



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-1974

Appeals PA-000151-1 and PA-000199-1

Ministry of Finance



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND

The records at issue in these appeals relate to the sale of the Highway 407 Express Toll Route (Highway 407) by the government of Ontario (the government) to the private sector. Before proceeding to discuss the nature of these appeals, I feel it would be helpful to provide the following background information, which is contained in the May 24, 2000 prospectus (a public document) of the 407 International Inc., the new owner of Highway 407:

407 International Inc. (the “Company”) was incorporated on March 17, 1999 under the *Business Corporations Act* (Ontario) (“OBCA”), on the initiative of SNC-Lavalin Inc.... and Cintra Concesiones de Infraestructuras de Transporte, S.A. ..., for the purpose of submitting a bid to the Government of the Province of Ontario (the “Province”) for the purchase from the Province of all of the issued and outstanding shares of 407 ETR Concession Company Limited (the “Concessionaire”). ... This bid was accepted and the purchase was completed on May 5, 1999. ...

The Concessionaire was established by the Province in 1993 as a Crown agency under the name Ontario Transportation Capital Corporation (“OTCC”) to oversee the design, construction, operation, maintenance, management and financing of Highway 407. On April 6, 1999, OTCC was continued by the Province as a share capital corporation under the OBCA under the name 407 ETR Concession Company Limited and entered into a 99-year concession and ground lease agreement (the “Concession Agreement”) with the Province. Together with the *407 Act*, this agreement establishes the Concessionaire’s principal rights and obligations with respect to Highway 407. ...

...

The principle business of the Company is the ownership of the Concessionaire and, through the Concessionaire, the operation, maintenance and management of Highway 407 Central and the construction, operation, maintenance and management of the Highway 407 Central Deferred Interchanges, 407 West Extension and 407 East Partial Extension.

...

The decision to sell OTCC and thereby privatize Highway 407 was announced by the Province on February 20, 1998. The Province subsequently enacted the *407 Act* to authorize and facilitate the privatization. Under the provisions of the *407 Act*, OTCC and the Province entered into the Concession Agreement which, in combination with the *407 Act*, authorizes the Concessionaire to establish, collect and enforce payment of tolls and obliges the Concessionaire to manage, maintain, repair and toll Highway 407 as well as construct certain extensions and expansions thereto. ...

The Company participated in the competitive bid process established by the Province for the sale of Highway 407 and the design and construction of the Highway 407 Central Deferred Interchanges, 407 West Extension and 407 East

Partial Extension. Following the Company's selection as the successful bidder, on April 12, 1999 the Province, the Company [and three other companies] being referred to herein collectively as the "Equity Participants", entered into a share purchase agreement (the "Share Purchase Agreement") pursuant to which, on May 5, 1999, the Company acquired all of the issued and outstanding shares of the Concessionaire for a purchase price of \$3.113 billion. ...

NATURE OF THE APPEALS

The Ministry of Finance (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to the following information:

- [1] The "Request for Proposals" used for soliciting the sale of highway 407.
- [2] Any documents used by the selection committee in dealing with the initial bidders (we understand there were a total of 4 bidders).
- [3] Any documents used by selection committee in dealing with the final bidders (we understand there were a total of 2 bidders at this stage).
- [4] Any documents that represent the final proposal by the selected bidder.
- [5] Any documents regarding the deal that was reached between the government and the winning consortium of [named company] and its subsidiary [named companies].
- [6] Any documents regarding the decisions of Cabinet on the selection process.
- [7] Any documents regarding toll revenues, both actual and projected, related to both the periods before the highway was privatized and after the highway was sold.
- [8] Any documents related to the financial objectives in the sale of the 407.

In his letter of request, the requester advised the Ministry that he also sent a similar request to the Ministry of Transportation, Management Board and Cabinet Office.

The Ministry identified a number of records responsive to the request and granted access to some of them. The Ministry also advised the requester that disclosure of certain records may affect the interests of a third party and that it is being given an opportunity to make representations concerning disclosure.

The Ministry also confirmed that the Ministry of Transportation "has carriage of and has responded to points 5 and 7 of [the] request". It also explained that one additional record under point 2 of the request, Appendix 5.3.3, the Data Room Catalogues of the Highway 407 Confidential Information Memorandum, has been referred to the Ministry of Transportation as that institution has the greater interest in the record.

The schedule that was attached to the Ministry's decision addressed each of the eight points of the request. According to this schedule, access was granted to a number of records either in total

or in part. Access to the remainder of the records was denied pursuant to sections 12(1)(a) and/or 17(1) of the *Act*. The schedule also specified which records and/or parts of records were subject to third party notification. In its decision, the Ministry also advised the requester that the fee for processing his request totals \$90.00.

The requester appealed the Ministry's decision on access. The requester did not take issue with the fee charged by the Ministry or its decision to transfer certain portions of the request to the Ministry of Transportation. In turn, this office opened Appeal PA-000151-1 to deal with the requester's appeal.

Pursuant to section 28 of the *Act*, the Ministry gave notice to 407 ETR Concession Company Limited (407 ETR), seeking submissions with respect to disclosure of certain requested records and/or parts of records.

Subsequently, the Ministry issued a supplementary decision to the requester. In this decision the Ministry stated that pursuant to section 28 of the *Act*, "[407 ETR] has been notified of the ministry's intention to release those records identified in our previous correspondence". The Ministry went on to indicate that after reviewing 407 ETR's representations concerning disclosure, the Ministry made a decision to release this information with the exception of three sets of records. On the same day, the Ministry also issued its decision to 407 ETR.

Subsequently, 407 ETR appealed the Ministry's decision. In turn, this office opened Appeal PA-000199-1 to deal with the appeal.

During mediation of Appeal PA-000151-1, the requester advised the Mediator that he accepts the Ministry's application of section 12(1)(a) to the records identified under point 6 of the Ministry's schedule and no longer wishes to pursue these records. The requester also advised that he is not disputing the section 17(1) severances made to the records identified under point 5 of the schedule. Accordingly, records which were identified under points 5 and 6 of the Ministry's schedule, as well as section 12(1)(a), are no longer at issue in Appeal PA-000151-1.

