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

ORDER P-1039

Appeal P-9500349

Ministry of Finance

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant, a group of associated corporate entities, submitted 21 separate request letters to the Ministry of Finance (the Ministry). As this matter is somewhat complicated, I will provide some context for the requests before describing them further.

Prior to submitting the requests, the appellant was involved in a condominium construction project (the project) which was financed, in large measure, by loans from a trust company (the trust company) which was also a partner in the project. As a result of a restructuring agreement between the appellant and the trust company, the trust company eventually took over ownership of 100% of the project. The appellant then complained to the Ministry about the trust company's loan practices, alleging that the trust company had violated the Loan and Trust Corporations Act (the LTCA). The trust company has commenced a civil action against the appellant for damages in connection with the project, and the appellant has launched a counterclaim against the trust company.

The 21 requests essentially seek information about the trust company relating to the project, the investigation of the appellant's complaints, and other information about the trust company collected by the Ministry as part of routine reporting and inspections.

The Ministry initially responded with a fee estimate and interim access decision. The fee estimate was for a total of $881, and included estimated charges for search costs, photocopies, preparation of the record and shipping costs. The Ministry advised that the exemptions in sections 13(1) (advice or recommendations) and 17(1)(a) (third party information) could apply to the responsive records.

In response to inquiries from the appellant, the Ministry then issued a second decision letter. This letter explained that the Ministry's first estimate was based on a "collective" approach to searching for records -- that is, the Ministry would do one search to identify responsive records pertaining to all 21 requests. This letter also offered the appellant the alternative of having the searches conducted on an "individual" basis -- i.e. the Ministry would do 21 separate searches (one for each request). The total fee estimate for searching on an individual basis was $20,211.

After receiving the second decision letter, the appellant's counsel provided a deposit to the Ministry, in the amount of $440.50, and asked that the search proceed on a "collective" basis.

After six weeks had passed with no further word from the Ministry, the appellant filed an appeal with the Commissioner's office, objecting to this delay and also appealing the amount of the fee. The appellant also indicated that he was seeking a waiver of the fee, and that he would object to any denial of access.

The Ministry completed its searches and, subsequent to the filing of the appeal, sent a final access decision to the appellant. This decision included an index of records, and indicated that access to certain records specified in the index would be granted upon payment of the remaining fee owing. Due to the fact that fewer records were disclosed than was contemplated in the original estimate, the total fee amounted to less than the $881 set out in that estimate. The total fee was reduced to $846.73. This left a balance owing to the Ministry of $406.23 (which the appellant subsequently paid). The decision also indicated that access to the

remaining records was being denied. The Ministry's index specified the particular exemptions being claimed for each record. The exemptions cited were as follows:

- third party information - sections 17(1)(a) and (c)
- advice and recommendations - section 13(1)
- invasion of privacy - section 21(1)
- information published or available - section 22(a).

The records at issue consist of Ministry examiner's working papers, information provided to the Ministry by the trust company, memoranda, correspondence, a record outlining a visit to the trust company by Ministry officials, a newspaper article and corporate registration information.

This matter has been the subject of two appeal files, the first of which was closed after the Ministry issued its final access decision. All outstanding issues arising from these two appeals were considered in the context of Appeal P-9500349, and will be resolved in this order. These issues include whether the Ministry is entitled to rely on the exemptions it has claimed, whether the fee estimate is consistent with the provisions of the Act and the applicable regulation (R.R.O. 1990, Reg. 460), and whether I should uphold the Ministry's decision not to waive the fees.

The Commissioner's office sent a Notice of Inquiry to the appellant, the Ministry, the trust company and a realty company mentioned in the records. As it appeared that the "public interest override" in section 23 of the Act would be an issue in this appeal, a Supplementary Notice of Inquiry was later issued, inviting the parties to comment on its possible application.

In response to these notices, the appellant, the Ministry and the trust company all provided representations.

