Information and Privacy
Commissioner/Ontario

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

ORDER P-1540

Appeal P-9700147

Ministry of Community and Social Services

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BACKGROUND:

The appellant is a "tri-local" committee of three Canadian Union of Public Employee locals who are currently working together as a result of their common labour negotiation issues. On December 4, 1996, the appellant submitted a request to the Ministry of Community and Social Services (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records for the following information related to Ministry approved service plans for agencies funded by the Ministry:

1. The most recent approved service plan and supporting documentation for four identified agencies.

2. The most recent by-laws of the four identified agencies.

3. Copies of the 1996 correspondence which relates to the funding of the four identified agencies.

4. Copies of any internal correspondence dated from September 1st, 1996, including inter-office memoranda, housebook notes, briefing notes and correspondence between the respective area offices and the developmental services branch where the above identified agencies are named but excluding any correspondence from or to the organizations and the Ministry.

The Ministry granted partial access to records responsive to this request. The appellant appealed this decision with respect to parts 3 and 4 of the request and Appeal Number P-9700046 was opened. In Order P-1464, I addressed the issues arising in that appeal, which include in part, whether section 65(6) applies to some of the records and the application of sections 17(1) and 21(1) to portions of the records.

In Order P-1464, I found that section 65(6) had no application in the circumstances of that appeal. I found that information pertaining to salaries of employees was exempt under section 21(1) as the disclosure of this information would constitute a presumed unjustified invasion of personal privacy under section 21(3)(f) (information which describes an individual's income). The appellant indicated that it was not interested in receiving information about clients or their families. Accordingly, as I found that a number of records contained this information, they were outside the scope of the request.

With respect to the exemption in section 17(1), I found that information pertaining primarily to discussions regarding the agencies' approaches to dealing with the management of their employees during a labour dispute, which contain contingency plans and strategies to be employed by the agencies in their dealings with their employees during and as a result of the dispute, qualifies as labour relations information. I found that the records had been supplied to the Ministry in confidence and that the disclosure of this information could reasonably be expected to interfere significantly with the labour negotiations between the affected parties and the respective unions representing their employees. As all three parts of the test were met for these records, I found them to be exempt under section 17(1).

NATURE OF THE APPEAL:

In March, 1997, the appellant made a second request under the Act to the Ministry. The request was for access to records containing the following information related to Ministry approved service plans for agencies funded by the Ministry:

1. Copies of any correspondence from December 1, 1996 to the present concerning the funding of three named organizations.

2. Copies of any internal correspondence dated from December 1st, 1996, to the present including inter-office memoranda, house book notes, briefing notes and correspondence between the Ottawa Area Office and the Developmental Services Branch naming any of three named organizations.

Essentially, this request is a continuation of parts 3 and 4 of the request for information submitted by the appellant in December 1996; the only difference being the time frame.

The Ministry identified 78 records as being responsive to the current request and granted partial access to them. The Ministry denied access in whole or in part to a number of records pursuant to sections 21(1) (invasion of privacy) and 19 (solicitor-client privilege) of the Act. The Ministry charged the appellant a fee of $74 dollars for the processing of this request.

The appellant appealed the Ministry's decision to deny access to the records, as well as the fee charged by the Ministry. The appellant also indicated that additional records should exist.

During mediation it was discovered that this request was being interpreted differently than the previous request. The Ministry was asked to explain the difference. The Ministry replied that it was "prepared at this time to consider additional records that may be on record with the Area Office, and may be responsive to this request, in line with the approach held in similarly worded requests."

The appellant has indicated that it is not interested in any personal information that would identify a client.

Originally a fee of $208 was requested by the Ministry. This fee was reduced to $74, then increased to $147.40 and then again reduced to $96.20. This is, ultimately, the amount at issue in this appeal. The $96.20 consists of fees charged for 181 pages of photocopies at 20 cents each ($36.20) and 2 hours search time at $30 per hour ($60). Upon the payment of the $96.20 fee, 42 pages of records were released to the appellant. Cheques were sent in payment of the fees by the appellant, but have not been cashed or returned by the Ministry.

