is in the nature of a "private" rather than a public interest

The ORC also submits that there is no reasonable expectation that the Executive Council would consent to access being given to any of the records to which section 12(1) applies.

The requester appellant's representations do not specifically address the application of the section 12(1) exemption to the contents of Records 175, 190, 191 and 201. However, I note that the requester appellant's interest in the records at issue in this appeal, as articulated through his representations, is based on concerns regarding the sale by the ORC of "almost 400 acres of prime [publicly owned] development lands" situated in the Town to "private interests" for the sum of "$2.2 million less $500,000 in prepaid rent." The requester appellant believes that the property was seriously undervalued at the time of sale and he views this transaction as one of great public interest.

Analysis and findings

On my careful analysis of the parties' representations and the contents of the records at issue, I am satisfied that these records are exempt under the introductory wording of section 12(1).

All four records are substantively similar in content, to the extent that they all address the proposed sale of the subject property by the ORC. Records 175, 190 and 191 are clearly briefing notes that were prepared by MBS for submission to Cabinet for consideration regarding the sale of the subject lands. Record 201 contains a briefing note as well; however, it also contains a draft Order-in-Council to be presented to Cabinet for approval. I concur with the ORC that the Order-in-Council contained in Record 201 is virtually identical in substance to the Order-in-Council that was approved by Cabinet (Record 54).

Under the circumstances, therefore, I am satisfied that the briefing note and draft Order-in-Council that comprise Record 201 were presented to Cabinet for consideration, deliberation and approval.

With regard to Records 175, 190 and 191, while it is not clear on the evidence presented by the ORC or on the face of the records themselves whether these briefing notes were formally put before Cabinet for deliberation, I am satisfied that their contents also reveal the substance of deliberations of Cabinet regarding the sale of the subject lands.

Accordingly, I conclude that the severed portions of Records 175, 190, 191 and 201 are exempt under the introductory wording in section 12(1).

As regards the exceptions in section 12(2), it is clear that section 12(2)(a) does not apply, owing to the age of the records, and I am satisfied that Cabinet has not consented to the disclosure of these records pursuant to section 12(2)(b). I acknowledge the requester appellant's views regarding the possible public interest in these records. However, the Cabinet of the day was not consulted for its consent at the time of the request and I accept the ORC's exercise of discretion, as outlined above, with respect to whether to seek Cabinet's consent under section 12(2)(b).

As the public interest override does not apply to the section 12 exemption, I am also not able to consider the application of section 23 to these records.

ADVICE OR RECOMMENDATIONS

The Ministry submits that the discretionary exemption in section 13(1) applies to portions of Records 95, 177-179, 181, 192 and 199. This section states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

This exemption is subject to the exceptions listed in section 13(2).

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, 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.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations," the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines)* (cited above)*]*; see also *Ontario (Ministry of Transportation) v.* (cited above)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views

- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation)* (cited above)]; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines)* (cited above)]

Representations

As a general submission on this exemption, the ORC states that the withheld portions of the records at issue contain "express and detailed recommendations, opinions and specialized advice for lease negotiations and the potential sale of the subject property" within the meaning of section 13(1). The ORC also provides the following specific representations regarding the application of section 13(1) to each of the records at issue:

- Record 95 – Described by the ORC as an "ORC briefing note," the ORC states that the three severed portions of this record pertain to "advice and direction regarding requirements that must follow a course of action already committed to by the government." The ORC adds that the information at issue "demonstrates the free flow of information and advice" within government regarding the "process, direction and requirements necessary to complete the subject real estate transaction from the perspective of a legal branch in another ministry."

- Record 177 – The ORC states that the information at issue comprises a "form of recommendation within the context of a preferred option that could be accepted or rejected during deliberations." The ORC submits that disclosure of this information would "allow for the drawing of accurate inferences as to the nature of the recommendation given."

- Records 178 and 192 – The ORC describes these records as "memoranda" that contain a recommendation in relation to "specialized appraisal advice that [the] ORC received regarding offers to purchase the subject property." The ORC adds that portions of Record 178 contain specific advice, based on the appraisal opinion and calculations, regarding proposed rental rates and terms, for the lease and possible sale of the subject property. The ORC claims that, if disclosed, the figures contained in the advice could easily be used to calculate and draw inferences about the advice provided and recommendation given. With regard to Record 192, the ORC submits that the severed portion contains a "general recommendation that is consistent with the recommended approach" that was severed on page 1 of Record 178.

- Record 179 – The ORC states that this record consists of handwritten notes that "clearly and expressly include a detailed recommendation about a lease and option to purchase transaction." The ORC states that the severed portion contains a "recommendation to be used in a future negotiation."

- Record 181 – The ORC describes the severed portions of this record as "three (3) brief handwritten comments found in the margins of pages 2, 3 and 5" of an Offer to Lease prepared by the ORC, which have been severed because they contain specific advice that relates directly to portions of the lease. The ORC describes the severed comments as "clear and specific" advice to be used in "re-negotiating the lease."

- Record 199 – Described as a memorandum to the ORC regarding the lease renegotiation of the subject property, the ORC states that the withheld information constitutes "specific advice from the MMAH about a possible future sale of the subject property."

The requester appellant's representations do not specifically address the records at issue or the application of section 13(1) to them. The requester appellant does state, however, that in his view "none of the versions of the memorandum of the ORC Valuator […] dated June 5, 1997 include his conclusions and recommendations." This comment appears to be in reference to Record 192, which is a memorandum from the ORC's Valuator, dated June 5, 1997.

Analysis and findings

Having carefully considered the parties' representations and the portions of the records at issue that the ORC has withheld under section 13(1), I conclude that the ORC has properly applied this exemption to the information for which it is claimed. Accordingly, I find the information at issue in Records 95, 177-179, 181, 192 and 199 exempt from disclosure under section 13(1).

I base my conclusions on the following analysis of the records:

- Record 95 – It is clear on the face of this record that it is a briefing note and I am satisfied that the severed portions of it confirm the advice and recommendations provided by the legal department of one government office to another government office on two issues relating to the sale of the subject lands. More specifically, the withheld information reveals a suggested course of action.

- Record 177 – Based on my review of this record, I find that the severed portions of this record contain two alternative courses of action within the context of a preferred option that could be accepted or rejected during deliberations. One severed portion contains contextual information that, if disclosed, would allow for the drawing of accurate inferences as to the nature of the recommendations given.

- Records 178 and 192 – These records contain the views of the ORC's Valuator regarding the value of the subject property. The ORC has disclosed most of the Valuator's views, with the exception of the course of action that he recommends to the ORC. While I acknowledge the requester appellant's views regarding the contents of Record 192, it is clear on my review of Record 192 that the severed portions contain the Valuator's conclusions and recommendations, and the same is true of the severed portions of Record 178.

- Records 179 – I concur with the views expressed by the ORC as outlined above in relation to this record. The severed portion of this handwritten note sets out a recommended course of action regarding key terms in the negotiation of a lease and option to purchase transaction between the ORC and a third party. Disclosure of this severed information would reveal the recommended course of action.

- Record 181 – The severed portions of this record set out specific advice on the negotiation of particular terms of an offer to lease, suggesting a course of action that will ultimately be accepted or rejected by the person being advised.

- Record 199 – This record is a memorandum from MMAH to the ORC regarding the renegotiation of the lease of the golf club and the impact of any sale of the subject lands. The severed portions of this record contain specific advice and recommendations from MMAH on the possible future sale of the property. The severed portions of the record recommend a specific course of action.

To summarize, I find the severed portions of Records 95, 177, 178, 179, 181, 192 and 199 exempt under section 13(1). I have also considered the exceptions to this exemption in section 13(2), and find that none of these exceptions apply to negate the application of section 13(1).

SOLICITOR-CLIENT PRIVILEGE

The ORC has claimed the application of section 19 to Record 101 in its entirety and to portions of Records 115 and 149, and has made representations to support its position.

As noted above, the third party appellant has also claimed the application of section 19 to a number of records in their entirety (Records 9, 10, 12, 13, 26, 80, 81, 83, 84, 85, 87, 97, 100, 101, 104, 107, 108, 112, 114, 115, 116, 118, 120, 125, 129, 131, 132, 136, 138, 139, 144, 146, 148, 149, 150, 151, 153, 154, 157, 158, 160, 161, 162, 163, 164, 165, 166, 167, 168, 193 and 203). The third party appellant has also provided representations. In the discussion below, I will consider whether the third party appellant is entitled to raise or rely on section 19 for these additional records.

I did not receive representations from the requester appellant that address the application of section 19.

Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Subsection (c) has no application in the circumstances of this appeal.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply. The ORC has indicated in its representations that it is relying on both branches 1 and 2 of section 19.

Branch 1 of the section 19 exemption appears in section 19(a) and encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2 of section 19 arises from sections 19(b) and (c). Section 19(b) is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Representations of the ORC

The ORC states generally that it needed to "confide in its counsel without reservation for the purpose of conducting the subject real estate transaction." The ORC states that the information at issue in Records 101, 115, and 149 constitutes privileged communications.

Record 101 is described by the ORC as a "memo from ORC counsel to her client containing more detailed advice" regarding the proposed purchase of the subject lands by the third party appellant. The ORC states that this record is part of a "continuum of communications" to "ensure the free-flow of legal advice sought and given between counsel and client pertaining to this real estate transaction."

Record 115 is described by the ORC as an email from ORC counsel to her client in which "counsel specifically seeks client feedback and instruction on comments and advice set out [in the email]." The ORC states that the record also reflects the "handwritten approvals" of an ORC representative in response to counsel's advice. The ORC submits that the severed portions of this record comprise "suggested components of an agreement of purchase and sale inter-twined with legal advice and client direction," which allows ORC counsel to properly represent her client with respect to a real estate transaction.

Record 149 is an internal memorandum from ORC counsel to her client. The ORC has severed a portion of page two of the memorandum, which it describes as "legal advice and direction provided specifically for the purpose of advising the ORC as to how it can address and mitigate risk involved with the subject real estate transaction."