In its representations, the trust company made several submissions which I must consider as preliminary issues. These are:

- disclosure of the records is not consistent with the purposes of the Act;
- the discretionary exemption in section 14(1)(f) (right to fair trial) applies and should be considered in this appeal;
- some of the records are not responsive to the request;
- certain common law decisions and statutory provisions outside the Act prohibit disclosure (i.e. common law decisions re confidentiality of customer information, the "implied undertaking" rule in litigation, and the provisions of the LTCA); and

- the fact that the trust company was not given access to certain records to assist it in preparing its representations (and a related argument that the description of these records given to the trust company was not adequate) should result in an adjournment of this inquiry as regards those records.

PRELIMINARY ISSUES:

PURPOSES OF THE ACT

The trust company submits that the principle that "information should be available to the public", which appears in section 1(a)(i) of the Act "... is not a directive that all information in the hands of the state should be disclosed; rather, it is information which is, first and foremost, of interest to the public which should be disclosed".

Section 1(a)(i) states as follows:

> The purposes of this Act are,
>
> > to provide a right of access to information under the control of institutions in accordance with the principles that,
> >
> > > information should be available to the public.

Under close scrutiny, it becomes apparent that the interpretation of section 1(a)(i) advocated by the trust company represents an attempt to add a new criterion to the principle enunciated in that section, namely, the notion that only information of general public interest should be disclosable under the Act.

In my view, to adopt this proposition would result in a misinterpretation of section 1(a)(i) which would severely compromise the access scheme in the Act. It is inconsistent with the plain meaning of this section, which refers to "information", and does not impose limits on the types of information which should be subject to access requests. Rather, section 1(a)(i) simply indicates that public access to information is one of the Act's primary purposes.

Moreover, the approach advocated by the trust company is not consistent with other important provisions found in the Act. For example, under this interpretation, requests for one's own personal information would not be permissible, in the absence of a general public interest in the information. This contradicts the provisions of section 47(1) of the Act, which expressly mandates requests for one's own personal information, whether or not it is of general public interest.

In my view, the request under consideration in this appeal is perfectly consistent with the principles of the Act.

RAISING OF DISCRETIONARY EXEMPTION BY AFFECTED PARTY

As noted above, the trust company (notified as an affected party in this appeal) has referred to the discretionary exemption provided by section 14(1)(f) of the Act. This exemption pertains to the right to a fair trial. The trust company relates this exemption to the civil litigation between itself and the appellant. This exemption was not claimed by the Ministry.

In Order P-257, former Assistant Commissioner Tom Mitchinson considered the issue of whether an affected party can raise a discretionary exemption, as follows:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released ... In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

I agree with former Assistant Commissioner Mitchinson's view. I find that a consideration of the proper application of the exemptions which the Ministry **has** claimed will address the interests of all parties, and that it is not necessary or appropriate for me to consider the possible application of section 14(1)(f).

The trust company has also referred to section 17(1)(b) in this case, whereas the Ministry only relied on sections 17(1)(a) and (c). Because section 17 is a mandatory exemption, I will consider the possible application of section 17(1)(b).

RAISING OF ARESPONSIVENESS" BY AFFECTED PARTY

The trust company submits that Record 19 and parts of Records 21 and 26 should not be disclosed because they are not responsive to the appellant's request. The Ministry has not taken this approach. In my view, there is a parallel between this submission by the trust company and the question of whether an affected party should be able to raise a discretionary exemption, which I canvassed above.

I am of the view that similar considerations to those enunciated by former Assistant Commissioner Mitchinson in Order P-257, and quoted above, should be applied to decide whether an affected party will be permitted to argue that records are not responsive. The Act requires institutions such as the Ministry to make this determination when requests are received, and does not contemplate that affected parties will enter into this assessment. However, there may be rare occasions when the Commissioner and his delegates could consider such a submission from an affected party, in order to protect the integrity of Ontario's access and privacy scheme. In my view, this appeal does not present such an occasion, and I am not prepared to consider the trust company's submissions concerning the responsiveness of these records. Rather, I rely on the Ministry's determination in this regard.