Subsequent to the Ministry notifying the three organizations (the affected parties) referred to in the request under section 28(1) of the Act, a new decision letter was issued indicating that the exemptions contained in sections 17(1)(a) and (b) were now being claimed.

The decision letter further indicated that access was being denied on the basis that, pursuant to section 65(6) of the Act, certain identified records are removed from the ambit of the Act. The Ministry removed its claim for section 19 on Record 50. Therefore, section 19 is no longer at issue in this appeal. Portions of Record 50 remain at issue, however, as they were exempted under section 21(1).

No further mediation was possible. Accordingly, this office provided the appellant and the Ministry with a Notice of Inquiry. This Notice of Inquiry was also sent to the affected parties. Representations were received from all parties.

In its representations, the Ministry has indicated that it is no longer claiming any exemptions for Records 41, 52, 55 - 56, 68, 70, 77, 80, 81, 85, 86, 92 - 93, 132 - 133, 134 -135, 136 - 137, 140, 184 - 189, 195, 197, 199, 201 - 202, 204, 207 - 208, 213 - 214, 219 and 220 - 221 in their entirety, for portions of Record 129 (with severances of the two names) and Record 130 (severing point 3).

Further, the Ministry indicates that it no longer objects to the disclosure of the following:

- the section entitled "Response" in Record 50;
- the paragraph entitled "Union" in Record 42;
- the two paragraphs beginning on Record 43 with "As indicated, with respect to..." and ending on Record 45 with "But we continue to monitor client safety and security."; and
- the point "3. Plan for Follow up" beginning on Record 46 and extending to Record 47.

However, the Ministry states that as the three affected parties insisted that these records be withheld from the appellant, it will not disclose these records and parts of records until the Commissioner has ruled on this issue. Accordingly, these pages and parts of pages remain at issue.

In their representations, the affected parties have specifically identified the records to which objection to disclosure is taken. In particular, the affected parties object to the disclosure of the following:

- section 21(1) - Records 40, 50, 61, 141, 142, 147 - 153, 165 - 170 and 182 - 183;
- section 17(1)(a) and/or (b) - Records 2, 7, 13, 15, 26, 32, 37, 40, 43, 46, 48 - 49, 51, 58, 61, 76, 85, 89, 93, 97, 99, 108, 110 and 112.

In accordance with the representations of the Ministry and the affected parties, no exemptions have been claimed for the following records: Records 41, 52, 55 - 56, 68, 70, 77, 80, 81, 86, 92 - 93, 132 - 133, 134 - 135, 136 - 137, 140, 184 - 189, 195, 197, 199, 201 - 202, 204, 207 - 208, 213 - 214, 219 and 220 - 221 in their entirety, and the portions of Records 42, 44, 45, 47, 129 and 130 which the Ministry has indicated as being releasable, as noted above. I have reviewed these records and find that they are not subject to any mandatory exemptions. Accordingly, they should be disclosed to the appellant.

The Ministry further indicates that, based on my findings in Order P-1464, it has withdrawn its reliance on section 65(6). The appellant and affected parties do not specifically address this issue in their representations. In view of my findings in Order P-1464, and the nature of the records and issues in the current appeal, I agree that section 65(6) does not apply in the circumstances. Accordingly, this provision is no longer at issue.

In summary, the issues to be determined in this appeal are as follows:

- whether section 21(1) applies to parts of the records;
- whether sections 17(1)(a) or (b) apply to parts of the records;
- whether the Ministry's search for responsive records was reasonable;
- whether the Ministry's calculation of fees was in accordance with the Act.

RECORDS:

The Ministry has provided this office with three packages of records. The numbering for each package overlaps. Therefore, in order to avoid confusion, I will refer to the two packages of records which pertain to the original decision as package one or two, Record number. These records consist of correspondence. The Ministry has only exempted portions of these records on the basis of section 21(1).

