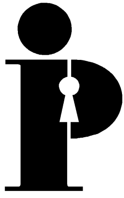
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-942

Appeal M_9500615

Les Conseil des ecoles francais de la communaute urbaine de Toronto

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

Les Conseil des ecoles francais de la communaute urbaine de Toronto (CEFCUT) received a lengthy, multi-part request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant was an unsuccessful candidate in several job competitions held by CEFCUT, and is presently involved in a number of legal proceedings with it before the Ontario Human Rights Commission (the OHRC) and the courts.

It should be noted that the request predated the enactment of the amendments to the Act which were contained in both the Labour Relations and Employment Statute Law Amendment Act, 1995 (Bill 7) and the Savings and Restructuring Act (Bill 26). Accordingly, I will decide the issues extant in this appeal based on the Act as it existed prior to the enactment of those amendments.

The request was many-faceted and involved records from the period December 1, 1988 to the date of the request, August 25, 1995. The request is set out as follows:

Part A

1. The access requests including the identity of the requesters, which have been sent to you as mentioned in point 1 of my letter of November 1994.

2. The minutes and reports of the board as well as its committees, which mention all the access requests mentioned in my letter of Nov. 17/94, concerning the board's legal fees defending itself against my OHRC case, and in addition, any mention authorizing the disclosure of my identity.

3. All the records and personal information banks containing/mentioning my personal privacy/information and my ongoing legal proceeding/action against the board.

4. All the approved policies and guidelines of the board concerning:

    (a) the disclosure of information and protection of personal privacy;
    (b) the hiring of staff;
    (c) employment equity;
    (d) racial and ethnic/cultural equity.

5. A complete list of all grievances, complaints or lawsuits filed (or where you have been notified of an intention to file) (completed and ongoing) both against the board and against any of its administrators.

6. The legal fees concerning each of the cases cited in #5, accompanied by the name of the lawyer and the legal firm involved. Please note whether the case is completed or ongoing and any settlement made as a result of conciliation/mediation.

7. All details concerning each and every of (all) the legal fees incurred by the board, and each one of its representatives, to obtain legal advice including the name of the law firm, the lawyer, the dates, the subject matter and the amount (of legal fees).

Part B

1. All information concerning the selection and hiring of the Director of Education and the Superintendent of Education in 1994. This would include the information concerning hiring [a named consulting firm], any person involved in the process, any minority report made or not made at the time in question, any declaration of conflict of interest, the employment policies followed, the selection criterion place and the details of all administrative and legal costs incurred for this purpose. Please provide the budget in total and in detail allocated to hiring these two people as well as all correspondence both formal and informal concerning this with agents and representatives of the Ministry of Education and Training, as well as all the candidates who applied and were short-listed for pre-selection/screening for these positions.

2. All detailed expenses incurred by the administrators of the board in the following areas:

   (a) trips outside of the province and the country by each of the administrators
   (b) discretionary budget of the Director of Education, of each superintendent and of each middle and upper management staff as well as the details of all the money actually spent in these budgets
   (c) all social benefits and any other contractual arrangements offered to the Director of Education, to each superintendent and to each middle and upper management staff
   (d) all consulting fees and external contracts as well as the details concerning the project and the company or the individual under contract
   (e) all expenses concerning loans of staff and other transfers
   (f) all kinds of contractual arrangements with board staff members
   (g) all financial revenue of the board.

CEFCUT located a large number of records responsive to the request and denied access to the majority of them, in whole or in part, claiming the application of the following exemptions contained in the Act:

- closed meeting - section 6(1)(b)
- advice or recommendations - section 7
- solicitor-client privilege - section 12
- invasion of privacy - sections 14 and 38(b)
- information published or available - section 15(a)
- discretion to refuse requester's own information - section 38(a)

CEFCUT also advised the appellant that records responsive to parts A5, A6 and B2(f) do not exist. In addition, CEFCUT issued interim fee estimates for parts A7, B1 and B2(a-e) and (g-h) of the request. The appellant appealed the decision on the basis that, in his view, the exemptions claimed do not apply, that additional records responsive to his request should exist and that the interim fee estimates provided by CEFCUT are exorbitant.

A Notice of Inquiry was provided to the appellant, CEFCUT and 15 other individuals whose rights might be affected by the disclosure of the information contained in the records (the affected persons). Representations were received from the appellant, CEFCUT, one of the affected persons on her own behalf and from counsel representing five other affected persons.