This order will address the issues raised in both Appeals PA-000151-1 and PA-000199-1.

A Notice of Inquiry was sent to the Ministry and 407 ETR, initially. In addition to the section 17(1) exemption, the parties were asked to make representations with respect to the possible application of section 21(1) (invasion of privacy) of the *Act*, as some of the records at issue in Appeal PA-000151-1 may contain personal information. The possible application of section 23 (public interest override) was also added to the scope of the appeals.

In response, both the Ministry and 407 ETR submitted representations. Both sets of the representations were then forwarded to the requester in their entirety, who in turn also provided representations. 407 ETR's and the requester's representations were then shared with the Ministry in their entirety. The Ministry submitted reply representations which were then shared with 407 ETR, together with the requester's representations. In turn, 407 ETR also submitted reply representations.

RECORDS:

In response to the Notice of Inquiry the Ministry, 407 ETR and the requester clarified their positions with respect to the records at issue in these appeals. The following is a brief summary.

The Ministry's position

In response to the Notice of Inquiry, the Ministry clarified that it is not relying on section 17(1) to withhold any of the records at issue in this appeal. The Ministry also took the position that section 21(1) is applicable to certain portions of Appendix 8 of both the 407 ETR Request for Proposals – Western Extension and the 407 ETR Request for Proposals – East Partial Extension. Accordingly, this is the only information to which the Ministry is denying access.

407 ETR's position

In its representations in response to the Notice of Inquiry, 407 ETR consents to the disclosure of certain information within the records at issue in these appeals. 407 ETR maintains its objection to the disclosure of the following records/portions of records only, on the basis of sections 17(1)(a), (b) and/or (c) of the *Act*:

1. Request for Expression of Interest
 - paragraph 4.2 on page 17
 - paragraph 4.4 on page 18
 - all of page 19
 - Appendix F, pages 59-62
 - the second paragraph on page 66
 - the third and fifth paragraphs under Section 6 on page 66
2. Confidential Information Memorandum (“CIM”)
 - the final 2 paragraphs on page 7
 - the portion of paragraph 3.7.4 on page 16
 - paragraph 3.7.5 on page 17
 - the portion of paragraph 3.7.6 on pages 18-19 under the heading “Traffic Forecasts”
 - paragraph 4.9.4 on page 35
 - Appendix 3.7.1, pages 9-11
 - Appendix 3.7.2, pages 12-14
 - Appendix 4.3, pages 16-17
3. 407 ETR Request for Proposals-Development and Design-Build for the Western Extension of the 407 Express Toll Route **and** the East Partial Extension

- Appendix 9 in its entirety (with the exception of the 2 page Dandy-Line Pull Tape Brochure)
4. Addenda 1, 2 and 3 to 407 ETR Request for Proposals-Development and Design-Build for the Western Extension of the 407 Express Toll Route **and** the East Partial Extension
 - 14 pages under the heading “Communication Network Requirements” following Addendum 3, comprising 8 pages of text (paragraph 1 through 7.5) and 6 pages of accompanying diagrams
 5. Final Bidding Draft of First Amending Agreement to the Highway 407 Concession Ground Lease Agreement
 - Schedule 22 in its entirety

The requester’s position

In response to the Notice of Inquiry, the requester confirmed that he is not pursuing access to the information being withheld by the Ministry pursuant to section 21(1) within Appendix 8 of both the 407 ETR Request for Proposals – Western Extension **and** the 407 ETR Request for Proposals – East Partial Extension. Accordingly, this information is no longer at issue and I will not consider it further in this order. In reviewing the remaining information within this record, I note that some of it also contains personal information which has not been severed by the Ministry. Since the requester is clearly not seeking access to this information, I will include an order provision stipulating that it too should not be disclosed. I have also highlighted the information that should be severed from this record, a copy of which will be provided to the Ministry’s Freedom of Information and Protection of Privacy Co-ordinator with this order.

The requester later confirmed that he is also not pursuing access to items 3 and 4, as described above, namely:

- Appendix 9 to the 407 ETR Request for Proposals - Development and Design-Build for the Western Extension of the 407 Express Toll Route **and** the Highway 407 East Partial Extension; and
- Package 4 entitled “Communication Network Requirements” following Addendum 3 to the Development and Design-Build for the West Extension of the Highway 407 ETR **and** for the East Partial Extension of the Highway 407 ETR – Request for Proposal.

Accordingly, these records are also no longer at issue in these appeals.

DISCUSSION

THIRD PARTY INFORMATION

As outlined above, the Ministry decided that the records do not qualify for exemption under section 17(1) of the *Act*. Therefore, the onus is on 407 ETR as the only party resisting disclosure to establish the application of this exemption.

407 ETR takes the position that sections 17(1)(a), (b) and (c) are applicable to the information contained in the records remaining at issue, as described above. Those 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, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order for a record to qualify for exemption under section 17(1)(a), (b) or (c) of the *Act*, each part of the following three-part test must be satisfied:

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 (a) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

Part one: type of information

407 ETR submits that all of the information at issue is “commercial information” relating directly to its business, which is the construction and operation of a toll highway and the services associated with it. It also states that much of the information is also “financial information”

since it is information concerning the financial performance (past, present and anticipated) of 407 ETR's business (before and after privatization). 407 ETR also submits that some of the information at issue is also "technical" and "scientific information" (principally the Communication Networks Requirements information and Appendix 9 to the 407 ETR West Extension and East Partial Extension Request for Expression of Interest) which discloses information about 407 ETR's tolling system and data communication networks. As indicated above however, these records are no longer at issue in these appeals.

The terms "commercial information" and "financial information" have been defined by this office as follows:

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

[Order P-493]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs.