WHETHER THE COMMON LAW AND STATUTORY PROVISIONS RAISED BY THE TRUST COMPANY APPLY TO PROHIBIT DISCLOSURE

As noted above, the trust company has raised several arguments relating to court decisions and statutory provisions. I will consider each argument in turn.

Court Decisions Relating to Client Confidentiality

The trust company submits that a number of common law decisions require it to keep customer information confidential. However, in my view, these decisions do not override the Act. Moreover, it is not the trust company, but the Ministry which will be required to disclose the records if they are not exempt. Therefore I do not accept the trust company's submission that these decisions require non-disclosure.

The "Implied Undertaking" Rule

This rule requires that, where information is shared in the context of litigation proceedings, the party receiving the information may not use or disclose it outside the context of those proceedings. As noted, there is litigation between the appellant and the trust company. The trust company argues that the appellant's request is an improper attempt to circumvent this rule.

I do not agree with this argument. The Act sets up an access scheme which is completely independent of the disclosure available to the parties to litigation. In section 64(1), the rights of parties to litigation to receive information within the litigation process are expressly preserved. However, it is to be noted that the Act does **not** take the extra step of prohibiting requests relating to litigation.

Based on the authorities presented to me, it is my view that the "implied undertaking" rule has no application to proceedings under the Act.

Statutory Provisions outside the Act

The trust company also argues that the provisions of the LTCA regulate disclosure of trust company information. The implication of this argument appears to be that any disclosure beyond what is required or permitted by the LTCA cannot be required under the Act.

The only reference to the provisions of other statutes "overriding" the access provisions in the Act appears in section 67(1). This section provides as follows:

> This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.

I have reviewed the LTCA. I found no indication that its provisions regarding disclosure are intended to supersede the Act. Nor is the LTCA mentioned in section 67(2) of the Act. Accordingly, in my view, the provisions of the LTCA do not have the effect of precluding disclosure under the Act, and they have no bearing on the application of the exemptions which are at issue in this appeal.

ACCESS TO RECORDS TO ASSIST THE TRUST COMPANY IN PREPARING ITS REPRESENTATIONS

As noted above, the trust company submits that this inquiry should be adjourned with respect to records not given to it by the Ministry to assist it in preparing its representations. These consist of Records 1, 4, 6, 7, 14, 15, 16, 18, 20, 22, 23 and 25. The trust company also asserts that it was not given an adequate description of these records. Two sections of the Act specifically deal with the rights of affected persons or parties during the appeals process. To facilitate my analysis of this issue, I will reproduce them here.

Section 50(3) requires notification of affected persons. It states:

> Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned and any other affected person of the notice of appeal.

Section 52(13) requires that affected parties be permitted to make representations during the inquiry. It states:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In my view, the statutory requirements pertaining to affected persons and parties have been met in this case. In view of the disclosure of a number of the records to the trust company by the Ministry, and the description of the others provided in the index of records which accompanied the Notice of Inquiry, I am of the view that the trust company has received sufficient disclosure to permit it to make effective representations. I will not adjourn this inquiry pending additional disclosure to the trust company.

DISCUSSION:

THIRD PARTY INFORMATION

This exemption appears in section 17(1) of the Act. The Ministry relies on it for the following records (using the numbering system established in the Notice of Inquiry): Records 1 through 14 inclusive, and Records 16, 19, 20, 21, 22, 23, and 26. Partial access was granted to Records 6 and 20, and only the parts to which access was denied are at issue. The other records were withheld in their entirety.