With its submissions, CEFCUT identified a number of additional records which are responsive to the request. Following a review of these records, a further 11 affected persons were identified and provided with a copy of the earlier Notice of Inquiry. Submissions were received from counsel on behalf of several of this second group of affected persons as well.

In addition, CEFCUT submitted that a number of records which it had earlier identified were not, in fact, responsive and should not be considered with this appeal. Additional submissions were then solicited and received from both CEFCUT and the appellant with respect to this issue. In Order M-867, I found that the majority of records identified by CEFCUT as being non-responsive fell outside the scope of the appellant's request. However, I determined that the undisclosed portions of Records B90, B93 and B97 identified by CEFCUT are, in fact, responsive to the request. They will, accordingly, be addressed in this order.

CEFCUT also withdrew its reliance on any exemptions, or did not make any submissions on the application of any exemptions, with respect to Records B10, B11, B54-B58, B64, B82, B93, B95, B97, B107-B110 and B114. As no other or mandatory exemptions apply to these records, and no fees were applied to them, they should be disclosed to the appellant.

I note that the records identified by CEFCUT as responsive to the request are voluminous. I have been provided with copies of a small number of these records, which are responsive only to parts of the request as framed by the appellant. CEFCUT has not provided a fee estimate with respect to these records. However, the majority of the responsive records fall within the category of records which are subject to the interim fee decision, which I will address below.

PRELIMINARY ISSUES:

REASONABLENESS OF SEARCH

Where a requester provides sufficient detail about the records which he is seeking and CEFCUT indicates that further records do not exist, it is my responsibility to ensure that CEFCUT has made a reasonable search to identify any records which are responsive to the request. The Act does not require an institution to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, CEFCUT must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist. The appellant has not provided any basis for his belief that additional records beyond those identified by CEFCUT which are responsive to his request exist.

CEFCUT has described in some detail the nature and extent of the searches which it undertook to identify and locate responsive records. Searches were undertaken primarily at its offices by the administrative assistant who has responsibility over matters involving requests under the Act. Further, a number of affidavits were sworn by this individual, attesting to the fact that the specific records which were requested by the appellant in parts A5, A6 and B2(f) of his request do not exist. CEFCUT submits that records containing information responsive to parts A5 and A6 exist, but not in the compiled form requested by the appellant. It also correctly points out that it is under no obligation to create a record in order to respond to a request. It further submits that it does not compile statistics on the ethnic backgrounds of its employees and that it is, accordingly, unable to provide a record responsive to part B2(f) of the request.

In Order M-909, Inquiry Officer Laurel Cropley made the following finding with respect to the obligation of an institution to a requester to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the Act by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

I adopt this statement for the purposes of the present appeal. In my view, the search conducted by CEFCUT for records responsive to all aspects of the appellant's request was reasonable in the circumstances of this appeal. I find that CEFCUT identified a number of possible locations for responsive records and that the searches of those locations, undertaken by an experienced employee, were reasonable. I am satisfied that CEFCUT has made a reasonable effort to locate records responsive to the appellant's request and this portion of the appeal is, accordingly, dismissed.

INTERIM FEE DECISION

In its decision letter dated September 27, 1995, CEFCUT provided an interim fee decision with respect to records responsive to part A7 of $1,300, B1 of $80 and B2(a-e and g-h) of $1,830. The decision letter indicates that these amounts are intended to cover the cost of searching and preparing the records for disclosure, as well as any shipping and handling costs. Finally, the decision letter explained that access to some of the records, in whole or in part, would be denied as they may be subject to various exemptions contained in the Act.

In its representations, CEFCUT has provided a more detailed breakdown of the estimated fees for the processing of this request, along with a more expansive explanation of the nature and extent of the work involved in it. I will outline CEFCUT's position with respect to each

individual component of the request. The appellant has not made any submissions with respect to this aspect of the appeal.

Part A5

Because there does not exist a compilation of the sort requested by the appellant of all "grievances, complaints or lawsuits" involving CEFCUT, a manual search of a number of record holdings would be required to locate the information sought. Searches would be undertaken at CEFCUT's offices and at the individual schools which it operates. It estimates that such a search would require 100 hours to complete, at a cost of $3,000, plus a further $75 for other costs associated with the search, including mileage, recording, copying and shipping.