[Orders P-47, P-87, P-113, P-228, P-295 and P-394]

The requester concedes that the information at issue in these appeals constitutes financial and/or commercial information.

Based on my review of the records, I agree that all of the information at issue qualifies as "commercial information" within the meaning of section 17(1). In my view, all of this information relates directly to the operation of the business of 407 ETR and thus relates to the buying, selling or exchange of services. Some parts of the records also include various financial aspects of this business, including historical revenue data, toll revenue projections, and various costs associated with the operation of the business. I find that these parts of the record also contain "financial information" as that term is used in section 17(1).

Therefore, part one of the section 17(1) exemption test has been established for the information at issue.

Part two: supplied in confidence

The second part of the three-part test under section 10(1) encompasses two components: it must be shown that the information was "supplied" to the institution, and that the supply of the information was "in confidence".

In regards to whether the information was supplied "in confidence", part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

[Order M-169]

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:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- (2) 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.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

407 ETR's representations

407 ETR submits:

The information which 407 ETR objects to the disclosure of was, as 407 ETR understands it, supplied to the [Ministry] by 407 ETR (then known as OTCC) for the limited and confidential purpose of permitting the RFP [Request for Proposal] process by which the 407 ETR business was to be privatized to proceed. While 407 ETR is not privy to (and has no means of ascertaining) all the details of the way in which the 407 ETR business was operated before its privatization, it is readily apparent that the information in issue concerns 407 ETR/OTCC and the only reasonable conclusion to be drawn is that the information was provided by

407 ETR/OTCC to the [Ministry] for the stated limited purpose. Without limiting the generality of the foregoing, 407 ETR understands that the information central to the development of Schedule 22 to the Final Bidding Draft of the First Amending Agreement to the Highway 407 Concession and Ground Lease Agreement, one of the records in issue on these Appeals, was developed by 407 ETR/OTCC and provided by it to the government for the purpose of developing Schedule 22.

This information was intended to be kept confidential by the Ministry and to be made available only to those bidding for Highway 407 for that limited purpose and subject to confidentiality agreements. It was, therefore, supplied in confidence as required by section 17(1) of the Act. Furthermore, 407 ETR has at all times kept this information confidential and has not disclosed any of it publicly since privatization.

The requester's representations

The requester submits:

According to Order P-561, in determining whether information was supplied in confidence, it is necessary to consider whether the information was not otherwise disclosed or available from sources to which the public has access.

A prospectus for 407 International dated February 3, 2000, which invites potential investors to refer to the Concession Agreement, available upon request to the Secretary of 407 International ... As well, the prospectus was available for inspection at 407 International's head office, during normal business hours. A copy of that prospectus is attached as Appendix A.

Although the third party may consider the records sought to have been confidential, they were made available to several potential investors. These potential investors may very well have chosen to become competitors to the third party.

Ministry's reply representations

Although the Ministry did not provide any specific representations with respect to section 17(1) in response to the Notice of Inquiry, in its reply representations it stated as follows:

The 407 ETR Concession Company Limited has asserted that the information at issue was "supplied to the Ministry of Finance by 407 ETR (then known as OTCC) for the limited and confidential purpose of permitting the RFP process by which the 407 ETR business was to be privatized to proceed".

It is this ministry's understanding that while some information was provided by the OTCC, then an agency of the Ministry of Transportation, information was also developed by Ministry of Transportation employees and advisors to the former Office of Privatization for use during the sale process. Hence, it is the opinion of this Ministry that the documents were not strictly *supplied* by the Concession Co. [original emphasis].

During the RFP process, documentation was shared with *all* potential bidders, including competitors of the 407 ETR. Although these bidders were expected to maintain the record's confidentiality during the bidding process, it was the ministry's intention to release as much of the record as possible once an agreement had been signed [original emphasis].

407 ETR's reply representations

In its reply representations, 407 ETR states:

The [Ministry] stated it was their intention to release as much of the record as possible once an agreement was signed. 407 ETR's position is that the information was supplied in confidence and that the Crown's intention to release the information was never documented or communicated to 407 ETR.

The requester stated that the information was available for inspection by the public and enclosed an excerpt from the 407 International Inc. prospectus dated February 3, 2000. 407 ETR points out that the information was not publicly available. The information was only made available to a restricted number of people, being those potential investors that had displayed a genuine interest in making a substantial investment and only after they entered a confidentiality agreement with 407 ETR.

Findings

Supplied

General

According to the Share Purchase Agreement (portions of which are at issue in a number of related appeals involving the Ministry of Transportation), the OTCC was a corporation without share capital incorporated pursuant to the *Capital Investment Plan Act, 1993*. The *Highway 407 Act* authorized the Crown in right of Ontario, as represented by the Minister without portfolio with responsibility for privatization (the Crown) to continue OTCC under the *Ontario Business Corporations Act* (the *OBCA*) as a corporation with share capital. OTCC was continued as 407 ETR under the *OBCA* by certificate of continuance dated April 6, 1999. The Crown was the registered and beneficial owner of all of the issued and outstanding shares of 407 ETR. Subsequently, the Crown entered into the SPA, dated April 12, 1999, with 407 International Inc.

(formerly 1346292 Ontario Inc.) and three other companies (the equity participants), pursuant to which 407 International Inc. acquired all of the issued and outstanding shares of 407 ETR.

Generally speaking, information provided to a provincial government institution by another institution of the same government cannot be considered to have been “supplied” for the purpose of section 17, and that the appropriate exemption to consider in those circumstances would be section 18, which is designed to protect government interests. However, the circumstances here are unusual, in that what was once a government institution, the OTCC, is clearly now a private sector third party, 407 ETR.