Representations of the third party appellant and others representing its interests

I received representations from counsel acting on behalf of both the third party appellant and a principal of the third party appellant company. Although I received two sets of representations (one for the third party appellant and one for the principal), the submissions made on the application of section 19 are identical. I also received a separate set of representations from a law firm that represented the third party appellant during the course of negotiations with the ORC regarding the purchase of the subject lands. The essence of all three sets of representations is that all communications between the third party appellant and its solicitors are confidential and subject to solicitor-client communication privilege. The third party appellant and the principal add that any communication with the ORC was a "limited and qualified communication to another party with a common interest, being the completion of the transaction in question."

Analysis and findings

Branch 1 solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

I am satisfied that Record 101 in its entirety and the severed portions of Records 115 and 149 are exempt under the branch 1 solicitor-client communication privilege exemption in section 19(a). Based on my review of the ORC's representations and the information at issue, I find that this information comprises part of a continuum of solicitor-client communications between ORC counsel and staff regarding issues relating to the negotiation of terms for the proposed sale of the subject lands by the Province to the third party appellant. There is no evidence on the face of these records that any of the severed information has been shared with anyone outside of the

ORC. Accordingly, I find that there is no evidence that privilege has been waived for these records.

I will now address the rights of the third party appellant, the principal of that company and the third party appellant's legal counsel with regard to the application of section 19 to those records identified by the third party appellant (set out in the Appendix). To do so, I must address two questions:

1. Is section 19 designed to only protect the privilege of non-government parties, based on the wording and legislative history of the provision?; and

2. If the answer to question 1 is "yes," does the requisite common interest exist between the third party appellant, or its legal representatives, and the ORC to overcome this limitation?

Applicability of section 19 to non-government parties

Generally speaking, affected parties and third party appellants are not permitted to claim discretionary exemptions not relied upon by the institution. As Adjudicator Anita Fineberg stated in Order P-1137:

> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the Act.

More specifically, this office has previously determined that section 19 cannot be asserted by non-governmental institutions (see: MO-1338, MO-1900-R and MO-1923-R).

In addressing this issue in MO-1338, Senior Adjudicator David Goodis states:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:
>
> > Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the **government** either commences litigation or is obliged to defend

> litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
>
> . . . . .
>
> If you do things to discourage the client from telling the lawyer the true story, then the **government** does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the **government**, which is spending taxpayers' money, should be able to be certain that **public servants** tell our lawyers the truth. We do not want to discourage **public servants** from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added]
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> [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]

> Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter.

In this appeal, the third party appellant is seeking to obtain the protection of section 19 to communications between it and its counsel, but the information has been disclosed to the ORC. Nevertheless, the third party appellant, its principal and its legal counsel have asserted that they are entitled to the benefit of section 19 to communications between the third party appellant and its legal counsel.

The records that the third party appellant, its principal and its legal counsel seek to protect are not confidential communications between a government lawyer and a government client. They are communications between parties outside government that have been provided to the ORC. Therefore, based on the reasoning of Senior Adjudicator Goodis in Order MO-1338, these communications are not subject to solicitor-client privilege under section 19 of the *Act*. In addition, I am satisfied that any privilege that may have existed in these records, as between the third party appellant and its counsel, has been waived by virtue of the fact that the records have been provided to the ORC.

This conclusion is subject to the possible existence of a common or joint interest as between the ORC and the third party appellant. I now turn to consider that issue.

Common or joint interest between the third party appellant and the ORC

In Order P-1342, Adjudicator Holly Big Canoe described the principal of "common interest" or "joint interest" as follows:

> It is possible for two or more parties to have a joint interest in a record which could have an impact on solicitor-client privilege. In *Johal v. Billan* [1995] B.C.J. No. 2488 (B.C.S.C.) the court found that a husband and wife who had consulted the same solicitor for the purpose of drafting wills had waived the privilege between themselves, but maintained this privilege against third parties who did not share a joint interest with one or both of them. This judgement makes reference to this interest being supported by Mr. Justice Sopinka in the text *Law of Evidence in Canada*, at page 638:
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>> Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication. ... Moreover, a client cannot claim privilege as against third persons having a joint interest with him in the subject-matter of the communication passing between the client and the solicitor.

Although Adjudicator Big Canoe rejected the joint interest argument in Order P-1342, it has been found to apply in other cases. In Order P-49, for example, former Commissioner Sidney Linden found a joint interest between the Ministry of Community and Social Services and a home for the aged funded by the Ministry in the context of a dispute over the performance of a construction contract.

In this case, the third party appellant and its principal argue that they share a joint or common interest with the ORC in the completion of the sale of the subject property to the third party appellant. I do not accept the third party's argument. I have not been provided with sufficient evidence to establish a "joint interest" between the third party appellant and the ORC for the purposes of solicitor-client privilege. The third party appellant is a private entity that, amongst other things, owns and operates a golf club. The third party appellant and the ORC were engaged in arm's length negotiations regarding the lease and possible sale of property, specifically the golf course that is associated with the golf club. Although it may be said that the third party appellant and the ORC had a shared interest in seeing this transaction completed, they were at all material times operating at arm's length, each advocating for and seeking to advance their own interests during the negotiation of the lease and purchase and sale terms. This is clearly borne out by the records that document the ebb and flow of the negotiations between the third party appellant and the ORC. I am not convinced that the interests of the third party

appellant and the ORC, in regard to the subject matter of the records at issue, are sufficiently connected to be accurately characterized as sharing a common or joint interest.

Conclusion

I have found Record 101 in its entirety and the severed portions of Records 115 and 149 exempt under the branch 1 solicitor-client communication privilege exemption in section 19(a).

I have also found that section 19 cannot apply to Records 9, 10, 12, 13, 26, 80, 81, 83, 84, 85, 87, 97, 100, 104, 107, 108, 112, 114, 116, 118, 120, 125, 129, 131, 132, 136, 138, 139, 144, 146, 148, 150, 151, 153, 154, 157, 158, 160, 161, 162, 163, 164, 165, 166, 167, 168, 193 and 203 since the third party appellant is not an institution under the *Act* and it does not share a common or joint interest with the ORC within the meaning of that term under the *Act*. I have also concluded that any privilege that may have existed in these records, as between the third party appellant and its counsel, has been waived because these records have been provided to the ORC.

Therefore, these records must be disclosed, subject to my analysis of the application of the section 17 mandatory exemption to some of these records and the third party appellant's abuse of process argument below.

PERSONAL INFORMATION

The ORC relies on the personal privacy exemption in section 21(1) as the basis for denying access to undisclosed information in Record 149. The third party appellant has also claimed the application of section 21(1) to deny access to information contained in Records 26, 52 and 153. Unlike section 19, which is a discretionary exemption, section 21(1) is a mandatory exemption. Therefore, I must consider its application regardless of who raises it.

The section 21(1) exemption can only apply to records containing "personal information," as defined in section 2(1) of the *Act*, so I will consider this requirement first.

"Personal information" is defined, in part, in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> …
>
> (g) the views or opinions of another individual about the individual, and

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The ORC describes Record 149 as an email that recounts a telephone conversation between ORC counsel and another individual. The ORC states that it decided to disclose most of the information contained in the record with the exception of three specific portions that it has identified as containing the personal information of an identifiable individual.

With specific reference to the severed portions of Record 149, the ORC states that while the first severance, on page 1 of the record, does not reveal an address *per se*, it "expressly identifies the town and the exact local neighbourhood where the individual lives." The ORC submits that the other two severances, both on page 2 of the record, reference respectively where the identifiable individual resides along with her telephone number.

The ORC states that the severed information is "about" the individual in a personal capacity. The ORC submits that it is personal in nature and does not relate to the individual in a professional, official or business capacity. The ORC states that if the severed information is

disclosed along with the individual's name, which was not severed, the identity of the individual would be revealed.

The ORC states that it has examined Records 26 and 52 and "cannot conclude that any information contained therein qualifies as personal information."

The third party appellant has taken the position in its representations that Records 26 and 153 contain the personal information of an identifiable individual. I note that the third party appellant has not made representations regarding Record 52, despite claiming that it contains information that is exempt under section 21(1).

The third party appellant notes that Record 26 identifies a named individual as being a shareholder of the third party appellant company. The third party appellant submits that the information in Record 153 relates to an identifiable individual and, in particular, to financial transactions involving that individual as well as other individuals and their relationship to various private corporations.

The requester appellant's representations do not address this issue.

I have carefully reviewed the parties' representations and the records at issue. I conclude that the severed information in Record 149 qualifies as the personal information of an identifiable individual other than the appellant, including that person's telephone number and other information that, when coupled with the person's disclosed name, would permit an assiduous inquirer to determine her address. I also find that this record contains the views or opinions of the ORC's counsel about this individual, and this also qualifies as this individual's personal information.

With regard to Records 26, 52, and 153, I find that the severed information contained in these records does not qualify as the personal information of an identifiable individual. The information at issue in these records is, in my view, clearly information about an identifiable individual in his business capacity. Much of this information falls within the exception in section 2(3), including the individual's name and title. The remaining information is financial in nature, but again, it is information that appears in the record in a business context. Subject to the application of the exemption in section 17 to the severed information in Records 26 and 52 and to my analysis of the abuse of process argument, below, I will order this information disclosed. As no other exemptions have been claimed for Record 153 I will order it disclosed, subject to my analysis of the abuse of process issue.

PERSONAL PRIVACY

Having found that Record 149 contains the personal information of an identifiable individual other than the appellant, as defined in section 2(1) of the *Act*, I will now consider whether this information is exempt from disclosure under section 21(1).

Where a requester seeks the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f)

of section 21(1) applies. If the information fits within any of the paragraphs of (a) to (f) of section 21(1), it is not exempt from disclosure under section 21(1). In the circumstances of this appeal, section 21(1)(f) is relevant. That provision reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2), as well as other considerations that are relevant in the circumstances of the case. If a presumption listed in section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2).

The ORC acknowledges that the information at issue in Record 149 does not fall within one of the presumptions in section 21(3). The ORC relies on the factors in sections 21(2)(g) and (h) to deny access to the severed information. These sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (g) the personal information is unlikely to be accurate or reliable;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

The ORC states that during the initial processing of the appellant's access request it attempted to contact the individual in question using the telephone number that appears in the record. The ORC indicates that it was unable to contact this individual because the telephone number was outdated.