Part A6

Again, CEFCUT submits that it does not maintain a specific record which contains the information sought in this part of the request. Rather, it argues that part A6:

> "does not request access to a record in the custody or control of CEFCUT; rather, the request is for information which may (or in some cases may not) be gleaned from records in the custody or under the control of CEFCUT."

The search would entail an examination of each of the records responsive to part A5 and the corresponding legal account, if any, to determine the amount of the legal fees relating to each matter. Records would also have to be obtained from CEFCUT's insurers with respect to lawsuits in which its liability insurers became involved. Finally, searches may be required of the record holdings of counsel retained either by CEFCUT directly or through its insurers with regard to these matters, at additional expense to it.

CEFCUT estimates that it would require 150 hours to complete such a search, at a cost of $4,500, plus a further $100 for other associated expenses relating to this aspect of the search.

Part A7

In its original decision letter, CEFCUT advised the appellant that "the costs of searching, locating, retrieving, processing, copying and preparing the records would be $1,300". CEFCUT indicates that since its inception in 1988, it has received approximately 175 legal accounts from various legal advisors. It estimates that it would require 40 hours to extract the information sought by the appellant in this part of his request from these records, for a cost of $1,200, plus $100 for other associated expenses.

Part B1

CEFCUT originally estimated the costs involved in responding to this part of the appellant's request as $80. In its submissions, it has revised this figure to $240, plus $60 for ancillary costs, following a re-evaluation of the work involved in locating the records responsive to part B1. Searches would be required of its own files, as well as those of the consulting firm which it retained and the members of the selection committee, for both competitions.

Part B2(a)

Again, CEFCUT has revised the amount of the interim fee estimate from the original $1,830 which was provided to the appellant in its September 22, 1995 decision letter. CEFCUT submits that:

> "ascertaining the information requested in B2(a) would entail an extensive manual search through literally thousands of expense slips, vouchers and receipts and other documents for all of the administrators of CEFCUT since its inception."

It estimates the time required to perform this search to be 120 hours, for a cost of $3,600, along with an additional $75 for costs associated with the search process.

Part B2(b)

CEFCUT submits that locating the information requested in this part of the request would involve a manual search of all 35,000 cheques which CEFCUT has issued since its inception, along with financial records in each of its individual schools. It estimates that a search of its records for the requested information would require 320 hours, for a total cost of $9,600, plus a further $250 in associated costs.

Part B2(c)

CEFCUT submits that the extraction of the information in this portion of the request would entail a manual review of all records pertaining to the contracts of employment of the Directors of Education, Superintendents and each senior and intermediate staff member to elicit the dollar values of the benefits and contractual arrangements allocated to each individual. It estimates that this would require 80 hours to complete, at a cost of $2,400, plus $75 in associated costs.

Part B2(d)

CEFCUT indicates that it would require 200 hours, at a cost of $6,200, to ascertain the information responsive to this portion of the appellant's request. This is, as a result of the large number of external contracts entered into between CEFCUT and outside suppliers of many services.

Part B2(e)

CEFCUT submits that the search required to locate and identify records responsive to this portion of the appellant's request would require 120 hours or $3,600, plus a further $50 in other associated costs. It estimates that there have been as many as 50 secondments or transfers of staff involving CEFCUT since 1988.

Part B2(g)

CEFCUT advises that it will require 40 hours of search time to locate all of the records which it maintains are responsive to this portion of the request. The cost for such time is, accordingly, $1,200 plus $30 for other associated costs.

Part B2(h)

CEFCUT submits that:

> Ascertaining the particulars of all the revenue streams of CEFCUT would involve approximately eight weeks, or 320 hours or research and preparation. In addition to receiving money from the Metro Toronto School Board, CEFCUT has received grants and money from the Ministry of Education and Training, bequests under wills, gifts from institutions and individuals, payments from school boards outside of Metropolitan Toronto in respect of attendance from out-of-district students, revenues from community use of facilities, payments from foreign students attending CEFCUT schools, the sale of assets, continuing education fees, bank interest, as well as a myriad of other revenue sources such as school shows or concerts, school bazaars and fund raisers, recycling of materials, parent-teacher association contributions, etc.

It adds that records responsive to this portion of the request would be situate at its offices and individual schools. The estimated cost is, accordingly, $9,850 which includes $250 for additional associated costs.