The purpose of section 17, as stated by Senior Adjudicator David Goodis in Order PO-1805, is to protect the “informational assets” of businesses or other organizations. If I were to find that section 17 cannot apply because the information was supplied to the Ministry not by 407 ETR, but by its predecessor, the purpose of this exemption would be defeated. At the same time, while section 18 might have been the appropriate exemption to consider had a request been made while OTCC existed, that exemption clearly cannot apply now, since the government no longer has a financial stake in 407 ETR’s assets. In my view, the Legislature could not have intended the result that, in these circumstances, an organization’s informational assets could not be protected by either section 17 or 18, based simply on the fact that the assets traded hands from the government to a private company. Therefore, given that 407 ETR’s interests may be affected by the disclosure of the information at issue in these appeals, I find that it is entitled to avail itself of the protection afforded under section 17, assuming the remaining elements of this exemption are satisfied.

I have reviewed the relevant records and have made the following findings with respect to each portion that remains at issue in these appeals.

Request for Expression of Interest

The Province of Ontario (the Province) through the Privatization Secretariat (the Secretariat) issued a Request for Expression of Interest (the RFEI) in connection with the sale of Highway 407. The RFEI contains information on Highway 407 and the proposed “sale” and “design/build” transaction. It also provided a means by which prospective bidders could formally express their interest in this transaction. 407 ETR is objecting to the disclosure of: paragraphs 4.2 and 4.4 (including Chart 4.4); Appendix F; the second paragraph on page 66; and the third and fifth paragraphs under Section 6 on page 66 in total.

Section 4 of the RFEI deals with financial and traffic information concerning Highway 407. Paragraph 4.2 explains how historical financial information relating to the financial and operating results of OTCC was prepared. The financial information itself is provided in Appendix F, which consist of a Statement of Operations for the OTCC, followed by three pages of notes to this statement. This section specifies that the Statement of Operations was prepared by the “advisors to the Privatization Secretariat”. Paragraph 4.4 (including Chart 4.4) deals with preliminary revenue projections. This paragraph specifies that this information was compiled

from a range of sources (including the Ministry of Transportation, OTCC, and another named company).

In my view, for the purposes of determining whether information was "supplied" under section 17(1), it does not necessarily matter which party "prepared" the records. The determinative issue is whether the information contained in the records was supplied to an institution by a third party. Given the history of 407 ETR, I accept that it may not have "all the details of the way in which the 407 ETR business was operated before its privatization". I also recognize that it may not be in a position to provide evidence as to precisely what information would have been supplied by the OTCC/407 ETR to the Ministry in preparation of the RFP documentation. Unfortunately, the Ministry's representations, although acknowledging that some information was provided by the OTCC, do not provide any details in this regard.

Based on my review of the records, I find that it is reasonable to conclude that at least some of the information within paragraphs 4.2, 4.4 and Appendix F to the RFEI was supplied by the OTCC/407 ETR. The information within these records consists of historical financial information relating to the business operations of the OTCC, including revenue projections, and as such, I accept 407 ETR's submission that it is likely that the information within these records would have been supplied by the OTCC/407 ETR. Therefore, part two of the section 17(1) exemption test has been established for this information.

Appendix G to the RFEI provides a brief summary of the major agreements OTCC has entered into with respect to Highway 407 and certain contracts proposed in connection with the sale. Section 5 of this appendix deals with the Toll System Operating, Maintenance, Management and Rehabilitation Agreement. The second paragraph on page 66 summarizes certain terms of this agreement, which deal with performance standards of the toll system, prices and management fees. Section 6 deals with Mark IV Electronic Toll Equipment Maintenance Agreement. Paragraphs three and five describe this agreement and summarize some of its terms.

Because the information in a contract is typically the product of a negotiation process between the institution and the affected party, the content of contracts generally will not qualify as having been "supplied" for the purposes of section 17(1) of the *Act*. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been "supplied" it must be the same as that originally provided by the affected party. In addition, information contained in a record would "reveal" information "supplied" by the affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution. [See, for example, Orders P-36, P-204, P-251 and P-1105]

Applying the reasoning in past orders dealing with negotiated agreements, I find that the information contained in the second paragraph on page 66 of the RFEI, as well as the third and fifth paragraphs under Section 6 on page 66 of the RFEI, which make reference to a few aspects of the two agreements in question, was not "supplied" for the purposes of section 17(1). There is no evidence before me to suggest that the contents of these sections of the RFEI were "supplied"

by the OTCC/407 ETR, nor is it apparent on the face of these sections that disclosure of these portions of records would permit the drawing of accurate inferences with respect to any information that was supplied. Therefore, I find that the second part of the section 17(1) test has not been established for this information.

Confidential Information Memorandum

Subsequent to the issuance of the RFEI, the Secretariat issued a Confidential Information Memorandum (the CIM) in connection with the sale of Highway 407. The CIM was prepared for “sale-qualified bidders” who have successfully met the criteria set out in the RFEI.

Section 3 of the CIM focuses on the OTCC’s business as it was structured before the privatization and briefly describes its assets, the toll system, the suppliers, the facility operator, and the agreements in place. Financial information is also summarized. This section explains that the responsibility for the day-to-day operation and maintenance of Highway 407, including tolling, was contracted to a variety of service providers. Most contracted services being co-ordinated by a named company in accordance with the terms of the Facility Operating, Maintenance, Management and Rehabilitation Agreement (the Facility OMM Agreement). 407 ETR is objecting to the disclosure of the last two paragraphs on page 7 under the heading of “Operational Overview”, which discuss certain terms of the Facility OMM Agreement.

Similar to my discussion relating to portions of the RFEI dealing with certain agreements, there is also no evidence before me to suggest that the contents of these sections of the CIM were "supplied" by the OTCC/407 ETR. It is also not apparent on the face of these sections that disclosure of these portions of records would permit the drawing of accurate inferences with respect to any information that was supplied. Accordingly, consistent with the reasoning in past orders dealing with negotiated agreements, I find that the information within these two paragraphs was not “supplied” within the meaning of section 17(1) of the *Act*.

Section 3.7 of the CIM deals with “financial matters”. 407 ETR is objecting to the information contained in section 3.7.4 on page 16, which deals with toll and other revenue, outlining the revenues for the six-month period ending September 30, 1998. Section 3.7.5 deals with “cost structure” and covers the same time period. Based on my review of these records, I find that it is reasonable to conclude that information within these records would have been supplied by the OTCC/407 ETR.