However, during the course of the adjudication stage of the appeal process, the ORC was successful in contacting the individual and it sought her consent regarding the disclosure of her personal information in Record 149. The ORC states that the individual asked that the ORC not disclose the information at issue in the record as she viewed it as sensitive. However, she gave her consent to the disclosure of the remaining information in the record.

As alluded to above, I also sought and received representations from the individual whose personal information appears in Record 149. This individual made it very clear that she did not want any of her personal information disclosed for privacy reasons, including her name, which she noted the ORC intended to disclose according to the severed copy of the record that she had received from the ORC for review. With reference to the proposed disclosure of her name she stated that she "must express [her] opposition to that action in the most strong of objections." This individual also submitted that the telephone number listed in the record is her current home phone number, with the exception of the area code which is incorrect.

The requester appellant does not offer representations that specifically address the application of the section 21(1) exemption to the information at issue in Record 149. However, I note that the requester appellant's representations provide a description of Record 149 that includes reference to the name of the individual cited in Record 149. The requester appellant suggests in his representations that there is a strong public interest in gaining insight into the Province's decision to not protect prime greenbelt and to sell the subject lands at what he argues was less than fair market value. In support of his views, the requester appellant notes the concerns raised by the individual that is the subject of Record 149 regarding the proposed sale of the subject property.

Turning to my analysis, having carefully weighed the requester appellant's interests in gaining insight into the circumstances surrounding the sale of the subject property against the privacy interests of the individual whose personal information appears in Record 149, I find that the privacy rights of the individual under sections 21(2)(g) and (h) are more compelling than the requester appellant's interests in gaining access to the withheld information.

I find the plea of the individual named in Record 149 sincere and compelling, and I conclude that she provided her personal information to the ORC in the first instance with a reasonable expectation that it would be held in confidence. It appears clear that despite this individual's desire to have her name withheld, it has been disclosed to the appellant. That said, the remaining personal information in the record, including the individual's telephone number, appears to be accurate (with the exception of the reference to the area code). Additional disclosure of her personal information would only serve to further compromise the appellant's privacy interests, which in my view are paramount in this case.

Accordingly, I find the non-disclosed information in Record 149 exempt under section 21(1) of the *Act*, subject to the application of the public interest override discussed below.

THIRD PARTY INFORMATION

Section 17(1)

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.), leave to appeal dismissed, Doc. M32858 (C.A.)]. 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].

In this appeal, the application of section 17 is being asserted by the third party appellant to deny access to the information in Records 1, 2, 4, 9, 10, 12, 13, 21, 26, 31, 35, 52, 54, 68, 75, 76, 88, 94, 103, 105, 111, 176, 182, 183, 184, 185 and 200.

The ORC is not relying on section 17 to deny access to any records at issue in this appeal. The ORC indicates in its representations that it has taken this position because it "could not satisfy various parts of the [three-part] test [under section 17] and therefore decided to disclose the subject records."

The third party appellant indicates in its representations that it is relying on sections 17(1)(a) and (b) to deny access to the aforementioned records. These sections read:

> 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, if 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;

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 paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

To satisfy part 1 of the section 17(1) test, the ORC and/or the third party appellant must prove that the records reveal a trade secret or scientific, technical, commercial, financial or labour relations information.

In my view, the records clearly do not reveal any trade secrets, technical information or labour relations information. The meaning of the other types of information listed in section 17(1) of the *Act* has been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *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].

The third party appellant states that the records at issue contain "commercial" as well as "financial" information. The third party appellant states that the records contain "financial information (including but not limited to the rent payable by the Third Party, and the structure of certain financing arrangements undertaken by the Third Party) […]. The third party appellant states that the "rental payments" form part of its "operating costs" and the financing arrangements relate to the "acquisition of the rights to use the lands in question."

The ORC states that many of the records at issue do not meet part 1 of the test, as they "do not contain information that fits within the definitions for the categories of information or examples of types of information that the IPC has determined may be exempt under section 17."

The requester appellant did not provide representations that address this issue.

I accept that all of the records at issue concern either the negotiation of a long term lease of the subject lands (or portions of them) by the third party appellant or the subsequent sale of the subject lands to the third party appellant. Accordingly, I accept that broadly speaking the records at issue reveal information that is "commercial" and "financial" in nature and I find that these records meet part 1 of the test under section 17(1).

Part 2: supplied in confidence

To satisfy part 2 of the section 17(1) test, the ORC and/or the third party appellant must prove that the information in the records at issue was supplied to the ORC in confidence, either implicitly or explicitly.

Supplied

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].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706]. This approach was upheld by the Divisional Court in the *Boeing* case, cited above.

In confidence

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]

Parties' representations

The third party appellant states that the information was "implicitly supplied in confidence to [the ORC]." The third party appellant submits that the "financial information" is "not part of the purchase contract" between it and the ORC. The third party appellant describes the financial information as "tangential information regarding a separate relationship between [it] and the [Town]." The third party appellant adds that this financial information was not mutually generated; it was "pre-existing information involving leasing arrangements between [it] and the Town." The third party appellant submits that "rental payments to the [Town] do not relate to receipts payable [to the ORC] for the transaction with [the ORC] and were simply part of the background that unavoidably was supplied to [the ORC] since it was contained in leases that were necessary for the valuation and other discussions." The third party appellant states that the ORC was "not a party to the lease between [it] and the [Town], and consequently the financial information and commercial information contained in those leases was "supplied" to [the ORC],

rather than being "mutually generated.'" The third party appellant submits that this information was "not otherwise available from sources to which the public has access, and was dealt with through lawyers and treated in a manner indicating a concern for its protection." The third party appellant notes that the leases were "not registered on title," which is another indicator of the third party appellant's intention to treat the information with a "concern for its disclosure."

The ORC states that for some of the records it "cannot prove or even demonstrate that information was supplied in confidence to the institution." The ORC adds that in some instances the records were "addressed to/from other entities and [the] ORC was not mentioned anywhere in the record." The ORC submits that "nothing in the records indicates any implied or explicit intention of confidentiality." With particular reference to the supplied element of part 2 of the test, the ORC states that some of the records "such as a lease, amending agreement, assignment of lease, sub-lease or agreement of purchase and sale evolved and were created as a result or product of negotiations." The ORC submits that such records "cannot be said to have been supplied to [it]."

Once again, the requester appellant did not provide representations that address this issue.

Analysis and findings

I have carefully reviewed the representations submitted by the third party appellant and the ORC, all in conjunction with the contents of the records at issue.

My analysis of the "supplied" component in part 2 of the test under section 17(1) was made complicated by the extended back-and-forth negotiations between the ORC and the third party appellant over a two year period. Accordingly, determining what had been "supplied" within the meaning of that term under the *Act* required a careful review of each record and often a cross-referencing of the contents of a particular record with the information in other records at issue.

Based on my analysis, I find that some of the records at issue contain information that meets the "supplied" test under section 17(1). This information falls into the following three categories:

- correspondence from the third party appellant or its counsel to various counsel representing the interests of the Province regarding issues relating to the ongoing negotiations of terms pertaining to either the long term lease or the subsequent purchase and sale of the subject property by the third party appellant (Records 9, 12, 13 and 176)

- documents not addressed directly to the ORC by the third party appellant, but provided by the third party appellant to the ORC as background information to the ongoing negotiations between the third party appellant and the ORC (Records 4, 10, 68, 88, 182, 183, 184, 185 and 200)

- correspondence from the ORC to the third party appellant that contains information that would reveal or permit the drawing of accurate inferences with respect to information supplied by the third party appellant (Records 103, 105 and 111)

Conversely, I find that some of the records at issue consist of the contents of executed contracts involving an institution and the third party appellant.

Record 21 consists of an executed Agreement of Purchase and Sale between the Province and the third party appellant. I am satisfied that the terms of that contract were mutually generated and, accordingly, the information in that record does not meet the supplied test under section 17(1).

Similarly, Records 1, 2, 31 and 35 contain financial terms relating to the closing of the purchase and sale transaction between the Province of Ontario and the third party appellant. Again, I find that this information was mutually generated and therefore not supplied within the meaning of that term in section 17(1).

Record 26 contains information regarding how title is to be taken by the third party appellant in regard to the purchase and sale transaction. I find that this information also comprises a term of the purchase and sale agreement between the Province and the third party appellant and, as such, does not meet the supplied test.

Records 52 and 75 contain the terms of a sub-lease between the third party appellant and the Town. I acknowledge the third party appellant's view that this is tangential information regarding a separate relationship it had with the Town and that the information was not mutually generated by it and the ORC. This information comprises the terms of a completed contract between the third party appellant and the Town that was provided to the ORC by the third party appellant. In this regard, I accept that the terms of such a contract were not mutually generated by the third party appellant and the ORC (the institution in this case) and that, as a result, this information could be viewed as immutable information "supplied" to the ORC within the meaning of that term in section 17(1). However, in the circumstances of this case, one of the parties to this contract (the Town) is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*). In my view, if a request was submitted to the Town under *MFIPPA* for the information in Records 52 and 75, this information would not meet the supplied test since, in that context, it comprises the terms of a mutually generated contract between the institution and a third party. Under the circumstances, it would be absurd to find that this information would not meet the supplied test in that situation, but that it does meet the supplied test in this case. Therefore, I find that the information in these records does not meet the supplied test under section 17(1). I also conclude, below, that these records do not meet the third requirement for exemption under section 17, dealing with harms, and they are not exempt under section 17(1) for that reason as well.

Record 76 has three parts to it. The first part is an index that highlights, in summary form, some of the salient terms of various leases and sub-leases pertaining to the subject lands (or portions of them) as well the terms of the proposed purchase and sale of the subject lands. The second part is an executed copy of a lease between the Province and the third party appellant. The third part of the record is an unexecuted draft version of an Agreement of Purchase and Sale regarding the subject lands between the Province and the third party appellant. I find that those sections of the first part of this record that describe terms contained in the various leases and sub-leases that are in existence do not meet the supplied test, since they consist of mutually generated contractual terms. For the same reasons, I find that the copy of the executed lease between the Province and

the third party appellant contains contractual terms and, as a result, I find that the information contained in it does not meet the supplied test. With regard to the unexecuted copy of the draft Agreement of Purchase and Sale, since this document does not reflect the terms of a concluded negotiation, I find that the information in it does not consist of contractual terms. Accordingly, I am prepared to treat the information in this draft document as having been supplied in accordance with the test under section 17.