The total amount claimed by CEFCUT to completely address the appellant's request is $46,205. As noted above, the request is extremely broadly-worded and encompasses a huge number of documents, which would have been compiled by the institution over a seven and one-half year period. To begin my analysis of the issue of the appropriateness of the interim fee decision, I will set out the relevant sections of the Act, and of R.R.O. 1990, Reg. 823 (the Regulation), as they existed at the time of the request.

The basic requirement for responding to a request is set out in section 19 of the Act, which states:

> Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 20 and 21, within thirty days after the request is received,
>
> (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
>
> (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

Sections 45(1), (2) and (3) of the Act specify the circumstances in which fees may be charged, and when estimates must be given. These sections state:

> (1) If no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record to pay,
>
> > (a) a search charge for every hour of manual search required in excess of two hours to locate a record;
> >
> > (b) the costs of preparing the record for disclosure;
> >
> > (c) computer and other costs incurred in locating, retrieving, processing and copying a record; and
> >
> > (d) shipping costs.
>
> (2) Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information.
>
> (3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over $25.

Section 7(1) of Regulation 823, made pursuant to the Act, contains further provisions relating to fee estimates. It states as follows:

> If a head gives a person an estimate of an amount payable under the Act and that estimate is $25 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before completing the request.

Order 81 permits an institution to issue an interim decision with respect to access and an interim fee estimate in circumstances where the records are unduly expensive to reproduce for the purposes of making a decision on access. In my view, this is a proper case for the application of the approach set forth in Order 81. The responsive records are voluminous and would be unduly expensive to reproduce for the purposes of reviewing in order to make an access decision.

With regard to the method of calculation to be used in preparing a fee estimate, Order 81 provides that, where an interim access decision is issued, the fee estimate may be prepared by representative sampling, or by consulting a knowledgeable employee. In this case, the fee estimate was prepared with the assistance of the administrative assistant who is familiar with CEFCUT's record-keeping systems.

I will now consider whether the items and amounts included in the estimate are in keeping with the provisions of section 45 of the Act, which I reproduced above, and section 6 of Regulation 823, made under the Act:

> The following are the fees that shall be charged for the purposes of section 45(1) of the Act:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> ...
>
> 3. For manually searching for a record after two hours have been spent searching, $7.50 for each fifteen minutes spent by any person.
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each fifteen minutes spent by any person.
>
> ...

In reviewing CEFCUT's fee estimate, my responsibility under section 45(5) of the Act is to ensure that the amount estimated by the institution is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with CEFCUT. In my view, CEFCUT discharges this burden by providing me with detailed information as to how the fee estimate has been calculated, and by producing sufficient evidence to support its claim.

As noted above, CEFCUT has provided me with affidavits sworn by its administrative assistant who is responsible for processing requests under the Act in which she describes in some detail the nature and extent of the searches which would be required for each part of the appellant's request. In my view, CEFCUT has provided me with sufficient evidence to substantiate the amounts claimed for search time.

However, I find that the amounts which CEFCUT has put forward for what it describes as "associated costs" have not been adequately explained or substantiated. It has failed to describe in adequate detail the nature of these costs and how they have been calculated As such, I find that CEFCUT has not satisfied me that this aspect of the fee estimate is reasonable and that it falls within the ambit of the Act and the Regulations made thereunder.

By way of summary, I find that CEFCUT is entitled to require the appellant to pay a fee of $45,680, which is composed of the total of all of the amounts for search time as calculated above, $45,740, less $60 for two free hours of search time. This amount does not include any search time for records containing the personal information of the appellant, which could not be recovered by an institution under the Act as it existed at the time of the request. Further, I find that a deposit in the amount of 50% of this amount may be required before proceeding further with the request. If the actual amount of any of the estimated items is less than the amount reflected in this estimate, any excess payment which may have been made in that regard is to be refunded to the appellant.

The appellant may, of course, choose those parts of the request which he wishes to proceed with and the fees may then be reduced accordingly.

DISCUSSION:

APPLICATION OF THE EXEMPTIONS:

I will now proceed to determine the application of the exemptions claimed to those records which were not included in the interim access decision/fee estimate. For these records, CEFCUT has provided the appellant with a final decision as to access and has chosen not to provide a fee estimate.

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, to mean recorded information about an identifiable individual. I have reviewed the information contained in the responsive records and make the following findings:

1. Records B9, B15, B90, B91, B92, B106, B111, B112 and B113 contain only the personal information of individuals other than the appellant.