Section 3.7.6 is entitled “Historical and Forecast Traffic”. 407 ETR is objecting to the disclosure of the information under the heading of “Traffic Forecasts” on pages 18 to 19. I note that the information under this section simply refers to a number of traffic and revenue forecasts that have been developed for Highway 407 by several private and public sector entities (including the Ministry of Transportation), as well as other forecasts that were expected to be performed. Although this section includes a list of the relevant documents that were available for sale-qualified bidders, this section itself does not contain any specific traffic and revenue forecast information. Based on my review of this portion of the CIM, I am not persuaded that

any of the information within it was supplied by the OTCC/407 ETR or would permit the drawing of accurate inferences with respect to any information that may have been supplied.

Section 4.9 of the CIM is entitled “Taxation”. 407 ETR is objecting to the disclosure of the information under section 4.9.4 on page 35 dealing with “Municipal and Education Taxes”. This section briefly refers to the ground lease between the 407 ETR and the province, as well as the Share Purchase Agreement, and addresses the issue of municipal and education property taxes with respect to Highway 407. There is no evidence before me to suggest that the information within this section was “supplied” by the OTCC/407 ETR, nor is it evident on the face of this section that disclosure of this information would permit the drawing of accurate inferences with respect to any information that may have been supplied.

Appendix 3.7.1 consists of a Pro Forma Balance Sheet and two pages of notes to this balance sheet. Appendix 3.7.2 consists of OTCC Statement of Operations, including two pages of notes to this statement. Based on my review of these appendices, I find that it is reasonable to conclude that the information within these records was supplied by the OTCC/407 ETR.

Appendix 4.3 of the CIM deals with the Tolling, Congestion Relief, and Expansion Agreement, setting out a summary of its principles. I have determined below that the actual agreement, which appears as Schedule 22 to the “Final Bidding Draft of the First Amending Agreement to the Highway 407 Concession and Ground Lease Agreement”, was not “supplied” but rather negotiated. Based on my reasoning below, I also find that the information within Appendix 4.3 of the CIM was similarly not supplied within the meaning of section 17(1) of the *Act*.

Final Bidding Draft of First Amending Agreement to the Highway 407 Concession Ground Lease Agreement

407 ETR is objecting to the disclosure of Schedule 22 to the Final Bidding Draft of the First Amending Agreement to the Highway 407 Concession and Ground Lease Agreement in its entirety, which is entitled the “Tolling, Congestion Relief, and Expansion Agreement”. In its representations, 407 ETR explains that this record “is substantially identical to the existing Schedule 22 of the Concession and Ground Lease Agreement under which 407 ETR currently operates Highway 407 ...” and that “[t]he only material difference between the draft Schedule 22 in issue here and the actual agreement now in force is that it contemplates the Highway 407 East Completion that was not ultimately agreed to at the time Highway 407 was privatized”. 407 ETR further explains:

Schedule 22 (both versions) is entitled the “Tolling, Congestion Relief and Expansion Agreement”. This agreement establishes, among other things, when 407 ETR will be required to expand Highway 407 in order to deal with increased traffic flows and how and when 407 ETR can adjust tolls on Highway 407.

With respect to this schedule, 407 ETR also states:

... Schedule 22, the protocol for toll rate setting, is Canadian developed intellectual property that if ordered disclosed would be gifted to the international business community. The information relates to the way in which 407 ETR regulates its tolls, deals with congestion pricing and strategies for future growth and expansion of its infrastructure.

Although the Ministry, in its representations, acknowledged that some information at issue in these appeals was provided by the OTCC, it also stated that information was also developed by Ministry of Transportation employees and advisors to the former Office of Privatization for use during the sale process, and therefore, takes the position “that the documents were not strictly *supplied* by the Concession Co. [original emphasis]”.

Furthermore, the CIM, which as indicated above was prepared by the Secretariat in connection with the sale of Highway 407, states the following with respect to “tolling, congestion relief, and expansion” at page 26:

Highway 407 provides congestion relief for East-West travel in the GTA [Greater Toronto Area] and will provide further congestion relief when Highway 407 West, Highway 407 East Partial, and Highway 407 East Completion are built. In order to achieve its congestion relief objective, *the Province has designed a protocol for toll rate setting.*

In addition, the Province wishes to ensure that Highway 407 continues to provide congestion relief into the future. Accordingly, *the Province has established pre-defined thresholds that, once reached, will require ConcessionCo [now 407 ETR] to expand the capacity of Highway 407.*

The Tolling, Congestion Relief, and Expansion Agreement is outlined in Appendix 4.3 and will be a schedule to the Concession and Ground Lease Agreement. [emphasis added]

As indicated above 407 ETR argues that the “information central to the development of Schedule 22 ... was developed by 407 ETR/OTCC and provided by it to the government for the purpose of developing Schedule 22”. 407 ETR does not, however, provide any indication as to what this information would have been, or how disclosure of this record would permit the drawing of accurate inferences with respect to this information. Insofar as 407 ETR is referring generally to the “protocol for toll rate setting”, based on the above, I do not accept that this information was developed solely by the OTCC/407 ETR and supplied to the government.

As far as the agreement itself is concerned, similar to my findings with respect to other agreements addressed above, it also appears to be one that was negotiated and not supplied. Although this record contains very detailed and complex provisions relating to the regulation of toll levels in relation to traffic flow, it is not apparent on the face of this agreement that any of

the information within it was originally provided by the OTCC/407 ETR or that disclosure of this record would permit the drawing of accurate inferences with respect to this information. Accordingly, I find that the information within this record was not “supplied” within the meaning of section 17(1) of the *Act*.