Record 94 is a letter from MBS to counsel for the third party appellant outlining amendments to the basic rent payment terms of an existing lease agreement between the third party appellant and the Province. As this information consists of negotiated terms of a contract between the Province and the third party appellant, I find that it does not meet the supplied test under section 17(1).

Having found that all of Records 4, 9, 10, 12, 13, 68, 88, 103, 105, 111, 176, 182, 183, 184, 185 and 200 and portions of Record 76 meet the supplied test, I must now consider whether this information meets the "in confidence" component of part 2 of the test under section 17(1).

I have not been provided with evidence that any of the information contained in the above records was explicitly supplied "in confidence" by the third party appellant to the ORC. However, due to the nature of the relationship between the parties involved in the transactions relating to the subject lands (or portions of them), I find that it is reasonable to accept for the purposes of my analysis, that all of Records 4, 9, 10, 12, 13, 68, 88, 103, 105, 111, 176, 182, 183, 184, 185 and 200 and portions of Record 76 were supplied in confidence due to the sensitive nature of their contents, and particularly in light of my findings below on the harms test under sections 17(1)(a) and (b).

For the sake of completeness, I will also consider the harms test to those records that I have found do not meet part 2 of the test under section 17(1), namely all of Records 1, 2, 21, 26, 31, 35, 52 and 75 and part of Record 76.

Part 3: harms

General principles

To satisfy part 3 of the section 17(1) test, the ORC and the third party appellant must prove that the prospect of disclosure gives rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

With respect to the quality of evidence required, the parties resisting disclosure 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].

Sections 17(1)(a) and (b)

In order to satisfy the requirements of section 17(1)(a), the parties resisting disclosure must provide detailed and convincing evidence to establish that disclosure of the information in 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.

In order to satisfy the requirements of section 17(1)(b), the parties resisting disclosure must provide detailed and convincing evidence to establish that disclosure of the information in the records at issue could reasonably be expected to result in similar information no longer being supplied to the institution.

I reiterate that in this case the ORC has taken the position that disclosure would not result in the harms prescribed by sections 17(1)(a) and (b). It is the third party appellant that makes the case that harms could reasonably be expected to accrue if the information at issue is disclosed.

With regard to harms under sections 17(1)(a) and (b), the third party appellant makes the following submissions:

> The Third Party and its related entities deal with well-known corporations and public bodies in respect of the use of the golf course facilities of the Third Party. Public disclosure of rental rates payable by the Third Party in relation to some of its facilities (being rates set approximately 10 years ago and set in context that involved expenditure of monies by the Third Party to improve the property at a time when it was not the owner of the property) can appear to be minimal rental rates in the context of today's economy. It can be prejudicial to the goodwill of the Third Party when negotiating transactions (particularly repeat transactions) with its customers. This will prejudice its competitive position to do business with those customers at a rate that provides the Third Party with its expected and necessary gross revenues. Its public disclosure can also interfere with the contractual or other negotiations of the Third Party with future joint venture partners. The Third Party owns a public golf course. Misunderstanding by members of the public could arise because these financial facts are out of context with the cost of the significant infrastructure improvements. Lastly, the Third Party would resist in future providing such information to [the ORC] in a similar context if that information is disclosed to the public in these circumstances.

The ORC states that the various related real estate transactions that are at the heart of the original access request "concluded in or around January 2000" and it does not regard the information relating to these transactions as worthy of protection under section 17. The ORC states that as a "matter of practice" it usually treats information contained in "closing documentation (such as an

Agreement of Purchase and Sale, Statement of Adjustments, Direction, Undertaking)" along with "amending documents [and] leasing documents (including a Lease, Offer to Lease and Lease amendments) of concluded real estate transactions including out-dated commercial and financial information in a way that is consistent with the ORC's obligations under [the *Act*] which is to operate in an open, transparent and accountable manner." In the ORC's view, disclosure of the records at issue will not result in any of the harms set out in section 17. The ORC notes the third party appellant's position that disclosure of the information contained in the records at issue could reasonably be expected to result in harm. However, the ORC submits that the third party appellant has not provided the requisite "detailed and convincing" evidence of harm. In this regard, the ORC states:

> Apart from mentioning the type of harm, such as prejudice to their competitive positioning in the marketplace and interfere significantly with contractual or other negotiations, it is difficult for [the] ORC to ascertain the actual harm [to the third party appellant] without a description of supporting details, examples or other convincing evidence.

The requester appellant simply states that aside from the third party appellant making statements that are self-serving, it has not shown how disclosure of the information could reasonably be expected to cause harm to it.

Analysis and findings

I have carefully examined the parties' representations on harms and the contents of the records at issue. I have found the representations submitted by the ORC and the third party appellant helpful in conducting my analysis. I conclude that, on the evidence presented, disclosure of the records could not reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the third party appellant or anyone associated with it [section 17(1)(a)] or be expected to result in similar information no longer being supplied to the ORC [section 17(1)(b)].

While the position taken by the ORC is not determinative of the harms test, I find some of its views on harms noteworthy. It is clear that the real estate transactions that are at the heart of the original access request concluded more than 10 years ago. Due to the age of the information contained in the records and, in the view of the ORC, the failure of the third party appellant to provide "detailed and convincing" evidence of harms under section 17(1), the ORC has openly questioned how it could justify non-disclosure and still discharge its obligations under the *Act* in an open, transparent and accountable manner.

The third party appellant is in the best position to describe the harms that it would experience in the event of disclosure. Unfortunately, it has provided me with little more than self-serving speculative statements about the nature of the harms that, in its view, may occur in the event the information contained in the records at issue is disclosed.

The third party appellant states that disclosure of the rental rates "can be" prejudicial to its goodwill when negotiating repeat and future transactions. However, the third party appellant has

failed to provide evidence as to how and in what circumstances this forecasted harm could reasonably be expected to occur. The third party appellant suggests that disclosure "can also interfere" with its negotiations with future joint venture partners. However, the reference to harms is vague and speculative.

The third party appellant also suggests that should its financial information be disclosed in this case it would resist providing such information to the ORC in the future. Again, I find the third party's comments self-serving and lacking in detailed and convincing evidence. I note, moreover, that the transactions in question are concluded, and the third party appellant is the owner of the subject lands. For this reason, I have no evidence to support a reasonable expectation that circumstances could arise in which the third party appellant would fail to provide information to the ORC where that would be in the public interest.

In my view, the information in the records at issue is specific to a transaction that was concluded more than 10 years ago. None of the information in these records reveals information about the financial inner workings of the third party appellant. Most importantly, I have been provided with no specific evidence of how the information contained in these records could reasonably be expected to be of any value to competitors today or possible partners in the future, as economic conditions and financial circumstances have undoubtedly changed through the passage of time. Nor have I been provided with detailed and convincing evidence that disclosure could reasonably be expected to result in similar information no longer being supplied to the ORC.

To summarize, I have found that section 17(1) does not apply to any of the records at issue. Accordingly, I will order Records 1, 2, 4, 9, 10, 12, 13, 21, 26, 31, 35, 52, 54, 68, 75, 76, 88, 94, 103, 105, 111, 176, 182, 183, 184, 185 and 200 disclosed in their entirety, subject to my analysis of the abuse of process issue. I note that three pages (pages 3 through 5) of the Agreement of Purchase and Sale that is the subject of Record 21 are missing. This appears to be an administrative error that occurred when the records were being assembled and manually numbered by the ORC (since page 2 of the record is numbered page 71 and then followed by page 6, which is then numbered page 72). Subject to my decision on abuse of process, I would request that the ORC, in preparing Record 21 for disclosure, ensure that a complete version of this record is disclosed to the requester appellant.

PUBLIC INTEREST OVERRIDE

I will now examine the application of the section 23 public interest override to the information I have found exempt under sections 13 and 21. Section 23 does not apply to information found exempt under sections 12 and 19.

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 disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, I will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Parties' representations

The requester appellant states that he is a resident of the Town and the subject matter of his request concerns "public lands" situated in the Town. He goes on to say that he has "an interest, as does the public, in learning how almost 400 acres of prime development land" located in the Town was sold by the ORC to the third party appellant for the sum of "$2.2 million less $500,000 in prepaid rent." The appellant submits that the "public interest is manifest." The requester appellant adds that the disclosure received to date demonstrates that the ORC had

"already received and been confronting contentious issues with the neighbours of the golf course who questioned why the greenbelt would not be protected."

The requester appellant questions how these public lands became transferred to private interests over the objections of the Town and the Ministry of Municipal Affairs and Housing (MMAH) for an amount "not considerably more than a single family private residence on adjoining [property in the Town]." The requester appellant questions "how the Ontario Cabinet [could] accept that this transfer was in the public interest." The requester appellant wonders why the "present value of future rents" was the "only valuation basis" considered rather than the "highest and best use."

The ORC acknowledges that a "relationship exists between the information requested and the public's interest in openness and transparency of government." The ORC adds that the "public has some interest in knowing about government real estate leasing and sales transactions." The ORC states that it is "in the public's interest to keep the government accountable for responsible real estate management of public assets, including real property." The ORC recognizes that the "public generally might have an interest" in the requested information. However, the ORC submits that the public's interest in this information, several years after the concluded transactions, is not "compelling."

The ORC also suggests that the requester appellant may be seeking access to the requested information "based on private interests," relating to litigation between the requester appellant and the third party appellant over an unrelated property. However, the ORC acknowledges that it "cannot speak to the validity or confirm any circumstances with respect to litigation that might be ongoing" between the requester appellant and the third party appellant.

The ORC states that it decided to disclose most of the records at issue in order to "shed light on the operations of government" and that it applied "limited and specific" exemptions to withhold certain information."

With regard to the information withheld under section 13, the ORC states that the purpose of the exemption is to protect the free flow of advice within the deliberative process of government decision-making and policy-making and to ensure that various people within the public service are able to advise and make recommendations freely and frankly. The ORC submits that the purpose of the exemption is not outweighed in this case by the "general (not compelling) public interest or personal interest in the responsive records pertaining to a routine real estate lease with option to purchase transaction."