2. The undisclosed portions of Records A29, A30 and C1-C6 (which are the unsevered versions of Records C7-C12) contain only the personal information of one or more of the affected persons. However, the unsevered version of each of these documents also contains the appellant's personal information. I will, therefore, examine the application of sections 38(a) and (b) to them, below.

3. Record B6 contains only the personal information of the appellant and an affected person who consented to the disclosure of her personal information to the appellant.

4. Records B14, B20, B23-B26, B28, B30, B32, B38, B41, B48-B53, B60, B61, B65, B67, B71, B72, C13, C15 and C21 contain the personal information of both the appellant and one or more of the affected persons.

5. Records B7, B8, B12, B13, B16, B17, B18, B19, B21, B27, B29, B31, B33-B36, B42-B47, B59, B62, B63, B66, B76, B77, B78, C17 and C18 contain only the personal information of the appellant.

6. Records B39, B40, B96, B114, C19, C20 and C22-C29 do not contain any personal information.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 38(a) of the Act, CEFCUT has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 38(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,

> if section **6, 7**, 8, 9, 10, 11, **12**, 13 or **15** would apply to the disclosure of that personal information. [emphasis added]

CEFCUT has exercised its discretion to refuse access to the records at issue under sections 6(1)(b), 7, 12 and 15(a). Because all of them, except Records B9, B15, B39, B40, B90, B91, B92, B96, B106, B111, B112, B113, B114, C19, C20 and C22-29, contain the personal information of the appellant, in order to determine whether the exemption provided by section 38(a) applies to the information in these records, I must first consider whether the exemptions in sections 6(1)(b), 7, 12 or 15(a) apply.

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the Act states:

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

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for the record to be subject to the common law solicitor-client privilege (Branch 1), CEFCUT must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**
   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49, M-2 and M-19]

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. 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 counsel employed or retained by CEFCUT; and

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

CEFCUT submits that the cover page to Record B6, along with Records B14, B17, B20, B21, B22, B23, B24, B25, B26, B28, B30 (handwritten notes only), B32, B38, B39, B40, B41, B48, B49-B53, B60, B62, B63, B65, B66, B76, B78, B96 and C20 qualify for exemption under Branch 1 and/or Branch 2 of section 12.

I have examined each of the documents described above and find that Records B17, B20, B21, B22, B23-B26, B28, B32, B38, B41, B48-B53, B60, B62, B63, B65 and B66 are properly exempt from disclosure under Branch 1 of section 12. Each of these records represents a confidential communication between counsel retained by CEFCUT and its staff and elected officials which was directly related to the seeking, formulating or giving of legal advice.

The cover page of Record B6 is not a confidential communication between solicitor and client and does not, therefore, qualify for exemption under either branch of the section 12 exemption. As no other exemptions have been claimed for this page, it should be disclosed to the appellant.

Further, I find that Records B14, B29, B30 (handwritten notes only), B76 and B78 qualify for exemption under Branch 2 of section 12. These are documents which were prepared by or for CEFCUT's counsel for use in litigation, CEFCUT's defense of the appellant's OHRC complaint.

As Records B17, B20, B21, B22, B23-B26, B28, B29, B30, B32, B38, B41, B48-B53, B60, B62, B63, B65, B66, B76 and B78 qualify for exemption under section 12 and contain the personal information of the appellant, they are exempt from disclosure under section 38(a).

CLOSED MEETING

CEFCUT submits that Records C13, C15, C16, C17, C18, C19, C20 and pages 13-17 of Record C21 are exempt under section 6(1)(b) of the Act. In order to qualify for exemption under section 6(1)(b), CEFCUT must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**

2. that a statute authorizes the holding of this meeting in the absence of the public; **and**

3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

The first and second parts of the test for exemption under section 6(1)(b) require CEFCUT to establish that a meeting was held and that it was held in camera. Records C13, C15, C16, C17, C18, C19, C20 and C21 are minutes of meetings of CEFCUT and its "Comite des Statuts, Reglements et Politiques Operationelles" which were held on October 27, 1994, November 10 and 30, 1994, January 19, 1995, February 16 and 23, 1995, along with two meetings held on April 20, 1995 respectively. The minutes include various staff reports with respect to the creation of a policy by CEFCUT for responding to requests made to it, under the Act about certain labour relations matters involving the appellant and other CEFCUT employees. Pages 7 and 13-17 of Record C21 are identical to Record C13.

