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

ORDER P-463

Appeal P-9200490

Ontario Native Affairs Secretariat

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ORDER

BACKGROUND:

The Ontario Native Affairs Secretariat (the Secretariat) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to:

> The comprehensive land claim by 5000 Algonquin Indians...research documents, maps showing lands claimed in Ontario, studies, documents on historical situations and matters pertaining to this claim... Also any negotiations policy documents, claims issue documents, any written agreements between the province and federal government on this claim.

The Secretariat did not respond to the request within the prescribed 30 day period under section 28(7) of the Act and the appellant appealed the deemed refusal to provide access. The Secretariat later issued a decision letter in which it refused to provide access to a particular report on the basis of sections 13(1), 17(1), 19, 21(3)(d) and (g) and 22(a) of the Act. The Secretariat subsequently claimed sections 18(1)(d) and (e) as further exemptions in relation to that report.

The Secretariat then made the decision to release approximately 1,000 pages of additional records to the appellant.

Finally, the Secretariat issued a fee estimate of $1,480 to apply to a third category of documents relating to "negotiation policy and interprovincial agreements".

As the appeal progressed, the appellant submitted a request for a fee waiver with respect to this third category of documents under sections 57(4)(b) and (c) of the Act, which the Secretariat subsequently denied. During the course of mediation, the appellant provided documentation respecting his financial status in support of his request for a fee waiver. Following a review of these materials, the Secretariat reiterated its decision not to waive the fee.

The appellant also asserted that there is a public interest in the disclosure of all documents that were the subject of his request pursuant to section 23 of the Act.

A notice of inquiry to review the Secretariat's decision respecting access to the one remaining report and the refusal to grant a fee waiver was sent to the appellant, the Secretariat and to the author of the report (the "affected person"). Written representations were received from all the parties.

ISSUES:

There are a number of discrete issues raised in this appeal. Issues A through H relate to the records which together constitute the report which the Secretariat has refused to disclose. Issue I

pertains to the records in respect of which the Secretariat has denied a fee waiver. These issues are more specifically set out below:

A. Whether the mandatory exemption provided by section 17 of the Act applies to the records.

B. Whether the discretionary exemption provided by sections 18(1)(d) and (e) of the Act apply to the records.

C. Whether the discretionary exemption provided by section 19 of the Act applies to the records.

D. Whether the discretionary exemption provided by section 13 of the Act applies to the records.

E. Whether the discretionary exemption provided by section 22(a) of the Act applies to the records.

F. Whether any of the information contained in the records qualifies as personal information as defined by section 2(1) of the Act.

G. Whether the mandatory exemption provided by section 21 of the Act applies to the records.

H. Whether there is a public interest in the disclosure of the records pursuant to section 23 of the Act.

I. Whether the Secretariat's decision not to waive the fee under section 57(4) of the Act was in accordance with the terms of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 17 of the Act applies to the records.

The specific report identified in the Secretariat's original decision letter is made up of three separate records. These are:

(1) A three page letter compiled by an affected person who commented on a researcher's work.

(2) A list of researchers with margin notes made by the author of Record 1 respecting the suitability of the researchers for certain work.

(3) A report consisting of research material and margin notes made by the author of Record 1.

A list of these records along with the exemptions claimed is set out in Appendix A of this order.

The Secretariat claims that sections 17(1)(a), (b) and (c) apply in relation to all these records. These sections read as follows:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For a record to qualify for exemption under section 17(1), the Secretariat and/or the affected person must satisfy the requirements of 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 must give rise to a reasonable expectation that one of the types of harms specified in section 17(1)(a) will occur.

[Order 36]

Part 1 of the test

In order to meet part 1 of the test, the Secretariat and/or the affected person must establish that disclosure of the records would reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

The Secretariat makes the following representations with respect to part 1 of the section 17(1) test:

> It is respectfully submitted that the interpretation of historical data, advice regarding historical research methodology, identification of historical issues relevant to a land claim and the selection of extracts taken from voluminous historical primary and secondary resources are all technical or scientific information. [The Secretariat] believes that it is widely appreciated that the gathering and interpretation of historical evidence is a complex endeavour requiring years of training. The work of well respected historians, such as [the affected person], must certainly be considered scientific or technical information.