In particular, the Ministry has referred to sections 17(1)(a) and (c). As noted above, the trust company has referred to these two sections, and also to section 17(1)(b). These sections provide 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 so 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)(a), (b) or (c), the institution and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

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

Part 1

Generally speaking, the records at issue pertain to scrutiny of the trust company's operations by the Ministry. In this case, the operations under scrutiny relate to loans. Not surprisingly, my review of the records indicates that, with three exceptions, it would be appropriate to characterize them as "financial" information, meeting Part 1 of the test.

The exceptions are: Record 19 (a letter setting out the trust company's views on disclosure of documents), and Records 22 and 23 (memos setting out particulars of the appellant's counterclaim against the trust company). It is true that Records 22 and 23 set out the dollar amount claimed by the appellant in the lawsuit, but in my view this is not "financial information" in the sense intended by section 17 because they do not describe any actual financial obligation, nor one that will necessarily ever come into existence. While some potential liabilities could well be considered financial information, I am of the view that in this case, the connection between this dollar figure and any actual liability is too remote. I find that Records 19, 22 and 23 do not contain financial information, or any of the other categories enumerated in the preamble to section 17(1).

Therefore, I find that Records 1 through 14 inclusive, and Records 16, 20, 21 and 26 meet Part 1 of the test, while Records 19, 22 and 23 do not.

Part 2

The records at issue were supplied to the Ministry's Loan and Trust Corporations Branch. This Branch is a major player in the regulation of trust companies, whose information it routinely receives. This information is usually not disclosed to the public. In the circumstances of this case, I am satisfied that most of the information in the records was supplied to the Ministry with a reasonable expectation that it would remain confidential.

Again, there are several exceptions. The withheld portion of Record 20 consists of notes taken during a telephone conversation with the appellant. Accordingly, the information was supplied by the appellant, and it is difficult to understand how he could have had a reasonable expectation that this information would be kept confidential **from him**. This also applies to the dollar information about the lawsuit in Records 22 and 23. Since the appellant is the plaintiff, it is not reasonable to expect that the amount claimed in his own lawsuit should be kept confidential from him.

Accordingly, I find that Records 1 through 14 inclusive, and Records 16, 19, 21 and 26 meet Part 2 of the test, while Records 20, and the dollar amount of the claim in Records 22 and 23, do not.

Part 3

The trust company has made extensive submissions regarding the harms which would flow from disclosure of many of the records. The trust company submits that disclosure would:

(1) result in similar information no longer being supplied to the Ministry;
(2) reveal the trust company's loan classification system;
(3) reveal the trust company's strategic methods relating to problem loans and its use of reserves;
(4) prejudice the trust company's efforts to sell the project to a prospective purchaser; and
(5) permit its competitors to impugn the soundness of the trust company's management and undermine consumer confidence.

The first of these arguments relates to section 17(1)(b). In particular, the trust company submits that it could reduce its record keeping in connection with problem loans so that the types of information at issue would not be available to Ministry inspectors in future. The trust company further submits that disclosure could lead it to comply with the statutory requirements of the LTCA on a more "pro forma" basis which would involve less disclosure to the Ministry.

These submissions require me to assess reasonable expectations about the future behaviour of the trust company. With respect to reduced record keeping, it is my view that adequate record keeping is essential for the viable operation of the trust company. I simply do not accept the argument that disclosure of these records would cause the trust company to alter its record keeping practices. With regard to the threatened "pro forma" compliance with statutory requirements, it is my view that the reporting and investigation provisions of the LTCA would require the trust company to continue to provide the types of information found in these records to the Ministry. I find that section 17(1)(b) does not apply to any of the records.

The remaining four arguments summarized above relate, in a broad sense, to both sections 17(1)(a) and (c). I am not persuaded that item (5), above, could reasonably be expected to result from disclosure. However, in my view, disclosure of most of the records for which the Ministry has claimed section 17(1)

would reveal the types of information referred to in items (2) and (3) above, and this could reasonably be expected to result in damage to the trust company's competitive position and undue loss to the trust company. I also agree that the harm mentioned in item (4) could reasonably be expected to flow from disclosure of some of the information at issue, which would also damage the trust company's competitive position and result in undue loss.