I am satisfied that meetings of CEFCUT took place on these dates and that section 207(2)(e) of the Education Act authorizes the holding of such meetings in the absence of the public as the subject matter of the meetings related to litigation affecting the Board, the appellant's OHRC complaint. With the exception of the meeting of CEFCUT which was held on April 20, 1995, and reflected in Record 21, I find that all of these meetings were held in camera. Accordingly, the minutes of the public CEFCUT meeting held on April 20, 1995 which are found at pages 1-5, the staff report at page 6 and the other information compiled at pages 8-12 which pertain to those minutes are not exempt under section 6(1)(b).

I am satisfied, however, that the disclosure of Records C13, C15, C16, C17, C18, C19, C20 and pages 7 and 13-17 of Record C21 would reveal the actual substance of the deliberations of in camera meetings of CEFCUT and one of its committees, which were held on those dates. Accordingly, these records qualify for exemption under section 6(1)(b). As Records C13, C15, C16, C17 and C18 contain the personal information of the appellant, they are exempt from disclosure under section 38(a).

ADVICE OR RECOMMENDATIONS

CEFCUT submits that Record B96 and pages 6 and 8-12 of Record C21 are exempt from disclosure under section 7(1) of the Act, which states:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

In Order P-1299, former Inquiry Officer Holly Big Canoe considered the application of section 13 of the Freedom of Information and Protection of Privacy Act, which is the equivalent provision to section 7 of the municipal Act. She held that:

> With regard to the remaining severed information, section 13 is not intended to exempt all communications between public servants, even if they can be seen broadly as "advice" or "recommendations". In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He states that it "... purports to protect the free-flow of advice and recommendations **within the deliberative process of government decision-making and policy-making**" (my emphasis). The remaining severed information deals with matters of an

> administrative nature associated with the manner in which the deliberative process would proceed, as opposed to dealing directly with the substantive issues being considered within the deliberative process itself. In my view, the information contained in this record is not sufficiently connected to the deliberative process of government decision-making and policy-making to bring it within the scope of section 13.

I adopt the approach outlined by Inquiry Officer Big Canoe for the purposes of this appeal.

CEFCUT submits that Record B96 contains a staff recommendation and that its disclosure would reveal that recommendation. I have reviewed the contents of this document and find that the information contained in it is administrative in nature and is not sufficiently connected to the deliberative component of CEFCUT's decision and policy-making process to bring this record within the scope of section 7. Accordingly, I find that it is not exempt under section 7.

CEFCUT also submits that pages 6 and 8-12 of Record C21 are exempt under section 7 as they contain advice or recommendations to it from an employee. I have reviewed these documents and conclude that they do not contain any advice or recommendations within the meaning of section 7.

INFORMATION PUBLISHED OR AVAILABLE

CEFCUT argues that a number of the records which remain at issue are properly exempt under section 15(a) of the Act. This section states:

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

Whenever an institution relies on section 15(a), the head has a duty to inform the requester of the specific location of the records or information in question. Where the head fails to properly discharge his or her responsibility to do so, the Commissioner may order the head to provide the appellant with information sufficient to identify the precise location of the records or information in question [Order 123].

In Order P-327, former Assistant Commissioner Tom Mitchinson considered the meaning of "currently available to the public" for the purposes of section 22(a) (the provision in the provincial Act which is equivalent to section 15(a) in the municipal Act) as follows:

> In my view, in order for records to qualify for exemption under section 22(a), they must either be published or available to members of the public generally, through a regularized system of access, such as, for example, a public library or a government publications centre.

He then went on to find this exemption was intended to provide government organizations with:

> "... the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access; it is not intended to be used in order to avoid an institution's obligations under the Act." I agree with this approach and adopt it for the purposes of this appeal.

CEFCUT submits that Records B7, B8, B12, B13, B15, B16, B18, B19, B27, B31, B33, B34, B35, B36, B37, B39, B40, B42, B43, B44, B45, B46, B47, B59, B61, B67, B71 and B77 are all available to the public, including the appellant, through the Ontario Human Rights Commission. It argues that the balance of convenience favours this alternative means of access because each of these records are "within the knowledge of the appellant and the document is readily available to
the appellant". It goes on to argue that Record C14 and pages 1-5 of Record C21, which are minutes of public CEFCUT meetings, are similarly available to any member of the public, including the appellant.