Although previous orders have considered the meaning of the terms "scientific" and "technical", no one set of definitions has been adopted.

I will turn, first, to a consideration of the term "scientific". The Concise Oxford Dictionary (8th ed.) defines "scientific", in part, as follows:

> 1. According to rules laid down in exact science for performing observations and testing the soundness of conclusions.
>
> 2. Used in, engaged in, or relating to science, especially natural science.
>
> 3. Assisted by expert knowledge.

"Science" is defined, in part, as:

> a branch of knowledge conducted on objective principles involving the systematized observation of an experiment with phenomena, especially concerned with the material and functions of the physical universe.

In my view, scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypotheses or conclusions and be undertaken by an expert in the field. Finally, scientific information must

be given a meaning separate from technical information which also appears in section 17(1)(a) of the Act.

The records at issue in this case represent a collection of historical articles with some evaluative comments. These materials neither test a specific hypothesis, set out conclusions based on observations, not present findings according to a specific methodology. On this basis, the materials cannot be said to constitute scientific information based on the definition that I have just set out.

I will now turn to a consideration of "technical" information. The Concise Oxford Dictionary (8th ed.) defines "technical", in part, as follows:

> of or involving or concerned with the mechanical arts and applied sciences.

In my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act.

Based on this definition, I find that the information contained in the records cannot reasonably be said to fall into the category of technical information.

Because I have found that the records consist neither of scientific nor technical information, the first part of the section 17 test has not been met. However, because the representations of the Secretariat and the affected person have focused on parts 2 and 3 of the test, I will address the issues which were raised.

Part 2

In order to meet part 2 of the test, the Secretariat and/or the affected person must establish that the information was supplied to the Secretariat in confidence, implicitly or explicitly.

In its representations, the Secretariat states:

> ... it was an explicit and clear condition of [the affected person] supplying the report to the Ontario government that his report ... and the fact that he had performed work for the Ontario government remain confidential. This condition of confidentiality is mentioned in [the affected person's] retainer ...

The "retainer" to which the Secretariat refers in its representations is a two page letter to the affected person confirming the work which the Secretariat wished the individual to undertake. The last paragraph states "... I am treating our discussion and your involvement in this matter in confidence".

Based on an assessment of these representations, I find that the records were explicitly supplied in confidence to the Secretariat.

Part 3

To satisfy the Part 3 test, the Secretariat and/or the affected party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in sections 17(1)(a), (b) or (c) would occur if the information was disclosed. (Order 36)

Section 17(1)(a)

In order to establish the harms envisaged by section 17(1)(a), the Secretariat and/or the affected person must establish that the disclosure of the information 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 its representations, the Secretariat states:

> [The affected person's] ability to conduct research in regard to primary sources in the hand's of First Nations is crucial to his work. That ability is directly linked to ... goodwill ...
> ...
>
> ... [W]e expect that ... breaches of confidentiality could prejudice significantly [the affected person's] competitive position by harming his reputation among his peers and among those upon whom he must rely to conduct his work.

The Secretariat then goes on to say that the atmosphere which surrounds a land claim may lead to "mischaracterization" of the information contained in the affected person's report.

The affected person also addresses the application of section 17(1)(a) in his representations. He states:

> I am covered by Section 17(1)(a) ... Any statements misconstrued, or taken out of context, in my letter and notes ... could prevent me obtaining access to archival collections held by Ontario First Nations...

The first argument advanced by the Secretariat is that the mere fact that the affected person was engaged by the organization and provided the Secretariat with a collection of research materials along with some editorial contents is sufficient to trigger the operation of section 17(1)(a). This submission does not specify, to the extent required, however, how the release of the **information** contained in the records would either **prejudice significantly** the competitive position or **interfere significantly** with the contractual or other negotiations of the affected person.

Both the Secretariat and the affected person also contend that the ability of the affected person to undertake future research could be harmed if the information contained in the records was misconstrued or taken out of context. While I appreciate the sincerity of these representations, the evidence necessary to support these submissions has not been provided. In addition, based on my own review of these records, I believe that it would be quite unlikely that the purpose of the documentation, which is designed to be constructive and helpful throughout, could be misconstrued.