Accordingly, I find that disclosure of Records 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 16, 21 and 26 could reasonably be expected to result in the harms mentioned in sections 17(1)(a) and (c), and therefore, these records have met Part 3 of the test. As these records have met all three parts of the section 17(1) test, they are exempt under that section.

However, I am not satisfied that the harms in sections 17(1)(a) or (c) could reasonably be expected to flow from disclosure of Records 3, 7, 19, 22 and 23, or the severed portions of Records 6 and 20. Thus these records and portions of records have not met Part 3 of the test. I also found, above, that Records 19, 22 and 23 did not meet Part 1 of the test, and that Record 20 and the financial information in Records 22 and 23 did not meet Part 2. Failure to meet any one part of the test means that the exemption does not apply. Therefore, Records 3, 7, 19, 22 and 23, and the severed portions of Records 6 and 20 are not exempt under section 17(1).

The trust company has advanced another argument with regard to Record 19, which I will consider here for the sake of convenience (since I have rejected the application of section 17 to this record, and no other exemptions have been claimed for it). This argument is to the effect that the record (a letter to the Ministry setting out the trust company's views on disclosure of a particular record) should not be disclosed because of section 52(13). That section, which is quoted above under the heading "Access to Records to Assist the Trust Company in Preparing its Representations", limits access to representations provided to the Commissioner or his delegates during an inquiry. This record was created before the access request under consideration here was submitted, and in my view, it cannot be construed as representations within the meaning of section 52(13). In my view, section 52(13) has no application to Record 19.

As no other exemptions have been claimed for Records 3, 19, 22 and 23, nor for the severed portions of Records 6 and 20, these should be disclosed. I have also found that Record 7 is not exempt under section 17(1). However, the Ministry has also claimed that section 13(1) applies to Record 7, so I will consider it in my analysis of that section, below.

ADVICE OR RECOMMENDATIONS

The Ministry claims that this exemption, found in section 13(1) of the Act, applies to Records 7 and 18, and the severed portion of Record 15.

Section 13(1) states as follows:

> 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.

It is important to note that section 13(2) sets out a mandatory list of exceptions to this exemption.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I am satisfied that Records 7 and 18 consist of recommendations of a public servant. I find that they are exempt under section 13(1) and that none of the exceptions in section 13(2) apply.

However, I am not satisfied that the severed portion of Record 15 consists of advice or recommendations. As no other exemption has been claimed for this information, and no mandatory exemption applies, it should be disclosed.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. The Ministry has claimed section 21(1) with respect to Records 8 and 17. I have already exempted Record 8 under section 17(1), in the discussion above under the heading "Third Party Information". I will not consider Record 8 in this discussion.

This leaves Record 17, a letter from an employee of the appellant to the Ministry. I have reviewed this letter. In my view, the letter constitutes the employee's personal information. The only exception to the section 21(1) exemption which could apply to this record is set out in section 21(1)(f), which permits disclosure where it would not be an unjustified invasion of personal privacy.

Section 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant.

Section 21(3)(f) provides that disclosure is presumed to be an unjustified invasion of personal privacy where the personal information "describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness". I find that this presumption applies to the contents of Record 17. Section 21(4) does not apply to this record. Accordingly, I find that Record 17 is exempt under section 21(1). I will consider whether section 23 applies in the discussion below, under the heading "Public Interest in Disclosure".

INFORMATION PUBLISHED OR AVAILABLE

The Ministry claims this exemption, which appears in section 22(a) of the Act, for Records 24 and 25. These records consist of a newspaper story from the Toronto Sun (Record 24), and the Articles of Incorporation and other information supplied to the Ministry of Consumer and Commercial Relations with regard to the corporation created to carry out the project (Record 25).