With respect to the information withheld under section 21, the ORC submits that the personal privacy of the individual identified in Record 149 "outweighs any general or personal interest in the information."

The ORC states that disclosing the information withheld under sections 13 and 21 "would not provide the public with any better understanding of [the] subject [real estate] transactions."

The third party appellant also provided representations. The third party appellant states that it is "overwhelmingly clear" that the requester appellant's interest in the information at issue is "private in nature and relates to personal gain" in connection with the litigation it is engaged in with the third party appellant and by a desire to cause "detrimental impacts and embarrassment to the [third party appellant] and related corporations." The third party appellant also submits that the requester appellant's actions in seeking access to records that he was no longer able to acquire through the litigation process due to procedural rulings undermines public respect for the judicial process. The third party appellant, therefore, suggests that there is a "public interest in non-disclosure in order to protect the integrity of the judicial process."

Analysis and findings

I have carefully considered the parties representations and the records at issue.

Both the third party appellant and the ORC have suggested that the requester appellant may be motivated to acquire the information at issue by a private rather than public interest. The basis for this view is that the third party appellant and the requester appellant have been embroiled in litigation and, due to procedural rulings handed down by the court that prevent the appellant from gaining access to additional information, the requester appellant has turned to the access provisions under the *Act*. While it may be the case that the appellant is motivated to some degree by private interests, I am satisfied that he has raised a legitimate public interest in the information at issue. In my view, the circumstances surrounding the sale of public lands to private interests should, in itself, be enough to pique public interest.

However, although I am satisfied that there is a public interest in the records requested, in order to meet the first requirement under section 23, I must find that there is a "compelling" public interest in the information. As stated above, the word compelling has been interpreted to mean "rousing strong interest or attention" [Order P-984].

In this case, as a result of this inquiry, the requester appellant stands to obtain access to most of the information at issue and in receiving this information will gain considerable insight into the basis upon which the Province determined the value of the subject lands. The only information not ordered to be disclosed, to which the public interest override could apply, are the small portions of Records 95, 177, 178, 179, 181, 192 and 199 that I have exempted under section 13(1), and the limited personal information of an identifiable individual in Record 149 that I have exempted under section 21(1).

Dealing first with the information ordered withheld under section 13(1), based on my review of these records the remaining information will not provide any further meaningful insight into the valuation of the subject property or the circumstances surrounding its sale. Accordingly, I cannot find that there is a compelling public interest in the disclosure of this remaining information that outweighs the operation of the section 13(1) exemption, which is to protect the free flow of advice within the deliberative process of government decision-making and policy-making. In my view, any compelling public interest in disclosure that may exist is satisfied by the degree of disclosure required under this order.

Finally, with regard to the information withheld under section 21(1), based on the evidence before me, including the personal information withheld in Record 149, disclosure of this information would not shed any additional light on the accountability issues that interest the requester appellant. Through this order the requester appellant will gain access to the views and concerns of an individual regarding the environmental impact of the sale of the subject lands. However, the disclosure of this individual's personal information will not assist the appellant requester. Accordingly, I find that there is no compelling public interest in the disclosure of that particular information.

To summarize, I find that the section 23 public interest override does not apply in the circumstances of this case.

EXERCISE OF DISCRETION

I have found above that section 13(1) applies to exempt the severed portions of Records 95, 177, 178, 179, 181, 192 and 199 and that section 19 applies to exempt the severed portions of Records 101, 115 and 149. Sections 13(1) and 19 are discretionary exemptions which permit 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)].

The ORC's representations indicate that in making its decision to apply the discretionary exemptions at sections 13(1) and 19, it weighed a number of factors including the following:

- the purposes of the *Act*, including the principle that information should be available to the public to promote transparency and accountability and shed light on the operations of government
- disclosure should not occur where it would inhibit the free flow of advice intended to be protected by section 13(1) or reveal solicitor-client privileged communication protected under section 19
- exemptions should be applied in a limited and specific fashion

- with the exception of a small amount of personal information contained in one record (Record 149), personal information is not being sought
- the extent to which the requester appellant had a sympathetic or compelling need to receive the information at issue
- disclosure will not necessarily increase the public confidence in the operations of the ORC
- past practice in dealing with similar information

The appellant states that in light of the ORC's commitment to disclose "most of" the information at issue in order to shed light on the operations of government, in the interest of transparency, he sees no reason for the ORC to withhold the balance of the information at issue.

I have carefully reviewed the representations of the parties and am satisfied that the ORC properly exercised its discretion and in doing so took into account only relevant considerations. I also find that the ORC did not exercise its discretion in bad faith, for an improper purpose or take into account irrelevant considerations.

Having regard to the above, I find that the ORC properly exercised its discretion not to disclose the information I have found exempt under sections 13(1) and 19 of the *Act*.

SEVERANCE

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be released without disclosing material which is exempt. The key question raised by section 10(2) is one of reasonableness.

The ORC states that it made a "rational and justifiable access decision" and severed only certain information in a reasonable manner. The ORC submits that it attempted to balance the requirement for transparency with the need to protect exempt information.

I am satisfied that the ORC understood and administered its responsibilities under section 10(2) of the *Act* and that it took a reasonable approach to the severing exercise in this case.

ABUSE OF PROCESS

As stated above, the third party appellant has suggested that the request initiated by the requester appellant is an "abuse of process."

The third party appellant states in its representations that it is engaged in litigation with the requester appellant. The third party appellant also states that the litigation is unrelated to the property that is the subject of the original access request that is the focus of this inquiry. I understand that the ORC is not a party to this litigation.

In a letter to the ORC at the request stage, the third party appellant provides submissions in response to the ORC's preliminary decision to disclose records to the requester appellant. In its letter, the third party appellant objects to the disclosure of information to the requester appellant. In raising its objection to disclosure, the third party appellant characterizes the requester appellant's access request as an attempt to obtain documents for the litigation that it can no longer obtain through the litigation process since the requester appellant "no longer has an ability to obtain 'discovery' of records within the confines of the procedural orders that have already been issued in such litigation." The third party appellant adds in this letter that the requester appellant's access request is "an attempt to do an 'end run' around the procedural limitations of the litigation to try to obtain additional documentation." The third party appellant submits further that these issues should be dealt with within the confines of the litigation and "not pursuant to this process under the *Act*." The third party appellant concludes that the access request has "not been made in good faith" by the appellant requester and is "an abuse of this process for a collateral and improper purpose […]."

These submissions raise the possible application of the "frivolous or vexatious" provisions of the *Act* and Regulation 460. A preliminary issue in that regard is whether the appellant is entitled to rely on those provisions, or whether they can only be claimed by the Ministry.

Section 10(1)(b) states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > *the head is of the opinion* on reasonable grounds that the request for access is frivolous or vexatious. [Emphasis added.]

Section 27.1(1)states:

> A head who refuses to give access to a record or a part of a record *because the head is of the opinion that the request for access is frivolous or vexatious*, shall state in the notice given under section 26,
>
> > (a) that the request is refused because *the head is of the opinion* that the request is frivolous or vexatious;
> >
> > (b) *the reasons for which the head is of the opinion* that the request is frivolous or vexatious; and
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 50(1) for a review of the decision. [Emphases added.]

The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

A review of these provisions makes it very clear that they exist for the benefit of "institutions" under the *Act*. Section 10(1)(b) sets a condition precedent for its application that "the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious." This theme is repeated in the notice requirement established by section 27.1(1). Similarly, sections 5.1(a) and (b) of Regulation 460 prescribe that:

> A head … shall conclude that the request for a record or personal information is frivolous or vexatious if:
>
> (a) *the head is of the opinion* on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) *the head is of the opinion* on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access. [Emphases added.]

In Order PO-2490, Senior Adjudicator John Higgins concluded that sections 10(1)(b) and 27.1(1) of the *Act* and sections 5.1(a) and (b) of Regulation 460 can only be relied upon by the head of an institution under the *Act*. In reaching this conclusion, Senior Adjudicator Higgins states:

> In my view, the universal requirement in these provisions that *the head* (i.e., the head of an institution under the *Act* – see the definition in section 2) must have *formed an opinion* that the request is frivolous or vexatious make it even more difficult for an affected party or appellant to rely on these provisions than to rely on a discretionary exemption, as discussed above. In fact, based on the statutory wording, I believe this is an insurmountable hurdle. I find that the appellant is not entitled to rely on these sections, *per se*. [Emphases in original.]

However, Senior Adjudicator Higgins goes on to state that parties to an appeal are not precluded from arguing that a request under the *Act* is an abuse of process at common law. In this regard, Senior Adjudicator Higgins endorsed the reasoning of former Commissioner Tom Wright in Order M-618, who considered a claim of abuse of process on the basis of common law principles, prior to the addition of the "frivolous or vexatious" provisions to the *Act*. In that case, former Commissioner Wright stated:

> I have been referred to ample and persuasive legal authority for the proposition that, as an administrative tribunal exercising quasi-judicial functions, the Commissioner is "master of his own process". On this basis I believe that I have the necessary authority to control what I identify as abuse of that process which would frustrate the intent of the Legislature in creating both a freedom of information regime and an office for its administration.
>
> The authority of an administrative tribunal to prevent abuses of its own process is affirmed in the judgment of Misener J., of the Ontario Court (General Division),

> in Sawatsky v. Norris (1992), 10 O.R. (3d) 67. Judge Misener considered that, even absent the express power to deal with abuses of process granted by section 23 of the Statutory Powers Procedure Act R.S.O. 1990, as amended, a review board under the Mental Health Act "has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right" (at p. 77).

Senior Adjudicator Higgins then went on to consider the application of the common law principles in the circumstances of PO-2490. However, because the common law principles are, to a significant extent, the foundation of the "frivolous or vexatious" provisions of the *Act*, he referred to previous decisions in that regard, and other case law on the subject, in deciding this issue in Order PO-2490.