Section 17(1)(b)

In order to establish the harm envisaged by section 17(1)(b), the Secretariat and/or the affected person must establish that disclosure of the information could reasonably be expected to "result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be supplied".

The affected person has not addressed the application of section 17(1)(1)(b) in his representations. The Secretariat, however, has indicated that, if the records in question are released, there is a real risk that the affected person will no longer provide similar information to the Government of Ontario.

While I appreciate the concerns which are being expressed by the Secretariat, I have not been provided with sufficient evidence to conclude that it is likely that the affected person would no longer provide information of this nature to the Secretariat. Nor am I persuaded that other researchers in the field would have similar concerns. For these reasons, I believe that section 17(1)(b) is not applicable to the records in the circumstances of this case.

Section 17(1)(c)

In order to establish the harm envisaged by section 17(1)(c), the Secretariat and/or the affected person must establish that disclosure of the information could reasonably be expected to result in "undue loss or gain to any person, group, committee or financial institution or agency".

The affected person does not address section 17(1)(c) directly in his representations. However, the representations which he has made under section 17(1)(a) could also relate to this section. In its representations, the Secretariat states:

> ... the information [outlined under the arguments for section 17(1)(a) and (b)] demonstrates that there exists a reasonable expectation that disclosure would harm [the affected person's] professional reputation and significantly inhibit his ability to continue much of his work so as to cause him undue monetary and career development loss.

For the reasons I have expressed above under my discussion of section 17(1)(a), I find that the Secretariat and the affected person have not provided me with sufficient evidence to establish that section 17(1)(c) applies.

As the Secretariat and the affected person have not met parts 1 and 3 of the section 17 test, I find that the section 17 does not apply in the circumstances of this appeal.

ISSUE B: Whether the discretionary exemption provided by sections 18(1)(d) and (e) apply to the records.

The Secretariat has also claimed that sections 18(1)(d) and (e) apply in relation to all of the documents in Appendix A, except for Record 4.

Sections 18(1)(d) and (e) of the Act read:

> A head may refuse to disclose a record that contains,
>
> (d) information where disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) position, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution of the Government of Ontario;

In all cases where a claim for exemption is made under section 18 of the Act, the onus rests with the institution to demonstrate that the harms envisioned by this section are present or reasonably foreseeable. The evidence submitted by the Secretariat must be detailed and convincing. In the absence of sufficient evidence to support a claim under section 18, the record should be released to the appellant (Order P-441).

In support of its position, the Secretariat states:

> ... disclosure of [the affected person's] report would reveal positions, strategies, and the basis and strength of those positions that are being, or will be applied, to the land claim negotiations (section 18(1)(e)). Premature disclosure of this information would have serious effects on the results of negotiations that involve the largest land claim in Ontario. It should not be underestimated how directly the historical evidence and its interpretation, and the assessment of the strength of Ontario's research, impacts upon the negotiation strategies and the direction and strength of its negotiation positions. The party negotiating on the other side of the land claim bargaining table would be in a far stronger bargaining position if it knew the strengths and weaknesses of Ontario's positions. As such, disclosure would likely be injurious to the ability of Ontario to negotiate as favourable a settlement which would be injurious to the financial interest of the government of Ontario (section 18(1)(d)).

Since the representations of the Secretariat focus more on section 18(1)(e), I will consider that exemption first.

In order to successfully claim that section 18(1)(e) applies to the records, the Secretariat must meet each part of the following four part test. It must establish that:

1. The record contains positions, plans, procedures, criteria or instructions; **and**

2. The record is intended to be applied to negotiations; **and**

3. These negotiations are being carried on or will be carried on in the future; **and**

4. These negotiations are being conducted by or on behalf of an institution or the Government of Ontario.

[Order 87]

In my examination of the records, I have not found any information that could reasonably be characterized as "positions, plans, procedures, criteria or instructions". I would also point out that, in its representations, the Secretariat has neither identified those portions of the records which it considers to be positions, plans, procedures criteria and instructions nor has it indicated which information will be applied to negotiations. Accordingly, I find that the Secretariat has failed to satisfy the first and second parts of the section 18(1)(e) test and, therefore, that the exemption does not apply to the records at issue.