It further submits that Records C22, C23, C24, C25, C26, C27, C28 and C29, which are CEFCUT policies and procedures, are also available to any member of the public for viewing at its head office. Finally, it argues that each of these records have also been made available to the OHRC in the context of the investigation into the appellant's ongoing complaint.

I find that the records which CEFCUT submits are available publicly through the OHRC are not, in fact, available through a regularized system of access. Nor have I been provided with any evidence that the appellant, in his capacity as the complainant in the OHRC proceeding, has any right of access to the records which relate to his complaint which are held by the OHRC. Accordingly, in my view, section 15(a) has no application to these records.

However, I find that CEFCUT's policies and procedures, as well as the minutes of its public meetings, are made available to the public through a regularized system of access. I find that the balance of convenience insofar as the disclosure of this information is concerned rests with CEFCUT. Records C14, pages 1-5 of Record C21, and Records C22-C29 are, therefore, exempt from disclosure under section 15(a).

INVASION OF PRIVACY

Where a record contains the personal information of both the appellant and other individuals, section 38(b) allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Where, however, the record only contains the personal information of other individuals, section 14(1) of the Act prohibits an institution from disclosing it except in the circumstances listed in sections 14(1)(a) through (f). Of these, only sections 14(1)(a) and (f) could apply in this appeal. They permit disclosure if the individual to whom the personal information relates consents to its disclosure or if disclosure "does not constitute an unjustified invasion of personal privacy."

In both situations, sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption.

CEFCUT submits that the disclosure of the personal information of the affected persons which is contained in the undisclosed portions of Records A29 and A30 and Records B9, B15, B72, B90, B91, B92, B106, B111, B112, B113, C1-C7 and pages 8-12 of Record C21 would result in an unjustified invasion of the personal privacy of these individuals under sections 14(1) and 38(b).

The appellant has not made any submissions with respect to the application of the personal information exemptions to the records.

The individual to whom the personal information in Record B6 relates consents to its disclosure to the appellant. Record B6 may, therefore, be disclosed to the appellant under section 14(1)(a). The other affected persons object to the disclosure of their personal information to the appellant.

In the absence of any submissions from the appellant suggesting factors which might weigh in favour of disclosure, I find that Records B9, B15, B90, B91, B92, B106, B111, B112 and B113 are exempt under section 14(1) of the Act. None of these records contain the personal information of the appellant.

I have balanced the appellant's right of access to his own personal information against the affected persons' right to privacy under section 38(b) of the Act. With respect to Records A29 and A30, as well as Record B72, (those portions which do not contain the personal information of the appellant), I find that their disclosure would result in an unjustified invasion of personal privacy. These records are, accordingly, exempt from disclosure under section 38(b). The remaining portions of Records A29, A30 and B72 which contain only the personal information of the appellant may be disclosed to him.

ORDER:

1. I uphold CEFCUT's decision to deny access to those portions of Records A29, A30 and B72 which do not contain the personal information of the appellant, as well as Records B9, B14, B15, B17, B20, B21, B22, B23, B24, B25, B26, B28, B29, B30, B32, B38, B41, B48, B49, B50, B51, B52, B53, B60, B62, B63, B65, B66, B72, B76, B78, B90, B91, B92, B106, B111, B112, B113, the undisclosed portions of Records C1-C12, C13, C14, C15, C16, C17, C18, C19, C20, Pages 1-5, 7, 8-12 and 13-17 of Record C21, C22, C23, C24, C25, C26, C27, C28 and C29.

2. I order CEFCUT to disclose to the appellant those portions of Records A29, A30 and A72 which contain only his own personal information, as well as Records B6, B7, B8, B10, B11, B12, B13, B16, B18, B19, B27, B31, B33, B34, B35, B36, B37, B39, B40, B42, B43, B44, B45, B46, B47, B54, B55, B56, B57, B58, B59, B61, B64, B67, B71, B77, B82, B93, B95, B96, B97, B107, B108, B109, B110, B114 and page 7 of Record C21 by providing him with a copy by **July 2, 1997** but not before **June 27, 1997.**

3. I uphold CEFCUT's authority to charge the appellant an interim fee estimate of $45,680.
4. In order to verify compliance with this order, I reserve the right to require CEFCUT to provide me with a copy of the records provided to the appellant in accordance with Provision 2 of this order.

Original signed by: May 28, 1997
Donald Hale
Inquiry Officer