In the case before me, as in Order PO-2490, the "abuse of process" issue has been raised not by the ORC but by the third party appellant. Accordingly, following the reasoning of Senior Adjudicator Higgins in Order PO-2490, I will consider whether the request is an abuse of process under the relevant common law principles in the circumstances of this case. In that regard, I will refer to relevant representations, decisions and case law on the issue of "frivolous or vexatious," as Senior Adjudicator Higgins did in Order PO-2490.

Representations and Submissions

As alluded to above, the basis for the third party's assertion that the requester appellant's request is an abuse of process is that it has "not been made in good faith," but rather for the "collateral and improper purpose" of circumventing the procedural limitations of the civil justice system. This is articulated in the third party appellant's submissions provided to the ORC at the request stage.

In my view, the third party appellant's representations submitted during the course of this inquiry do not add measurably to the discussion of this issue.

The third party appellant offers a brief review of the scope of Section 5.1 of Regulation 460, focusing on the head's obligation under that section to conclude that a request is frivolous or vexatious if, on reasonable grounds it is the head's opinion that (a) the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution or (b) request is made in bad faith or for a purpose other than to obtain access.

The third party appellant goes on to state that the "activity in the Litigation and the context there existing is a material factor to be taken into account when considering (under section 5.1 of the Regulation) whether the request is part of a pattern of conduct that amounts to an abuse, or alternatively is made in bad faith." The third party appellant adds that any inquiry or evaluation under Section 5.1 would be "artificial if it excluded reference to actions in the judicial process that were relevant to whether parties are acting in bad faith or in abusive manner." However, the third party appellant does not provide any insight into how the application of Section 5.1 (or the common law principles underlying this section) apply in the circumstances of this case or how the circumstances in the litigation between the third party appellant and the requester appellant are relevant to an examination of Section 5.1.

The third party appellant also appears to attempt to distinguish the circumstances in Order PO-2490 from those in this case. The third party appellant submits that Order PO-2490 "uses as its foundation Order 48," but it argues that the comments in Order 48 were "limited to the situation where the institution was involved in litigation." The third party appellant points out that in the current case the parties to the litigation are the requester appellant and the third party appellant. The third party appellant also distinguishes the current case from the circumstances in Order 48 on the basis that in the latter case the decision maker, former Commissioner Sidney B. Linden, "only comments generally on whether there is any general policy to be implied as to the interaction of the rules of Court and those of the *Act* […]," whereas in the current case the court has made "express rulings" to manage "difficult, lengthy and protracted litigation." Finally, the third party appellant suggests that the circumstances in Order PO-2490 are distinguishable from those in the current case because in Order PO-2490 Senior Adjudicator Higgins made a finding that litigation did not qualify as a suitable venue for "competition" in the context of the exemption in section 17(1)(a) of the *Act*, whereas in this case the third party appellant is not relying on the application of the exemption in section 17.

The ORC also presented submissions on the abuse of process issue. The ORC states that the circumstances in this appeal are similar to those in Order PO-2490 to the extent that in each case the original requesters are engaged in litigation with third parties. The ORC submits that it agrees with the approach adopted by Senior Adjudicator Higgins in PO-2490, where he rejected the argument that making an access request under the *Act* constitutes a "collateral attack" in the litigation. The ORC argues that a requester's rights under the *Act* were "clearly intended to co-exist with any rights the [requester] may have to production of records in the context of litigation."

The requester appellant submits that the third party appellant has not shown how "disclosure of the information relates to, or is 'contrary' to, interim rulings in litigation referred variously in its submissions, or is otherwise an 'abuse of process.'" The requester appellant states that "what happens in the litigation process is irrelevant to whether the information sought herein should be disclosed."

Analysis and findings

Turning to my analysis, I am not satisfied on the evidence presented by the third party appellant that the requester appellant's access request is an abuse of process at common law. In reaching that conclusion, I have considered and rejected the third party appellant's arguments that the request amounts to an abuse of the right of access under the *Act* or was made in bad faith or for a purpose other than to obtain access.

I note that at the request stage, the third party appellant asserts that the access request was an "abuse of process" as it was "not made in good faith," but was made for the "collateral and improper purpose" of circumventing the procedural limitations of the civil justice system.

Unfortunately, the third party appellant appears to be of the view that its abuse of process claim is self-evident in the circumstances of this case; its representations do not provide any further meaningful information to explain why, in the circumstances of this case, the requester

appellant's access request or appeal would amount to an abuse of process, or more particularly, an abuse of the right of access, or how the request was made in bad faith, or made for a purpose other than to obtain access.

Abuse of process is a common law concept that often refers to repeated or multiple proceedings. It has been associated with a high volume of requests, taken together with other factors (see Orders M-618, M-796, MO-1488 and MO-1949). In my view, there is no evidence before me to substantiate an allegation of this nature in this case.

On the question of whether the request was "for a purpose other than to obtain access," Senior Adjudicator Higgins addressed this question in Order MO-1924, also in regard to a request in the context of ongoing litigation. In that appeal, the institution denied an access request on the basis that the requester was attempting to "expand" the discovery process in a pending civil litigation matter by requesting access under the *Act*. The institution claimed that this amounted to an improper purpose and was frivolous or vexatious.

The following comments from Order MO-1924 are applicable in this case:

> The [institution] also suggests that the objective of obtaining information for use in litigation with the [institution] or to further the dispute between the appellant and the [institution] was not a legitimate exercise of the right of access.
>
> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have "a right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

Order MO-1924 also included a review of section 51(1) [the *MFIPPA* equivalent of section 64(1)] and its relevance to this issue:

> I note that records protected by litigation privilege are subject to the solicitor-client privilege exemption at section 12. In addition, section 51 expressly addresses the relationship between the *Act* and the litigation process. [S]ection [52(1)] states:
>
> > 1. This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
> >
> > […]
>
> The Legislature clearly considered the relationship between the *Act* and the litigation process, and could have chosen to go beyond the section 12 exemption to limit the application of the *Act* where the requester is engaged in litigation with an institution. It did not do so. In my view, the [institution]'s argument on this point is entirely without merit.

Senior Adjudicator Higgins went on to conclude that the requester was "… entitled to make an application for access to the records at issue and any intention to use those records in a civil proceeding would not constitute a "purpose other than to obtain access" as those words are used in section 5.1(b) of Regulation 460."

Similarly, in Order PO-1688, Senior Adjudicator David Goodis discussed the relationship between access under the *Act* and the discovery process. In that case, a third party appellant had argued that it was improper, in circumstances where the requester has commenced litigation against it, for the requester to utilize the access to information process under the *Act* as opposed to the discovery process under the Rules of Civil Procedure. He rejected this argument, and provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
>
> …
>
> In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and

the access to information process under the *MFIPPA*, in the context of a motion to clarify an earlier order he had made granting a publication ban:

> The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the Municipal Freedom of Information and Protection of Privacy Act legislation, nor ban the publication of the contents of police files required to be produced under that Act. … In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

I agree with the reasoning of Senior Adjudicator Higgins and apply it to the circumstances of this case. The requester appellant was entitled to make an application for access to the records at issue and any intention to use those records in a civil proceeding would not constitute a "purpose other than to obtain access" within the meaning of section 5.1(b) of Regulation 460 of the *Act*.

The third party appellant also makes reference to the other ground in section 5.1(b) of Regulation 460, suggesting that the requester appellant's request was "not made in good faith." I note that the third party appellant suggests in passing that the requester appellant has "admitted [to committing] fraud," although there is no elaboration on this argument and how it may be relevant to this issue.

In Order M-850, former Assistant Commissioner Tom Mitchinson commented on the meaning of the term "bad faith." He stated that "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of a dishonest purpose or moral underhandedness. He went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with a secret design or ill will.

Based on the evidence before me, I am not persuaded that the requester appellant has engaged in underhanded behaviour and I find that the requester appellant's decision to exercise his rights under this *Act* does not constitute "bad faith."

I turn now to the third party appellant's argument that the request was intended to circumvent the procedural limitations of the civil justice system. The issue of "collateral attack" was examined by Senior Adjudicator Higgins in Order PO-2490.

Order PO-2490 concerned a request submitted to the Ministry of the Environment (the Ministry) under the *Act* for information about environmental concerns relating to two adjoining properties during a specified time period. The requester was a corporation that owned one of the properties and was the plaintiff in litigation relating to environmental contamination. The Ministry notified an affected party (one of the defendants in the requester's litigation), who consented to disclosure of two of four reports that were responsive to the request. As in this case, the Ministry was not a party to this litigation. The Ministry agreed to grant the requester access to all four reports. The affected party appealed the Ministry's decision to disclose the two reports that the affected party did not agree to have disclosed. In its submissions during the course of an inquiry, the affected party submitted that the request was frivolous or vexatious, within the meaning of section 5.1(b) of Regulation 460, as the real purpose of the request was to obtain documents for use in the litigation with the requester. The affected party argued that the request was "an improper collateral attack" and, as such, was made in bad faith.

The affected party in Order PO-2490 argued that the requester's access request amounted to a "collateral attack" on an order of the court in the civil proceeding, and thereby constituted a purpose other than to obtain access.