Section 18(1)(d) deals with information which, if disclosed, could reasonably be expected to be injurious to the financial interests of the Government of Ontario, or its ability to manage the provincial economy. Detailed and convincing evidence is required to support a claim under

section 18(1)(d) that one of the consequences identified in the section could reasonably be expected to occur if the records were disclosed (Orders 141, P-346).

The Secretariat's submissions under section 18(1)(d) are related to those which it has advanced under section 18(1)(e). The nub of the Secretariat's argument is that the release of a collection of research materials, with some annotations appended by the person who collected them, could compromise the land claims negotiation process. On this basis, such disclosure "could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government to manage the economy of Ontario".

The representations of the Secretariat deal with possible consequences, but it has failed to demonstrate a clear, specific and understandable linkage between its allegations of harm under section 18(1)(d) and disclosure of the types of records at issue in this appeal. Nor, in my view, is it evident on the face of the records that the consequences contemplated by section 18(1)(d) could reasonably be expected to result from disclosure. Accordingly, I find that the Secretariat has not met the burden of proof under section 18(1)(d). On this basis, the records do not qualify for exemption under either section 18(1)(d) or (e).

ISSUE C: Whether the discretionary exemption provided by section 19 of the Act applies to the records.

Section 19 reads as follows:

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

The Secretariat relies upon the second branch of the exemption (i.e. that the record was prepared for use by Crown counsel in giving legal advice or in connection with litigation) to exempt all the records contained in Appendix A.

Two criteria must be satisfied in order for a record to qualify for exemption under branch 2:

1. the record must have been prepared by or for Crown counsel; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The inclusion of the term "for use" in section 19 contemplates that the record, itself, will be used either for the provision of legal advice or for litigation (Order 210).

The question of what constitutes "in contemplation of litigation" was considered by former Commissioner Sidney B. Linden. In Order 52, he stated that, in order for a record to qualify as being prepared "in contemplation of litigation", the **dominant** purpose for the preparation of the document must be in contemplation of litigation; **and** there must be a reasonable prospect of such litigation at the time of the preparation of the record - litigation must be more than just a vague or theoretical possibility.

In its representations, the Secretariat makes the following statements with respect to section 19:

> In a land claim, the historical facts are the evidence which form the legal tests and issues and which ultimately determine the validity of the land claim. The historical record, its interpretation, and the assessment of the strength of any particular interpretation inform in a direct and profound way the legal advice which plays a fundamental role in land claim negotiation strategies and positions. All the legal tests and issues are informed or resolved by the application of the historical evidence. For example, in order for the First Nations to establish its claim, the parties will scrutinize the historical record to determine if there has been sufficient continuous occupation of land to ground a claim to "aboriginal title".

The Secretariat further contends that Crown counsel has already used the affected person's report in providing legal advice regarding negotiations and strategies for this land claim.

Having reviewed the contents of these records and the representations provided by the Secretariat, I am not persuaded that the records in question were prepared **for** Crown counsel and, therefore, that the first requirement has not been met. I will, nevertheless, consider whether the second part of the test has been established.

In my view, the dominant purpose of the preparation of the records was for the affected person to comment on work undertaken by a researcher in the land claims field and to indicate further areas for study. The fact that material provided by the affected person may have subsequently been used in helping to structure legal advice or in litigation does not alter the fact that the records were not prepared for such purposes originally. Therefore, the second requirement has not been met and the records do not qualify for exemption under section 19.

ISSUE D: Whether the discretionary exemption provided by section 13 of the Act applies.

The Secretariat contends that section 13(1) applies to Record 1 and to the affected person's notes which appear on Records 4, 6, 7, and 8 (pages 51, 52, 56, 57, 58, 61, 62, 64); Records 9, 11 and 13 (page 74); Record 14 (pages 77, 80, 82, 84, 85, 87, 90, 91, 92); Record 15 (page 93) and Record 21 (page 101).

Section 13(1) of the Act 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.