Section 22(a) of the Act provides as follows:

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

Given the nature of the records, I agree with the Ministry's view that Records 24 and 25 are available to the public. Therefore, I find that they are exempt under section 22(a).

However, Order 123 and many subsequent orders have indicated that, whenever an institution relies on subsection 22(a), the institution has a duty to inform the requester of the specific location of the records or information in question. Where the institution does not discharge its responsibility to do so, the Commissioner or his delegate may order the institution to provide the appellant with information sufficient to identify the precise location of the records or information in question. In this case, the Ministry has not advised the appellant of the location of these records, and I will order it to do so.

PUBLIC INTEREST IN DISCLOSURE

The appellant argues that there is a public interest in disclosure of the records at issue. This argument relates to section 23 of the Act, which 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. (emphases added)

I have found, above, that the section 17(1) exemption applies to Records 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 16, 21 and 26. I have also found that Records 7 and 18 are exempt under section 13(1). In addition, I have found that Record 17 is exempt under section 21(1). I will consider whether section 23 applies to these records.

In support of the application of section 23, the appellant contends that the trust company acted illegally in its dealings with the appellant, and that, in view of the recent collapse of several trust companies, this information is of public interest. Subsequent to its formal representations, the appellant has provided me with two packages of documents (including extracts from the Toronto Stock Exchange's Policy Statement on Timely Disclosure, and information relating to a person who purchased a condominium unit in the project and a second individual who attempted to do so).

The Ministry submits that, if there is a pattern of complaints respecting a trust company, the public interest is protected by the Ministry's mandate to investigate under the LTCA. For similar reasons, the trust company also submits that section 23 does not apply. In addition, the trust company submits that the appellant's interest in the records is of a private nature, and is not a public interest in the sense intended by section 23. I have carefully considered the appellant's submissions in this regard, particularly in view of the recent difficulties affecting several trust companies and the resulting consequences to their shareholders and investors. However, in this case, I find that the appellant's interest in these records is essentially a private one, and I am not persuaded that, in the circumstances of this appeal, there is a compelling public interest in the disclosure of these records.

Accordingly, I find that section 23 does not apply.

FEES

As previously noted, the appellant has objected to the fees charged by the Ministry in connection with this request.

The applicable provisions of the Act are found in section 57(1). The applicable provisions of the Regulation appear in section 6. These sections were reproduced in the Notice of Inquiry sent to the appellant and the Ministry, and I will not reproduce them here. However, I note that section 57(1) of the Act permits fees to be charged for search time in excess of two hours, and for time spent preparing records for disclosure. Charges for shipping are also permitted. Section 6 of the Regulation provides that search time in excess of two hours may be charged at $7.50 for each fifteen minutes, and preparation time may be charged at that same rate.

The fees charged by the Ministry are as follows:

Search time in excess of two hours (13 hours @ $7.50 per 15 minutes)	$390.00
Preparation time (15 hours @ $7.50 per 15 minutes)	$450.00
Photocopies	$1.73

Shipping costs	$5.00
TOTAL	$846.73.

With regard to search time, the Ministry has only allowed a total of two free hours of search time, despite the fact that 21 requests were submitted. However, in my view, this was a reasonable approach for the Ministry to take in this case, because the appellant instructed the Ministry to proceed with this request on a "collective" basis.

In explaining the time required to locate responsive records, the Ministry indicates that files containing the records are at three separate locations within the Ministry. In view of the Ministry's submissions and the nature of the requests, I am prepared to uphold the charges for search time.

With respect to preparation time, the Ministry indicates that part of this time was spent "considering whether severances could be applied which would permit disclosure". In my view, this is essentially the same as deciding whether the records, or parts of them, are exempt. Order 4 determined that time spent deciding whether an exemption applies is not "preparation time" and cannot be the basis for charging a fee. This approach has been adopted in many subsequent orders and I will follow it here. Accordingly, the Ministry may not charge for time spent deciding whether to sever the records.