Summary

I have concluded above that only the information at issue within paragraphs 4.2 and 4.4 (including Chart 4.4) and Appendix F to the RFEI and sections 3.7.4 and 3.7.5 and Appendixes 3.7.1 and 3.7.2 to the CIM was supplied by the OTCC/407 ETR. Accordingly, I will go on to consider part three of the section 17 test in relation to these records.

Since I have determined that the remainder of the information at issue was not “supplied” for the purpose of the section 17(1) exemption, the second part of the three-part test for exemption under section 17(1) has not been established. Accordingly, it is not necessary for me to consider whether harm is likely to result from disclosure of this information.

In Order MO-1393, Adjudicator Sherry Liang stated the following with respect to the municipal equivalent of section 17(1):

... I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the “intimate details of our operation (costs and constraints) to our direct competition.” There may indeed be harm to the affected party from the disclosure of the information. Nevertheless, section 10(1) of the *Act* does not shield this information from disclosure unless it is clear that it originated from the affected party and is therefore to be treated as the “informational assets” of the affected party and not of the Town. In these circumstances, the record is not exempt from the *Act*’s purpose of providing access to government information.

I agree with these comments. Accordingly, I find that the requirements for the application of section 17(1) have not been met with respect to the information remaining at issue and it does not qualify for exemption under this section of the *Act*.

In Confidence

As outlined above, the information remaining at issue was supplied by OTCC/407 ETR to the government for the purpose of permitting it to undertake the sale of Highway 407. In my view, the OTCC, being a business that was owned by the government, would have had a reasonable expectation that its business information would be treated confidentially, particularly in the circumstances of the sale transaction in question. Although the information at issue may have been made available to several potential investors, I accept 407 ETR’s submission that this disclosure was made only to those potential investors who executed confidentiality agreements.

Under the heading of “Use of Information”, the RFEI also states the following:

This document is provided to you on, and subject to, the terms of a Confidentiality Agreement that has been executed by you. The information received as part of this process may be used only for the purposes set forth in this RFEI and in the Confidentiality Agreement and may not be photocopied, reproduced, or distributed to any other person at any time except strictly in accordance with the terms of these documents.

The RFEI further states:

All Sale-Qualified Bidders must post a C\$ 250,000 deposit ... and sign and cause all Prime Team Members ... to sign an additional prescribed form of confidentiality agreement to:

- receive a copy of the CIM;
- receive a copy of the Design/Build Documents;
- gain entry into the Sale Data Room;
- gain entry into the Design/Build Data Room; and
- be eligible to submit a Sale bid.

In view of the above, I find that the information at issue was prepared for a purpose that would not entail disclosure to the public. I further find that the information at issue would appear not to be otherwise available from sources to which the public has access.

Accordingly, based on the material before me and the particular circumstances of this case, I am satisfied that the information at issue was supplied by the OTCC/407 ETR with a reasonable expectation of confidentiality.

Part 3: Harms

The Commissioner's three-part test for exemption under section 17(1), and statement of what is required to discharge the burden of proof under part three of the test, have been approved by the Court of Appeal for Ontario. That court overturned a decision of the Divisional Court quashing Order P-373, and restored Order P-373. In that decision the court stated:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "*detailed and convincing*" do not modify the

interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)].

In order to discharge the burden of proof under part three of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Orders 36, P-373].

In Order PO-1747, Senior Adjudicator David Goodis stated the following with respect to the phrase "could reasonably be expected to", which appears in the opening words of section 17(1):

The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In my view, 407 ETR must provide detailed and convincing evidence to establish a "reasonable expectation of probable harm" as described in paragraphs (a), (b) and/or (c) of section 17(1).

Section 17(1)(a): Prejudice to competitive position

407 ETR's representations

407 ETR makes the following general representations with respect to the exemption under sections 17(1):

The potential ramifications of disclosing this information are significant, not only for 407 ETR, but also for the public interest. Whenever the government decides that it wishes to “privatize” a business that has previously been undertaken for the government by a Crown corporation, the government will normally institute an RFP (request for proposals) process in the course of which it will obtain confidential information concerning the business in issue from the Crown corporation for the purpose of the RFP process. That information will generally be made available to interested parties, normally under strict confidentiality provisions limiting the use of that information to their participation in the RFP process. The ability of the government to make information of this kind available to bidders allows bidders to bid on an informed basis and allows the government to maximize its return from any such sale. This information will normally remain in the custody or control of the government following the privatization.

Until the privatization occurs, the government could generally refuse to disclose information of the kind described in the preceding paragraph about its Crown corporation, if it were requested under the Act, on the basis of section 18 of the Act. Logically, the person acquiring the business should equally be able to prevent disclosure of the same information after privatization on the basis of section 17 of the Act. The same information is in issue. The same business is in issue. All that has changed is the identity of the owner of the business.

If it were otherwise, anyone acquiring a business from the government would be exposed to potentially substantial and unwarranted prejudice. After privatization of the business, anyone interested (for example, competitors) could obtain from the government under the Act highly material and confidential information about the business, its operations, its projections, its customers, that could not have been obtained before the privatization because of section 18. If this were the result under the Act, which 407 ETR submits for the reasons that follow, it is not, there would be substantial impediments facing any privatization of any business by the government. Private sector parties might well not be prepared to even consider acquiring businesses from the government if all confidential business information relating to this business in the control of the government could be obtained under the Act by anyone who asked for it following privatization. Privatization could, therefore, easily become difficult, if not impossible, to complete. The continued ability of the government to effect privatizations where and when the government considers it in the public interest to do so is clearly something that is itself in the public interest.

With reference to the harm alleged at section 17(1)(a), 407 ETR submits:

The Ontario government has announced its interest in the construction of additional privately-operated toll highways in Ontario, for example the 407 ETR East Completion, Niagara Mid-Peninsula highway, Highway 410/427 extension to Collingwood, Highway 404 north extension to Lake Simcoe, an unnamed

highway north of and parallel to Highway 407 ETR and the Gardiner Expressway replacement. As recently as [March 2001], there has also been public discussion of the possibility of the City of Toronto adding four toll lanes to the Don Valley Parkway. 407 ETR is a potential bidder, but by no means the only potential bidder, on additional privately-operated toll highways that may be built in Ontario. Given the various public announcements identified above, there is significant prospect that such highway projects will be undertaken in the reasonably near term.