I will first deal with the issue of whether the affected person can be said to have been "retained" by Secretariat. As evidence of its intention to engage the affected person, the Secretariat has submitted a copy of a formal retainer letter which it sent to the individual outlining the nature of his engagement. While the Secretariat admits that it did not pay a fee to the affected person (at the affected person's request), it maintains that it was, at all times, prepared to pay this individual for his work.

The Secretariat also asserts that the payment of fees should not be the conclusive factor in determining whether an individual has been retained by a government organization. It compares this case to the situation where a lawyer agrees to act for an individual on a pro bono basis. The Secretariat contends that, despite the absence of payment, the lawyer is still considered to have been retained by his/her client.

I agree with the position that the Secretariat has put forward. While the payment of a fee is an important indicator in determining whether a formal engagement of services has occurred, it is not determinative. In this case, the Secretariat intended to and did retain the services of the affected person, notwithstanding the absence of a fee.

I must now consider whether the information contained in the records qualifies as "advice" or "recommendations" under section 13(1).

It has been established in a number of previous orders that "advice" for the purposes of section 13(1) must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process (Orders 118, P-304, P-348, P-356 and P-402). "Recommendations" should be viewed in the same vein (Orders 161, P-402, P-428, P-348 and P-356).

To support its section 13(1) claim, the Secretariat presents the following arguments:

> Acquiring expert history advice and recommendations, then, is a critical and necessary step in Ontario successfully negotiating land claims such as the subject claim. Such advice may include an evaluation of research methodology already conducted and advice concerning additional research methodology, appropriate research issues, and evaluations of current research to date.
>
> [The affected person] was retained by Ontario as an expert consultant to assess Ontario's current historical research as of that date, and to give advice regarding

> future directions in the historical research. His advice is not mere information but is the result of an expertise in historical research methods and sophisticated evaluation and interpretation. He gave advice regarding Ontario's current historical reports, what further research should be conducted, how to conduct it, what issues were important and some expert interpretation of historical documents.
>
> It is clear from the above, that [the affected person's] recommendations and advice were very important to the " deliberative process of government decision
>
> making" regarding important steps in preparing and developing positions and strategies for very important and complex negotiations.

Record 1 contains comments offered by the affected person respecting another researcher's work and identifies further areas of potential research. I am satisfied that the information in paragraphs 2 to 12 of this Record constitutes "advice" under section 13(1) and, accordingly, qualifies for exemption.

Record 2 contains a list of researchers and their addresses, together with comments made by the affected person as to the suitability of each of these individuals for further historical research. In my view, the comments expressed by the affected person can also be characterized as "advice" or "recommendations" under section 13(1).

The Secretariat also claims section 13(1) in respect of margin notes made by the affected person on Records 4, 6, 7, 9 and 11 and certain pages of Records 8, 13, 14, 15 and 21. These records are copies of published articles, bibliography sources and extracts and a letter dated 1913. The Secretariat makes the following representations with respect to the affected person's margin notes on these records:

> We believe that these comments are more than information because [the affected person] is calling upon his expertise in recommending various perspectives, interpretations, and highlighting what he advises is relevant or pertinent historical data relevant to the land claim. These comments are much more than the simple outlining of information. This is expert advice requiring evaluation of issues important to the claim and evaluation of what documents and historical evidence is relevant to those issues.

Having reviewed the margin notes, I am satisfied that they contain "advice" under section 13(1).

I have reviewed the list of mandatory exceptions contained in section 13(2) of the Act, and find that none of them apply in the circumstances of this appeal.

Because section 13(1) is a discretionary exemption, I have also reviewed the Ministry's representations regarding its decision to exercise discretion in favour of claiming this exemption, and I find nothing improper in the circumstances of this appeal.

ISSUE E: Whether the discretionary exemption provided by section 22(a) of the Act applies to the records.

The Secretariat also states that Records 2, 3 and 5 to 19 and 21 are located in libraries or archives available to the public.

Section 22(a) of the Act reads:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

Section 22(a) gives the head of an institution the discretion to refuse to disclose the requested information, if it has been published or is currently available in another form. However, when an institution relies on subsection 22(a), the head not only has a duty to inform the requester of the location of the record or the information in question, but is also required to identify or provide the requester with a description of the records or the information in question (Order 191).