As already noted, Senior Adjudicator Higgins found that the affected party was not entitled to rely on the "frivolous or vexatious" provisions of the *Act*, but was entitled to argue that the request was an abuse of process at common law. In response to this argument by the affected party, Senior Adjudicator Higgins examined the doctrine of "collateral attack," as discussed in *Garland v. Consumers' Gas Co.* [2004] 1 S.C.R. 629 (SCC). With respect to the doctrine of collateral attack on the OEB order, the Supreme Court of Canada stated:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen,* [1983] 2 S.C.R. 5594, at p. 599, this Court described the rule against collateral attack as follows:
>
>> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked [page 662] collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

In concluding that the affected party's collateral attack assertion could not be sustained, Senior Adjudicator Higgins stated:

> I have decided that the appellant's assertion of a collateral attack cannot be sustained because of the extremely different and separate processes involved. It is simply not tenable to claim that a request under the *Act* can be considered a collateral attack on a motion for production in a civil action.
>
> Using the language of the court in the *Garland* case, the object of this request for access is "not to invalidate or render inoperative" the order of the court. The object of this request is to gain access to a record through the totally independent mechanism of an access request under the *Act*. This same request could have been made by *all* members of the public, not just this requester.
>
> In this regard, I note that one of the bases relied on for rejecting the collateral attack argument in *Garland* was that the party bound by the OEB order was not the same as the party bringing the court challenge. In the present case, the requester is the moving party seeking production in the civil action, but as I have just noted, this party is making a request under the *Act* that could be made by any member of the public. There is no principled basis for differentiating the requester from other members of the public, and disenfranchising the requester under the *Act* because it is also involved in litigation.
>
> If the fundamental purpose of the rule against collateral attack, as described by the Court in the *Garland* decision, is to "maintain the rule of law" and preserve the "repute of the administration of justice", the request in this case does not conflict with that purpose. This office has no authority to make an order that would affect the litigation process. Nor is the requester in the wrong forum in any sense of that word when making this request. The requester is asserting a right under the *Act* that was clearly intended to co-exist with any rights that the requester may have to production of records in the context of litigation.
>
> This is confirmed by the order of Justice Lane … in the *Doe* case [*Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.)]. In *Doe*, Justice Lane issued an order prohibiting publication of information obtained in the civil discovery process, including publication by third parties. An application was made by a party to the civil litigation in that case under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to the contents of police files that were to be produced in the discovery process. Justice Lane stated that his order in the civil proceeding was not intended to interfere with the operation of *MFIPPA*, and would not bar the publication of records obtained under *MFIPPA*. I have previously reproduced the relevant comments of Justice Lane, but they bear repeating here:

> In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

> Although the context of a publication ban in civil proceedings, as compared to a request under the *Act*, is not an exact analogy to an order refusing production as compared to a request under the *Act*, it is very close, and I find Justice Lane's analysis, which speaks directly to the relationship between civil actions and requests under the *Act*, to be persuasive.
>
> I therefore conclude that even if there were an order in the civil proceeding that dealt specifically with the production of the records at issue, the request could not be considered a "collateral attack", and the requester is not prohibited from making an application under the *Act* for that reason.
>
> Accordingly, I dismiss the appellant's "collateral attack" argument as a basis for finding that the request was for a purpose other than to obtain access, or made in bad faith. I will now consider whether there is any other basis for finding that those objections have any validity.

The third party appellant takes the view that Order PO-2490 should be distinguished from the circumstances in this case for various reasons, as set out above in its representations. I strongly disagree. In my view, the circumstances in this case are virtually identical to those in Order PO-2490. In both cases the requester and the third party were engaged in litigation and subject to court orders limiting the discovery of documents in the respective civil proceedings.

The third party appellant seems to take issue with Senior Adjudicator Higgins' analysis of the interpretation of section 64 of the *Act*, which provides that the *Act* "does not impose any limitation on the information otherwise available by law to a party to litigation." Adjudicator Higgins examined section 64 in the context of his analysis of the application of the section 17 exemption to information at issue in Order PO-2490. In doing so, he cites with approval various orders of this office including Order 48, which affirms the view that the existence of codified rules to govern the production of documents in other contexts (such as civil litigation) does not necessarily imply that a different method of obtaining documents under the *Act* is unfair.

The fact that the circumstances in Order 48 may be different from those in this case is irrelevant. As stated above, Senior Adjudicator Higgins dealt with section 64 and Order 48 in the context of an argument under section 17, to the effect that the competitive position of the third party appellant in that case would be prejudiced by disclosure of information. He had to decide

whether the third party's "competitive position" under section 17(1)(a) included its position in litigation, and found that it did not. This issue does not arise here.

In considering the question of "collateral attack," the Senior Adjudicator referenced section 64, and the relationship between the discovery process in litigation and access under the *Act*. He concluded that earlier decisions including Orders 64, MO-1924 and PO-1688 "… reject the idea that requests under the *Act* are not permissible where there is related litigation." This view is reinforced by Justice Lane's comments in *Doe* (reproduced above).

To repeat, I find that the circumstances of Order PO-2490 are directly analogous to those found in this case as regards the abuse of process issue, and I conclude, for the reasons already given, that the request is not an abuse of process as argued by the appellant.

I note, moreover, that the third party appellant has not provided me with any evidence regarding the breadth, scope and substance of any procedural orders issued by the court that would limit the requester appellant's access to documents that may be relevant to the litigation. For this additional reason, I cannot conclude that the requester appellant's request in this case is intended as a collateral attack to "undermine previous orders issued by a court." The third party appellant has itself acknowledged that the subject matter of the litigation and the subject matter of the access request are entirely different. Consequently, I am satisfied that the object of the request is to gain access to information through the totally independent mechanism of an access request under the *Act*. Furthermore, this same request could have been made by *any* member of the public, not just the requester appellant. In my view, the requester appellant was asserting a right under the *Act* that is clearly intended to co-exist with any rights that he may have to production of records in the context of litigation.

To conclude, for the reasons presented above, I am satisfied that the requester appellant had an independent right to seek access under the *Act* and that in exercising this right by submitting an access request to the ORC, this did not amount to a "collateral attack" in the civil proceeding.

I therefore dismiss the third party appellant's arguments related to "abuse of process" whether they are considered in the context of the *Act*, under the "frivolous or vexatious" provisions in section 5.1 of Regulation 460 or in the context of "abuse of process" at common law.

REASONABLE SEARCH

As stated above, during the course of the mediation stage the requester appellant challenged the adequacy of the ORC search for responsive records and maintained that additional records should exist.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221 and PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist [Order MO-2246].

I invited the ORC to submit representations on its search efforts. The ORC did provide representations on the search issue, which I shared with the requester appellant. However, the requester appellant declined to submit representations.

The ORC states that during the mediation stage of the requester appeal it conducted "three (3) additional searches" in order to "fully and completely search for all records and missing pages of records" responsive to the access request. The ORC outlined the sequence of events in its representations. After the initial records search and the issuance of the original access decision, the ORC submits that the following cycle generally occurred during the course of the mediation stage:

- requester appellant reviewed the records disclosed after the initial access decision
- requester appellant asked for additional records (that is, records identified in those released)
- ORC conducted additional and specific record searches
- additional records were located
- ORC issued a revised decision letter and subsequently released additional records

The ORC claims that this cycle occurred three times during mediation and that each time the affected third parties were notified and asked to comment on the disclosure of additional records.

The ORC also provided an affidavit, sworn by the individual who was the ORC's Freedom of Information Coordinator (the Coordinator) at the time the original access request was submitted. The Coordinator's affidavit outlines the steps taken to process the request and to conduct the first two searches as well as commence the third search for responsive records.

The ORC submits that during the mediation stage the Coordinator accepted an acting assignment to another department within the ORC and another individual (the Acting Coordinator) assumed the Coordinator's duties and responsibilities for this file. The ORC states that the Acting Coordinator conducted two additional searches for responsive records. The ORC has also provided an affidavit, sworn by the Acting Coordinator, which outlines the steps taken to conduct the third and fourth searches for records.

The ORC adds that at all times during the course of processing the request as well as during the mediation stage of the appeal process, it acted in a "responsible, diligent and accommodating manner." The ORC submits that the affidavits of the Coordinator and Acting Coordinator demonstrate that the ORC "responsibly addressed the initial access request and took extraordinary steps to address three (3) follow-up requests for additional records (not formal FOI requests)." The ORC states that it did not charge the requester appellant for any of the additional time it expended in conducting the three additional searches. The ORC states that its efforts in responding to the request exemplify its commitment to meeting its obligations under the *Act* and its dedication to conducting itself in an "open, responsible and accountable manner."

Having reviewed the ORC's submissions, including the affidavits sworn by the Coordinator and Acting Coordinator, I am satisfied that the ORC has conducted a reasonable search for records as required by section 24 of the *Act*. In my view, the ORC has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records and it has ensured that experienced employees knowledgeable in the subject matter of the request expended reasonable efforts to locate records which are reasonably related to the request.

ORDER:

1. I uphold the ORC's decision to deny access to the severed portions of Records 175, 190, 191 and 201 pursuant to section 12(1).

2. I uphold the ORC's decision to deny access to the severed portions of Records 95, 177, 178, 179, 181, 192 and 199 pursuant to section 13(1).

3. I uphold the ORC's decision to deny access to Record 101 in its entirety and the severed portions of Records 115 and 149 pursuant to section 19.

4. I uphold the ORC's decision to deny access to the severed portions of Record 149 pursuant to section 21(1).

5. I order the ORC to disclose copies of Records 1, 2, 4, 9, 10, 12, 13, 21, 26, 31, 35, 52, 54, 68, 74, 75, 76, 78, 80, 81, 83, 84, 85, 86, 87, 88, 90, 92, 93, 94, 96, 97, 98, 99, 100, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113, 114, 116, 117, 118, 120, 123, 125, 129, 131, 132, 136, 138, 139, 140, 144, 145, 146, 147, 148, 150, 151, 152, 153, 154, 155, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 172, 176, 180, 182, 183, 184, 185, 193, 200 and 203 to the requester appellant in their entirety by sending him copies by **September 20, 2010** but not earlier than **September 15, 2010**. With regard to Record

21, the ORC is requested to ensure that a complete copy of this record, which contains all pages, is disclosed to the requester appellant.

6. I uphold the ORC's search for records responsive to the requester appellant's request.

7. In order to verify compliance with provision 5, I reserve the right to require the ORC to provide me with a copy of the records which are disclosed to the requester.