In any such bidding process, those bidding in competition with 407 ETR could easily make use of the commercial, financial, technical and scientific information in issue in these Appeals to, for example,

- (1) Develop or bid on competitive toll highways using the included traffic and revenue forecasts which are not limited to 407 specific traffic but include traffic surrounding the GTA.
- (2) Develop competitive tolling systems (e.g. gantry structure, location and make-up);
- (3) Compete against 407 ETR with the protocol for toll rate setting (Schedule 22), without 407 ETR having any equivalent opportunity to gain access to similar information about its competitor; and
- (4) Compete against 407 ETR and its shareholders when bidding from concessions worldwide.

Requester's representations

The requester submits:

One scenario suggested by the third party suggests that the release of tolling information would allow competitors to develop competing highways, and schedule their construction to coincide with mandated expansion and construction, leaving 407 ETR vulnerable to competitors.

407 ETR's own Annual Information Form makes this scenario unlikely. Appendix B, which shows page 3 of the Annual Form, describes the process for highway construction as slow and complex, making the rapid construction required to harm the highway's competitive position unlikely.

“The planning process for a major thoroughfare of the scale of 407 may take 20 years or more and the process of assembling contiguous land parcels, obtaining environmental permits and all

requisite municipal and provincial approvals may extend this time frame by an additional 10 to 15 years.”

407 ETR seems to indicate that the process for constructing highways is so arduous, that, as an already completed highway, it stands as a financially secure investment with a significant competitive advantage.

407 ETR’s reply representations

In response to the requester’s submission, 407 ETR states:

The requester questions any prejudice to 407 ETR’s competitive position by citing the length of time required to plan and construct Highway 407 ETR. Although 20 or 30 years may elapse from inception to completion of a major thoroughfare of the scale of Highway 407, complexity of planning and construction ought not be confused with the ability to compete with 407 ETR. It is also worth note that 407 ETR is merely 2 years into a 99 year concession term and that Highway 407 ETR may have Eastern and Western extensions beyond what is in the Concession Agreement in relatively short period of time ...

Findings

With respect to 407 ETR’s argument that “anyone acquiring a business from the government would be exposed to potentially substantial and unwarranted prejudice”, I have already determined above that the fact that 407 ETR used to be a Crown corporation does not preclude it from availing itself of the protection afforded under the section 17(1) exemption. Having said that, however, I also believe that if an organization chooses to do business with the government, it must be prepared to accept the level of public scrutiny contemplated under the *Act*.

As far as the section 18 argument is concerned, 407 ETR is correct in asserting that this exemption is designed to protect the interests of the government. However, whether or not the information at issue would have been exempt under section 18 prior to the sale of Highway 407 is not determinative of the issues in these appeals. The application of section 18 to information concerning Crown corporations may involve factors and considerations significantly different from those in this case. In my view, section 17(1) of the *Act*, being designed to protect the interests of parties outside the government, is the appropriate exemption to be considered in the context of potential harm to 407 ETR.

As indicated above, only the information within paragraphs 4.2, 4.4 and Appendix F to the RFEI and sections 3.7.4 and 3.7.5 and Appendixes 3.7.1 and 3.7.2 to the CIM is under consideration here. This information consists of historical financial information, including information relating to revenue and costs, as well as certain revenue projections.

Having reviewed all of the representations, together with the information at issue, I am not satisfied that 407 ETR has provided sufficient evidence to demonstrate that disclosure of the

information remaining at issue could reasonably be expected to cause the harms described in section 17(1)(a). Although 407 ETR argues that potential competitors could make use of the information to “develop or bid on competitive toll highways using the included traffic and revenue forecasts”, other than making these general assertions it does not provide any supporting details in this regard. 407 ETR also does not explain how the information at issue could be used to “compete against 407 ETR and its shareholders when bidding for concessions worldwide”, nor does it refer to any specific portions of the records in this regard. Furthermore, it is not evident on the face of the records how disclosure of this information could reasonably be expected to significantly prejudice the competitive position or interfere significantly with any future contractual or other negotiations.

Also, given the limited information under consideration in this section, I see no basis for the 407 ETR’s concern that the information at issue could be used to “develop competitive tolling systems (e.g. gantry structure, location and make-up)”. It appears that this concern relates to the technical information concerning 407 ETR toll system (contained within Appendix 9 to the 407 ETR Requests for Proposals, including Addendum 3), which is no longer at issue in these appeals.

As far as 407 ETR’s concern relating to Schedule 22, I have already determined above that the information within this record was not “supplied” by the OTCC/407 ETR within the meaning of section 17(1) and therefore does not qualify for exemption under this section of the *Act*.

Accordingly, I find that section 17(1)(a) is not applicable here.

Section 17(1)(b): Similar information no longer supplied

407 ETR’s representations

407 ETR submits:

If the information in issue in these Appeals is ordered disclosed pursuant to the Act, it would also be the case that all information retained by the government following the privatization of virtually any businesses would very likely be obtainable under the Act. As indicated above, this would seriously jeopardize the government’s ability to privatize business.

A possible means of avoiding disclosure under the Act of information in the continuing control of government following privatization of the business of a Crown corporation would be for the Crown corporation not to provide the information to any government institution subject to the Act prior to or in connection with the proposed privatization (E.g. Schedule 22). Then, the government would not have the information and could not be required to disclose it under the Act following privatization.

But, a necessary consequence of adopting this approach would be that the government would be much less knowledgeable about the business it was privatizing. It would, therefore, be hard-pressed to determine fair market value for the business with the result that it could well sell such business for an amount substantially less than its fair market value. Such a result would clearly not be in the public interest.