In its representations, the Secretariat indicates that it would be happy to provide assistance to the appellant, if it is required, to access these libraries.

I am not satisfied that the Secretariat has provided the appellant with sufficient information which would enable the appellant to identify the records in question. Consequently, I am unable to find that the records qualify for exemption under section 22(a).

ISSUE F: Whether any of the information contained in the records qualifies as personal information as defined by section 2(1) of the Act.

The Secretariat also claims that the disclosure of Record 4 would reveal personal information which would constitute an unjustified invasion of personal privacy. In order to address these representations, the first step in my analysis is to determine whether any parts of the record contain personal information as defined in section 2(1) of the Act.

This provision states, in part,

"personal information" means recorded information about an identifiable individual, including

...

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(d) the address, telephone number, fingerprints or blood type of the individual,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Record 4 contains a list of ten researchers and their addresses as well as brief comments put forward by the affected person as to the suitability of the researchers to undertake certain research. Because I have previously found that the affected person's comments are exempt under section 13(1) of the Act, I will limit my discussion to the names and addresses of the researchers.

The definition of personal information found in section 2(1) of the Act is similar to that found in the Municipal Freedom of Information and Protection of Privacy Act (the municipal Act). It has been established in a number of previous orders, decided under both the provincial and the municipal Acts, that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not "personal information". Similar considerations apply in this appeal. In my view, the names and addresses of persons identified in an employment or professional capacity and their apparent business addresses, do not constitute personal information (Orders 157, P-326, M-118). Two of the addresses contained in the record, however, appear to be residential rather than employment addresses and I find that this information constitutes the personal information of the two researchers.

ISSUE G: Whether the mandatory exemption provided by section 21 of the Act applies to the information contained in Record 4.

Under Issue F, I found that the residential addresses of two researchers contained in Record 4 are the personal information of these individuals.

Section 21(1) of the Act is a mandatory exemption which prohibits the disclosure of personal information except in certain circumstances which are listed in sections 21(1)(a) through (f) of the Act.

Before access can be granted to another individual's personal information, it must be established that one of the six listed exceptions found in section 21(1) of the Act would apply in the circumstances. For example, a requester or an institution might supply evidence that the individual to whom the information relates has provided written consent to disclosure of the information (section 21(1)(a)). Similarly, the requester or an institution might attempt to establish that disclosure of the information would not constitute an unjustified invasion of the individual's personal privacy (section 21(1)(f) of the Act).

In this case, the Secretariat has argued that the disclosure of Record 4 would result in an unjustified invasion of personal privacy. Having found that the residential addresses qualify as personal information, and in the absence of any submissions weighing in favour of finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception contained in section 21(1)(f) of the Act does not apply. The result is that the addresses are properly exempt from disclosure under section 21(1) of the Act. I have highlighted the two residential addresses on the copy of Record 4 provided to the Secretariat with this order.

ISSUE H: Whether there is a public interest in the disclosure of the records, pursuant to section 23 of the Act.

Section 23 of the Act states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

I have previously determined that the majority of Record 1 and the notes contained in Records 4, 6, 7, 8, 9, 11, 13, 14, 15 and 21 qualify for exemption under section 13 of the Act. I have also found that the residential addresses of two of the researchers qualify for exemption under section 21 of the Act. I must now decide whether there is a compelling public interest in the disclosure of this information, which would clearly outweigh the purpose of the sections 13 and 21 exceptions.

There are certain requirements contained in section 23 of the Act which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order 24).

The appellant contends that there is considerable public interest in the information which is the subject of this appeal. As evidence of this assertion, he points to the interest expressed by many groups during the constitutional referendum respecting Native land claims, socio-economic matters pertaining to Natives and general information on the Native community.

In his representations, the appellant also relies on the Supreme Court of Canada decision of R. v. Sparrow [1990] 111 N.R. 241 as authority for the proposition that he is entitled to the records at issue. This case stands for the general proposition that, where there existed an aboriginal right to fish for food, that right is constitutionally protected. Furthermore, such a right may only be regulated for justifiable purposes such as conservation or the management of fish resources. The Sparrow decision pertains to the definition of aboriginal hunting and fishing rights under section 35(1) of The Constitution Act, 1982. In my opinion, however, the case has no application to access requests made under the Freedom of Information and Protection of Privacy Act which is a provincial statute that confers equal rights on all citizens.