The other records which remain at issue in this appeal are described simply by record number. In general, the records consist of Contentious Issue reports, letters, interoffice memoranda, minutes of a meeting, policies, procedures and operational protocols, and handouts to parents.

DISCUSSION:

REASONABLE SEARCH

In cases where a requester provides sufficient details about the records which he or she is seeking and the Ministry indicates that records do not exist, it is my responsibility to insure that the Ministry has made a reasonable search to identify any records that are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

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.

In its letter of appeal, the appellant indicates that the information received from the Ministry in response to the second request is "dramatically" different from that received following the appellant's initial request in December 1996. The appellant's representations in the current appeal do not address this issue.

The Ministry advises that transfer payment agencies of the Ministry report to it through an assigned Program Supervisor. The Ministry indicates further that files containing documentation on these transfer payment agencies are maintained in the custody of the Program Supervisors. These files contain information on program, financial and administrative operations in the agencies.

The Ministry states that records responsive to this request are maintained in a filing system for each Program Supervisor (one supervisor is responsible for two of the agencies, and another supervisor is responsible for the third agency) in the Ottawa Area Office (the OAO) of the Ministry. The Ministry indicates that upon receipt of the request, a thorough search of all records in the filing systems of the two Program Supervisors at the OAO was completed. An estimate of 215 pages was provided to the Ministry's Freedom of Information and Protection of Privacy office. Upon reviewing the request, the OAO determined that it had interpreted the request too broadly, and had included records in the initial estimate that, in their opinion, were not responsive to the request. The 215 records originally collected were reviewed and resorted, and it was decided that of those, only 78 pages were responsive. A revised fee estimate was provided at that time.

The Ministry indicates that, following negotiations with the Commissioner's office during the mediation stage of the appeal, the OAO agreed to reinterpret the request in accordance with the first request the appellant had filed, which was for the same records for the same agencies, for an earlier time period. At this time, a further search uncovered an additional 181 records which were responsive to the request. Some of these records were disclosed to the appellant and the rest are at issue in this appeal.

While it is apparent that the Ministry's initial response to the appellant was inadequate, in my view, the subsequent reinterpretation of the request and resultant search has produced a number of additional records. I am satisfied, based on the representations, that the Ministry's searches for responsive records were ultimately reasonable.

FEES

The appellant does not address this issue in its representations. In its letter of appeal, the appellant indicates that because much of the information which has been disclosed is by-law and service plans, this information should have been made more publicly available. The appellant implies that it should not have been charged for public information. In my view, it has not been established that the information for which fees have been charged is publicly available. Even if it were, there is nothing in the Act which states that disclosure must be given to such a record without charging a fee for it. Further, in this regard, I note that section 22(a) of the Act provides a discretionary exemption which permits a head to refuse disclosure under the Act where the record is currently available to the public. Even this provision, however, does not prohibit an institution from providing access under the Act. In my view, the appellant's arguments on this issue are without merit. Despite that, I have reviewed the fees charged by the Ministry.

The Ministry indicates that when the request was initially submitted the two areas of the Ministry with responsive records, the Developmental Services Branch (DSB) and the OAO, advised that they had undertaken searches totaling 5.5 hours (DSB, 1.5 hours, OAO, 4 hours), and had 215

records (DSB, 30 pages, OAO, 185 pages). At a rate of $30 per hour, the estimate for the search time was $165, and at 20 cents per page, the estimate for the photocopying was $43, for a total of $208. This estimate was communicated to the requester in a letter dated April 1, 1997.

The Ministry notes that the OAO subsequently reduced the number of records held in their office which they considered responsive to the request as they determined that they had interpreted the request too broadly. The number of responsive records was reduced from 185 to 35. As the total number of pages now was 78, the Ministry reduced the fee for search time to $74. The Ministry returned the appellant's cheque for $208 upon receiving a second cheque for $74.