Accordingly, section 17(1)(b) of the Act applies because, if the information in issue on these Appeals is disclosed, it could reasonably be expected that similar information concerning other Crown corporations being considered for privatization would no longer be supplied to the government where it is in the public interest that such similar information be so supplied for the reasons just outlined.

Requester's submission

The requester states:

It has been suggested that the release of information regarding the tolling practices, and other agreements reached between 407 ETR and the Government of Ontario would result in the termination of the practice of sharing information with the Government so that it may evaluate its asset, undermining its ability to attract full value for its investment.

In spite of the financial incentives for the Government to deny itself of this information, it will continue to be the Government's prerogative to request this information of its Crown corporations.

A government which chooses to refuse to request this information of its Crown assets will be making a political decision, and as such will be accountable to the political decisions of the public.

Findings

Similar to the Ministry the OTCC was an institution under the *Act* and as such, its records were also subject to the *Act*. Therefore, as far as any future privatization transactions are concerned, if the Crown corporation in question is already subject to the *Act*, there would be no reason to withhold any information from the Ministry on the basis as argued by 407 ETR.

Even if the Crown corporation was not a designated institution under the *Act*, in my view, it is unlikely that it would withhold relevant information from the government if it was required for the purposes of completing a similar sale transaction in the future. It is also worthy to note that the Ministry does not appear to share 407 ETR's view in this respect. As stated earlier, the Ministry chose not to make any representations with respect to the application of section 17(1). However, I would assume that if the Ministry felt that there was a reasonable expectation of

harm, as described by 407 ETR, it would have asserted that section 17(1)(b) is applicable in this case.

Based on the above, I find that a decision in the present appeals to order the disclosure of the information remaining at issue could not reasonably be expected to result in similar information no longer being supplied.

Section 17(1)(c): Undue loss or gain

407 ETR's representations

With respect to section 17(1)(c), 407 ETR states generally:

Disclosure of the information in issue on these appeals to, for example, those bidding against 407 ETR in anticipated RFP processes for additional privately-operated toll highways in Ontario would give such competitors valuable information about 407 ETR's current business, its projections and historical financial information as well as concerning the provisions of various of the agreements to which 407 ETR is subject in connection with the operation of its current business. 407 ETR's competitors have no legitimate basis for obtaining this information and would not, in normal circumstances, be able to obtain such information concerning a private-sector competitor. Undue loss to 407 ETR would be likely to result from disclosure of such information to 407 ETR's competitors and undue gain would accrue to its competitors if they were able to obtain access to such information since such competitors would, thereby, gain access to and acquire a valuable knowledge base concerning 407's ETR's business expertise, its operating procedures, the agreements it has or has proposed to enter into, all without 407 ETR having any equivalent opportunity to gain access to similar information about its competitors. The loss to 407 and its shareholders and the gain to its competitors that would result would be particularly "undue" because it would occur merely because 407 ETR/OTCC was previously owned by the government with the result that the government has control of the information in issue on these appeals.

The remainder of 407 ETR's representations with respect to section 17(1)(c) focus only on Schedule 22, which I have already concluded does not qualify for exemption under section 17(1) and Appendix 9 to the 407 ETR's Requests for Proposals, including the information at issue within addendum 3, which the requester is no longer pursuing. Accordingly, I will not reproduce these submissions here.

Requester's representations

The requester states:

However harmful this disclosure may be to the third party, it is difficult to understand how it may be viewed as excessive. As mentioned earlier, it may take upward of 20 years to construct a competing highway for 407 ETR, making the rapid response required by a competitor to capitalize on this information next to impossible.

Furthermore, the information that the third party wishes to protect was made available, as I have mentioned before, to potential investors, how would conceivably be the potential competitors of the third party.

Findings

Similar to my finding with respect to section 17(1)(a), I find that 407 ETR has not provided sufficient evidence to demonstrate that disclosure of the information remaining at issue could reasonably be expected to cause the harms described in section 17(1)(a). Other than making general assertions, 407 ETR does not refer to any specific portions of the records that are under consideration, nor does it provide any supporting deals with respect to the alleged harms. It is also not evident on the face of the records how disclosure of this information could reasonably be expected to result in any undue loss or gain, as argued by 407 ETR.

Accordingly, I find that section 17(1)(c) is not applicable to any of the information at issue.

ORDER:

1. I uphold the Ministry's decision to disclose the records at issue in this appeal, with the exception of the following two records, which are no longer being pursued by the requester:
 - Appendix 9 to the 407 ETR Request for Proposals - Development and Design-Build for the Western Extension of the 407 Express Toll Route **and** the Highway 407 East Partial Extension; and
 - Package 4 entitled "Communication Network Requirements" following Addendum 3 to the Development and Design-Build for the West Extension of the Highway 407 ETR **and** for the East Partial Extension of the Highway 407 ETR – Request for Proposal.
2. I order the Ministry to disclose the records at issue to the requester, no later than **January 14, 2002**, but not earlier than **January 7, 2002**, with the following exceptions:
 - the highlighted information within Appendix 8 to the 407 ETR Request for Proposals-Development and Design-Build for the Western Extension of the 407 Express Toll Route and the East Partial Extension should **not** be disclosed, as the requester is no

longer seeking access to this information (**it should be noted that the highlighted information includes the Ministry's original severances, as well as additional severances of personal information**);

- the entire Appendix 9 to the 407 ETR Request for Proposals - Development and Design-Build for the Western Extension of the 407 Express Toll Route **and** the Highway 407 East Partial Extension should **not** be disclosed, as the requester is no longer seeking access to this information; and
 - the entire Package 4 entitled "Communication Network Requirements" following Addendum 3 to the Development and Design-Build for the West Extension of the Highway 407 ETR **and** for the East Partial Extension of the Highway 407 ETR – Request for Proposal should **not** be disclosed, as the requester is no longer seeking access to this information.
3. I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the requester pursuant to Provision 2.

Original signed by: _____

Irena Pascoe
Adjudicator

December 5, 2001 _____