The Secretariat, for its part, asserts that the appellant's request for records stems from his personal disputes with the Ministry of Natural Resources regarding the application of hunting laws to Aboriginal people. The Secretariat then submits that the disclosure of the report would tend to promote the appellant's private needs rather than meet a compelling public interest.

Having regard to the circumstances of this case, and the fact that most of the records which constitute this report will be released, I am not convinced that there exists a compelling public interest in the release of the remainder of the records, which would clearly outweigh the purpose of the sections 13 and 21 exemptions.

II. Whether the decision of the Secretariat not to waive the fee under section 57(4) of the Act was in accordance with the provisions of the Act.

In processing the appellant's request for "negotiation policy documents and intergovernmental agreements" pertaining to the Algonquin Nation, the Secretariat identified approximately 40 boxes of materials which might be responsive to that request. Pursuant to section 57(1) of the Act, the Secretariat provided a fee estimate in the amount of $1,480 to the appellant. The estimate was broken down into the following components:

Search Time:	
approximately 18 hours @ $30.00 per hour	$ 540
(less 2 hours)	$ 60
	$ 480
Preparation Time:	
approximately 30 hours @ $30.00 per hour	$ 900

Photocopying Charge:

approximately 500 pages @ $0.20 per page	$ 100
Total	$1,480

While the appellant did not appeal the amount of the fee estimate, he made a fee waiver request to the Secretariat pursuant to sections 57(4)(b) and (c) of the Act. The Secretariat subsequently made the decision not to waive the fee. During mediation, the Secretariat reviewed documentation provided by the appellant respecting his financial status but decided to confirm its original decision. The Secretariat also indicated that, given the volume of materials requested, the fee might be reduced if the appellant were able to narrow his request. The appellant was, however, apparently unable to do so.

Sections 57(4)(b), (c) and (d) of the Act read as follows:

> A head shall waive the payment of all or any part of an amount required to be paid under this Act where, in the head's opinion, it is fair and equitable to do so after considering,
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed in the regulations.

Section 8 of Regulation 460, made under the Act reads, in part, as follows:

> The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.

The Secretariat bases its decision not to waive the fee on the following considerations:

> Thus far [the Secretariat] has released over 1,300 pages to [the appellant] and have waived the fees because of the length of time it took to process the request, and in regard to the later releases made pursuant to clarification, the fee was

> waived in part because of [the appellant's] financial situation. Locating some of the released records necessitated substantial search time, again for which no fee was charged.
>
> We are open to [the appellant's] representations as to why we should waive additional fees but believe we have waived fees for documents which we understood were the documents in which [the appellant] was most interested. Based on [the appellant's] expressed motivation for making the request we believe that we have released the most important and substantial documents that contain
>
> the information he seeks. We are conducting further searches based upon [the appellant's] additional clarifications and if successful, will consider a fee waiver for any records we locate.

It has been established in a number of previous orders that the person requesting a fee waiver has the responsibility of providing adequate evidence to support a claim that such a waiver is appropriate. [Orders 4, 10, 111, P-425].

As part of his representations, the appellant provided evidence that he has a modest income and that he is the sole supporter of two dependents. Based on these submissions, I am prepared to say that an expenditure of approximately $1,500 to obtain the records in question would cause a financial hardship to the appellant under section 57(4) of the Act.

The appellant originally argued that the release of the records in question would also benefit public health and safety under section 54(4)(c) of the Act. Since no specific arguments were presented to support this assertion, however, I will not pursue the matter any further.

I have also reviewed the remaining considerations listed in section 54(4) of the Act and in section 8 of Regulation 460 and find that none of them are applicable to the facts of this case.

Having found that the payment of the fee would cause a financial hardship to the appellant, I must now consider whether it was fair or equitable for the Secretariat **not** to have waived payment of the fee in this particular case.