Original signed by: ________________ August 16, 2010
Bernard Morrow
Adjudicator

APPENDIX

Record #	Description	ORC's Decision	Sections that Could Apply
1	Statement of Adjustments as of January 26, 2000	Disclose in full	17, 23
2	Journal 01/27/2000	Disclose in full	17, 23
4	Draft Indenture between the Town and a named holding company, dated June 27, 1985	Disclose in full	17, 23
9	Correspondence from third party appellant's solicitors to MGS, dated March 2, 1998	Disclose in full	17, 19, 23
10	Correspondence from third party appellant's solicitors to Town, dated March 2, 1998	Disclose in full	17, 19, 23
12	Correspondence from third party appellant's solicitors to MGS, dated May 5, 1998	Disclose in full	17, 19, 23
13	Correspondence from third party appellant's solicitors to MGS, dated June 25, 1998	Disclose in full	17, 19, 23
21	Agreement of Purchase and Sale between the Province and third party appellant	Disclose in full	17, 23
26	Correspondence between third party appellant's solicitors and ORC, dated January 13, 2000	Disclose in full	17, 19, 21, 23
31	Statement of Adjustments as of January 14, 2000	Disclose in full	17, 23
35	Notice and Direction, dated January 24, 2000	Disclose in full	17, 23
52	Lease Agreement between the Town and third party appellant, dated November 1, 1988,	Disclose in full	17, 21, 23
54	Order-in-Council, dated March 25, 1998	Disclose in full	17, 23

68	Leased fee interest appraisal, dated March 17, 1996	Disclose in full	17, 23
74	Correspondence from ORC to third party appellant's solicitors, dated June 17, 1997	Disclose in full	
75	Offer to Lease between the Province and third party appellant, dated December 17, 1997	Disclose in full	17, 23
76	Leases and Agreements regarding the golf club, as of January 16, 1998	Disclose in full	17, 23
78	Town Staff Report, dated May 4, 1998	Disclose in full	
80	Correspondence from third party appellant's solicitors to Town, dated May 29, 1998	Disclose in full	19, 23
81	Correspondence between two law firms representing the third party appellant, dated June 11, 1998	Disclose in full	19, 23
83	Correspondence from third party appellant's solicitors to Town, dated July 16, 1998	Disclose in full	19, 23
84	Correspondence between two law firms representing the third party appellant, dated August 10, 1998	Disclose in full	19, 23
85	Correspondence from third party appellant's solicitors to Town, dated August 11, 1998	Disclose in full	19, 23
86	Correspondence from Town to third party appellant's solicitors, dated August 17, 1998	Disclose in full	
87	Correspondence from third party appellant's solicitors to Town, dated August 25, 1998	Disclose in full	19, 23
88	Correspondence from third party appellant to Town, dated October 22, 1998	Disclose in full	17, 23
90	Correspondence from Town to third party appellant, dated December 3, 1998	Disclose in full	

92	Correspondence from Town to third party appellant, dated January 20, 1999	Disclose in full	
93	Correspondence from Town to third party appellant, dated February 4, 1999	Disclose in full	
94	Correspondence from MBS to third party appellant's solicitors, dated March 9, 1999	Disclose in full	17, 23
95	Briefing Note, dated March 13, 1999	Disclose in part	13, 23
96	Correspondence from ORC to third party appellant's solicitors, dated April 22, 1999	Disclose in full	
97	Correspondence from third party appellant's solicitors to ORC, dated April 26, 1999	Disclose in full	19, 23
98	Correspondence from ORC to third party appellant's solicitors, April 27, 1999	Disclose in full	
99	Correspondence from third party appellant's solicitors to ORC, dated April 29, 1999	Disclose in full	
100	Correspondence from third party appellant's solicitors to ORC, dated April 29, 1999	Disclose in full	19, 23
101	ORC Memo, dated May 4, 1999	Withhold	19, 23
103	Correspondence from ORC to third party appellant's solicitors, dated May 6, 1999	Disclose in full	17, 23
104	Correspondence from third party appellant's solicitors to ORC, dated May 10, 1999	Disclose in full	19, 23
105	Internal ORC correspondence, dated May 11, 1999	Disclose in full	17, 23
106	Correspondence from ORC to third party appellant's solicitors, dated May 11, 1999	Disclose in full	
107	Correspondence from third party appellant's solicitors to ORC, dated May 18, 1999	Disclose in full	19, 23

108	Correspondence from third party appellant's solicitors to ORC, dated May 19, 1999	Disclose in full	19, 23
109	Correspondence from ORC to third party appellant's solicitors, dated May 20, 1999	Disclose in full	
111	Correspondence from ORC to third party appellant's solicitors, dated May 20, 1999	Disclose in full	17, 23
112	Correspondence from third party appellant's solicitors to ORC, dated May 21, 1999	Disclose in full	19, 23
113	Correspondence from ORC to third party appellant's solicitors, dated may 26, 1999	Disclose in full	
114	Correspondence from third party appellant's solicitors to ORC, dated May 26, 1999	Disclose in full	19, 23
115	Internal ORC correspondence, dated June 1, 1999	Disclose in part	19, 23
116	Correspondence from third party appellant's solicitors to ORC, dated June 8, 1999	Disclose in full	19, 23
117	Correspondence from ORC to third party appellant's solicitors, dated June 17, 1999	Disclose in full	
118	Correspondence from third party appellant's solicitors to ORC, dated June 22, 1999	Disclose in full	19, 23
120	Correspondence from third party appellant's solicitors to ORC, dated June 23, 1999	Disclose in full	19, 23
123	Correspondence from ORC to third party appellant's solicitors, dated July 21, 1999	Disclose in full	
125	Correspondence from third party appellant's solicitors to ORC, dated July 22, 1999	Disclose in full	19, 23
129	Correspondence from third party appellant's solicitors to ORC, dated September 17, 1999	Disclose in full	19, 23
131	Correspondence from third party appellant's solicitors to ORC, dated September 20, 1999	Disclose in full	19, 23

132	Correspondence from third party appellant's solicitors to ORC, dated September 21, 1999	Disclose in full	19, 23
136	Correspondence from third party appellant's solicitors to ORC, dated September 24, 1999	Disclose in full	19, 23
138	Correspondence from third party appellant's solicitors to ORC, dated October 5, 1999	Disclose in full	19, 23
139	Correspondence from third party appellant's solicitors to ORC, dated October 21, 1999	Disclose in full	19, 23
140	Correspondence from ORC to third party appellant's solicitors, dated October 25, 1999	Disclose in full	
144	Correspondence from third party appellant's solicitors to ORC, dated November 12, 1999	Disclose in full	19, 23
145	Correspondence from ORC to third party appellant's solicitors, dated November 15, 1999	Disclose in full	
146	Correspondence from third party appellant's solicitors to ORC, dated November 16, 1999	Disclose in full	19, 23
147	Email from ORC to MBS, dated November 16, 1999	Disclose in full	
148	Correspondence from third party appellant's solicitors to ORC, dated November 17, 1999	Disclose in full	19, 23
149	Internal Memorandum, dated November 17, 1999	Disclose in part	19, 21, 23
150	Correspondence from third party appellant's solicitors to ORC, dated November 22, 1999	Disclose in full	19, 23
151	Correspondence from third party appellant's solicitors to ORC, dated November 23, 1999	Disclose in full	19, 23
152	Correspondence from ORC to third party appellant's solicitors, dated November 25, 1999	Disclose in full	
153	Correspondence from third party appellant's solicitors to ORC, dated November 26, 1999	Disclose in full	19, 21, 23

154	Correspondence from third party appellant's solicitors to ORC, dated November 26, 1999	Disclose in full	19, 23
155	Internal Memorandum, dated November 26, 1999	Disclose in full	
157	Correspondence from third party appellant's solicitors to ORC, dated November 29, 1999	Disclose in full	19, 23
158	Correspondence from third party appellant's solicitors to ORC, dated November 30, 1999	Disclose in full	19, 23
159	Correspondence from ORC to third party appellant's solicitors, dated November 30, 1999	Disclose in full	
160	Correspondence from third party appellant's solicitors to ORC, dated December 1, 1999	Disclose in full	19, 23
161	Correspondence from third party appellant's solicitors to ORC, dated January 6, 2000	Disclose in full	19, 23
162	Correspondence from third party appellant's solicitors to ORC, dated January 10, 2000	Disclose in full	19, 23
163	Correspondence from third party appellant's solicitors to ORC, dated January 11, 2000	Disclose in full	19, 23
164	Correspondence from third party appellant's solicitors to ORC, dated January 14, 2000	Disclose in full	19, 23
165	Correspondence from third party appellant's solicitors to ORC, dated January 17, 2000	Disclose in full	19, 23
166	Correspondence from third party appellant's solicitors to ORC, dated January 17, 2000	Disclose in full	19, 23
167	Correspondence from third party appellant's solicitors to ORC, dated January 18, 2000	Disclose in full	19, 23
168	Correspondence from third party appellant's solicitors to ORC, dated March 2, 2000	Disclose in full	19, 23
172	Partially executed Agreement of Purchase and Sale between ORC and third party appellant, dated November 4, 1996	Disclose in full	

175	MBS Briefing Note, dated December 18, 1996	Disclose in part	12, 23
176	Offer to Lease between ORC and third party appellant with handwritten notes, dated December 20, 1996 (unexecuted)	Disclose in full	17, 23
177	Memorandum, dated January 13, 1997	Disclose in part	13, 23
178	ORC Memorandum with attachment, dated January 10, 1997	Disclose in part	13, 23
179	Handwritten notes, dated January 13, 1997	Disclose in part	13, 23
180	Handwritten notes, dated January 23, 1997	Disclose in full	
181	Offer to Lease between ORC and third party appellant with handwritten notes, dated December 20, 1996 (unexecuted)	Disclose in part	13, 23
182	Correspondence from third party appellant to Town, dated March 4, 1997	Disclose in full	17, 23
183	Offer to Assume Lease between third party appellant and Town, dated March 3, 1997 (unexecuted)	Disclose in full	17, 23
184	Second Lease Amending Agreement between Town and third party appellant, dated April 1, 1997 (unexecuted)	Disclose in full	17, 23
185	Offer to Lease between Town and third party appellant, dated March 3, 1997 (unexecuted)	Disclose in full	17, 23
190	MBS Briefing Note, dated June 3, 1997	Disclose in part	12, 23
191	MBS Briefing Note, dated June 5, 1997	Disclose in part	12, 23
192	Internal ORC Memorandum, dated June 5, 1997	Disclose in part	13, 23

193	Correspondence from third party appellant's solicitors to ORC, dated June 13, 1997	Disclose in full	19, 23
199	Memorandum from MMAH to ORC, dated September 12, 1997	Disclose in part	13, 23
200	Offer to Lease between Province of Ontario and third party appellant, dated November 19, 1997 (unexecuted)	Disclose in full	17, 23
201	Draft Order-in-Council, undated	Disclose in part	12, 23
203	Correspondence from third party appellant's solicitors to MGS, dated May 19, 1998	Disclose in full	19, 23