Also under the head of "preparation time", the Ministry included time spent indexing and matching the records. In my view, these activities do not relate to the plain meaning of "preparing the records for disclosure" and I do not uphold the Ministry's fee in this regard. In the result, I do not uphold the Ministry's charges for preparation time.

The Regulation permits a charge of $0.20 per page for photocopies. The Ministry did not advise me of the actual number of pages disclosed. However, $1.73 is not a multiple of $0.20. I will allow the Ministry to charge a fee of $0.20 for each page disclosed. I will leave it to the Ministry to calculate this sum. I am also prepared to allow the Ministry to recover its shipping costs of $5.00.

Accordingly, I uphold a fee in the amount of $395.00 plus photocopying at $0.20 per page disclosed. The appellant has paid $846.23 to the Ministry, and I will order the Ministry to refund to the appellant the difference between the fees received and the amount I have upheld.

I would like to comment on one additional matter before leaving this subject. Throughout these proceedings, the appellant has questioned the difference between the fees charged on a "collective" basis ($846.23) and the Ministry's estimate for conducting separate searches for each of the 21 requests ($20,211). Much of this difference results from the time required to do 21 searches instead of one. However, the appellant's concerns relate in particular to the discrepancy in the photocopying charges shown in the initial estimate for the collective fee and the estimate for separate searches. The Ministry has explained that the separate searches would produce many duplicate records, and that this accounts for the discrepancy in the photocopying charges. I accept this explanation.

FEE WAIVER

While this request was being processed by the Ministry, the appellant requested a fee waiver. The Ministry did not grant a fee waiver to the appellant.

In my view, the reasons given by the appellant to support a fee waiver (the fact that there were 21 separate requests, and the public importance of the requested information) do not fall within the criteria identified in section 57(4) of the Act, which states 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,
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> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
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> (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.

In section 8 of the Regulation, several matters are prescribed to be considered by institutions in deciding whether to grant a fee waiver. One of these which has possible relevance in this appeal is "whether the person requesting access to the record is given access to it". In this case, access was denied to more than half of the records, taking into account the disclosures which this order will require. In this situation, it could be argued that section 57(4) requires the Ministry to waive the fee if it would be "fair and equitable" to do so.

Order P-760 established that one of the factors to be considered in determining whether it would be "fair and equitable" to grant a fee waiver is whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

In this case, the Ministry advised the appellant in advance that exemptions would apply. The Ministry expended a considerable amount of time and effort to locate responsive records. I have already reduced the fees which the Ministry may charge, and in my view, it would not be reasonable to shift the burden for the cost of locating responsive records to the Ministry. Therefore, I uphold the Ministry's decision not to allow a fee waiver.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 1, 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 21, 24, 25 and 26.

2. I order the Ministry to disclose to the appellant Records 3, 19, 22 and 23, and the severed portions of Records 6, 15 and 20, within thirty-five (35) days after the date of this order, but not before the thirtieth (30th) day after the date of this order.

3. I order the Ministry to advise the appellant of the locations at which Records 24 and 25 may be obtained, within twenty-one (21) days after the date of this order, and to forward a copy of this correspondence to my attention, c/o Information and Privacy Commissioner/Ontario, Suite 1700, 80 Bloor Street West, Toronto, Ontario, M5S 2V1, within twenty-five (25) days after the date of this order.

4. I uphold the Ministry's fees in the amount of $395 plus photocopying charges at the rate of $0.20 per page disclosed. I order the Ministry to refund any amount paid by the appellant in excess of the fees allowed, within twenty-one (21) days after the date of this order, and to forward to me, at the address noted in Provision 3, a copy of its correspondence to the appellant in this regard, within twenty-five (25) days after the date of this order.

5. I uphold the Ministry's decision not to grant a fee waiver.

6. To verify compliance with the terms of Provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: November 2, 1995
John Higgins
Inquiry Officer