The Ministry states that after negotiations with the appellant, the OAO agreed to expand the area of their search. Initially it was thought that the appellant was not interested in records pertaining to clients. A revised fee estimate in the amount of $147.40 (137 pages @ 20 cents per page, and 2 hours of search time) was provided to the requester, although the Ministry recognizes that this was incorrectly calculated; the correct figure should have been $87.40. Upon clarification that client records were to be included, an additional 181 pages were found after a further 2 hours search time. A new fee estimate was issued in the amount of $96.20 (181 pages @ 20 cents per page = $36.20, and 2 hours search @ $30 per hour = $60.) The Ministry advises that although the appellant paid the fee, the cheque has not been cashed as the OAO withheld the 181 documents in full.

Finally, the Ministry indicates that further to the 181 documents noted above, the OAO has released another 53 documents in full or partially severed, with no further fee requests being made to the appellant.

The Ministry advises that no other charges have been applied to the fee such as shipping costs or costs relating to preparing the records for disclosure.

In reviewing the Ministry's representations, I am satisfied that the fees were calculated in accordance with the fee provisions of the Act.

PERSONAL INFORMATION

Personal information is defined in section 2(1) as "recorded information about an identifiable individual". The Ministry claims that the following records contain personal information:

- Package one - Records 46, 48, 49, 50, 52, 72 and 75;
- Package two - Records 1, 2 and 3;
- Records 3, 4, 8, 9, 11, 14, 15, 17, 18, 19, 20, 21, 22, 26, 27, 28, 30, 34, 38, 39, 60, 61, 69, 73, 74, 75, 78, 79, 89, 90, 94, 99, 101, 107, 108, 111, 112, 113, 115, 117, 119, 122, 124, 126, 127, 129, 130, 131, 138, 139, 141, 142, 143, 145, 147 - 153, 143, 155, 156, 157, 158, 159, 160, 162, 164, 165 - 170, 171 - 173, 174 - 183, 190 - 191, 193, 203 and 218.

The affected parties are particularly concerned about disclosure of the personal information which they believe is found in Records 40, 50, 61, 141, 142, 147 - 153, 165 - 170 and 182 - 183.

I have reviewed these records and find that Records 40 and 50 do not contain personal information. As no other exemptions have been claimed for Record 50, it should be disclosed to the appellant. The affected parties claim that section 17(1) also applies to Record 40, and I will consider the application of this section to the record in my discussion of section 17(1) below.

With respect to the remaining documents, I find that they contain a large amount of information which pertains to the identity of clients and/or their families (ie. names and/or addresses). The appellant states that it is not interested in obtaining this information and, accordingly, it is not at issue in this appeal.

The remaining information in these records pertains primarily to information about clients, such as details of incidents involving clients. In my view, there is sufficient detail in these portions of the records for the individuals referred to therein to be identified. It is not clear whether the appellant wishes this information. Therefore, I will determine whether its disclosure would constitute an unjustified invasion of privacy.

Portions of a number of records also pertain to individuals employed by the affected parties with respect to allegations and/or civil action against them. In my view, this information qualifies as these individuals' personal information.

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.

In its representations, the appellant indicates that it is seeking any personal information which is not subject to section 21(1)(f). This section provides that:

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

Sections 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 in the circumstances of the case.

The appellant has not specifically addressed whether disclosure of the personal information in the records would or would not constitute an unjustified invasion of personal privacy. The Ministry submits that the information in the records relating to allegations against and matters pertaining to civil action involving employees of the affected parties is highly sensitive (section

21(2)(f)). I agree. I am also of the view that, in the circumstances of this appeal, any information pertaining to clients and/or their families is also highly sensitive. I find this to be the case because of the labour disputes between the appellant and the affected parties and ongoing concerns of the families who are unfortunately caught up in the midst of them. In the circumstances, I find that disclosure of any of the personal information which has been severed by the Ministry would constitute an unjustified invasion of personal privacy and is thus properly exempt under section 21(1) of the Act.