In addressing this issue, I believe that it is appropriate for me to consider the manner in which the Secretariat has attempted to respond to the appellant's request. In the first instance, the Secretariat furnished the appellant with 1,000 pages of general records free of charge. While it is true that this step was taken to compensate the appellant for the slow and somewhat disorganized approach with the Secretariat took to process his request, it nonetheless shows the willingness of the Secretariat to meet the appellant part way.

Next, in the process of working with the appellant to clarify his request, the Secretariat provided an additional 300 pages of documents to him free of charge when, once again, it could have charged a fee under section 57(1) of the Act. Finally, officials within the Secretariat have also spent many hours with the appellant over the telephone in an effort to narrow the request in order to reduce the fees in question.

Having considered the particular circumstances of this case, I am of the view that the Secretariat's decision **not** to waive the $1,480 fee was based on fair and equitable grounds. On this basis, I uphold the Secretariat's decision.

I wish to make it clear, however, that my decision has been based on the somewhat unique history of the case and I would encourage the Secretariat to work constructively with the appellant with respect to any subsequent requests which he may file with the institution.

ORDER:

1. I order the Secretariat to release Records 1-21 except for the following parts:

> Record 1 (paragraphs 2-12); Record 4 (two addresses and margin notes); Record 6 (margin notes on pages 21, 22, 23, 24, 25, 26, 30 and 31); Record 8 (margin notes on pages 51, 52, 56, 57, 58, 61, 62 and 64); Record 11 (margin notes); Record 13 (margin notes on page 74); Record 14 (margin notes on pages 77, 80, 82, 84, 85, 87, 90, 91 and 92); Record 15 (margin notes on page 93) and Record 21 (margin notes).

For greater certainty, I have provided the Secretariat with highlighted copies of these records. The highlighted portions identify those parts of the records which should **not** be released.

2. I order the Secretariat to disclose the records to the appellant after severing the information which I have found to be exempt within 35 days of the date of this order, but not earlier than the thirtieth (30th) day following the date of this order.

3. In order to verify compliance with the order, I order the Secretariat to provide me with a copy of the records which are disclosed to the appellant, **only** upon my request.

Original signed by: May 26, 1993
Irwin Glasberg
Assistant Commissioner

APPENDIX A

LIST OF RECORDS AND CORRESPONDING EXEMPTIONS

Description of Document	Page # of Record	Exemptions Claimed
1. Letter from [affected person] dated September 6, 1991.	1-3	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19
2. Extract from the Canadian Journal of Native Studies	4	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
3. Extract from Revue D'histoire De L'amerique Francaise	5-7	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
4. List of researchers, their addresses and comments	8-9	Sections 13(1), 17(1)(a)(b)(c), 19, 21(3)(d)(g)
5. Bibliography of sources	10-20	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
6. Bibliography sources and extracts	21-32	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a) Section 13(1) is claimed in relation to comments appearing on pages 21, 22, 23, 24, 25, 26, 30, 31
7. Published article	33-50	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
8. Bibliography sources and extracts	51-65	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a). Section 13(1) is claimed only in relation to comments appearing on pages 51, 52, 56, 57, 58, 61, 62, 64
9. Published article	66-69	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
10. Title page of publication	70	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
11. Bibliography sources and extracts	71	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a). Section 13 is claimed in relation to comments appearing on page 71
12. Extract from published article	72	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)

Description of Document	Page # of Record	Exemptions Claimed
13. Notes	73-74	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a). Section 13 is claimed in relation to the comments on page 74
14. Bibliography sources and extracts	75-92	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a). Section 13 is claimed in relation to the comments on pages 77, 80, 82, 84, 85, 87, 90, 91, 92
15. Letter dated December 12/27/1913	93-94	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a). Section 13 is claimed in relation to the comments on page 93
16 Notes	95	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
17. Published article	96	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
18. Notes	97	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
19. Cover page of published article	98	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)
20. Letter from Cincinnati Historical Centre to [affected person] dated April 18, 1973	99-100	Sections 17(1)(a)(b)(c), 18(1)(d)(e), 19
21. Extract from published article.	101	Sections 13(1), 17(1)(a)(b)(c), 18(1)(d)(e), 19, 22(a)