THIRD PARTY INFORMATION

The Ministry claims that sections 17(1)(a) and (b) apply to Records 48 - 50, 51, 209, 215 - 217 and portions of Records 42, 43 and 46. The affected parties submit that sections 17(1)(a) and/or (b) apply to Records 2, 7, 13, 15, 26, 32, 37, 40, 43, 46, 48 - 49, 51, 58, 61, 76, 85, 89, 93, 97, 99, 108, 110 and 112.

For a record to qualify for exemption under section 17(1)(a) or (b), the Ministry and/or the affected parties 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) or (b) of section 17(1) will occur.

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All three parts of the test must be satisfied in order for the exemption to apply.

Type of Information

With the exception of Records 43, 46 and 85, all of the records at issue in this part pertain primarily to discussions regarding the agencies' approaches to dealing with the management of their employees during a labour dispute. These records contain contingency plans and strategies to be employed by the agencies in their dealings with their employees during and as a result of the dispute. I am satisfied that this qualifies as labour relations information. I find that only the first two bullet points of Record 85 contain similar information, thereby qualifying as labour relations information.

In my view, the information remaining at issue on Record 85 and the portions of pages 43 and 46 for which the Ministry no longer objects to disclosure does not fall within any of the types of information referred to in the exemption. Accordingly, they do not qualify for exemption under section 17(1). As no other exemptions have been claimed for these portions of the records, they should disclosed to the appellant.

Supplied in Confidence

In order for this part of the section 17(1) test to be met, the information must have been supplied to the Ministry, in confidence, either implicitly or explicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

I am satisfied that the information in the records at issue was either supplied to the Ministry by the agencies or that its disclosure would reveal information supplied to the Ministry.

Both the Ministry and the affected parties describe the confidentiality with which they conducted their discussions and I am satisfied that such discussions were carried out in a confidential manner. Thus the second part of the test has been met.

Harms

In order to meet this part of the test, the Ministry and/or the affected parties must show how disclosure of the information in the record could reasonably be expected to result in the harms described in section 17(1)(a) and/or (b) of the Act.

Section 17(1)(a)

This section provides that:

> 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,
>
> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

With respect to section 17(1)(a), counsel for the affected parties described the history of the affected parties negotiations with the union, which has been somewhat acrimonious. Counsel indicates that issues relating to labour negotiations are still on-going with the union. In my view, the circumstances described by the affected parties have not significantly changed since the previous appeal and I find the records to be of a similar nature.

Similar to my findings in Order P-1464, I am satisfied that disclosure of the information contained in Records 2, 7, 13, 15, 26, 32, 37, 40, 48 - 49, 51, 58, 61, 76, 89, 93, 97, 99, 108, 110 and 112 and the first two bullet points in Record 85 would interfere significantly with the labour negotiations between the affected parties and the respective unions representing their employees. As all three parts of the test have been met for these records, they are exempt under section 17(1).

ORDER:

1. I order the Ministry to disclose the following records and parts of records to the appellant by providing it with a copy of them by **April 9, 1998** but not earlier than **April 6, 1998**.

    - Records 41, 50, 52, 55 - 56, 68, 70, 77, 80, 81, 86, 92 - 93, 132 - 133, 134 - 135, 136 - 137, 140, 184 - 189, 195, 197, 199, 201- 202, 204, 207 - 208, 213 - 214, 219 and 220 - 221;

    - the portions of Records 42, 43, 44, 45, 46, 47, 85, 129 and 130 which the Ministry has indicated it no longer objects to withholding.

2. I uphold the Ministry's decision to withhold the remaining records from disclosure.

3. I uphold the Ministry's decision to charge the appellant $96.20.

4. The Ministry's search for responsive records was reasonable and this portion of the appeal is dismissed.

5. In order to verify compliance with the provisions 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 1 of this order.

Original signed by: March 5, 1998
Laurel Cropley
Inquiry Officer