



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

ORDER P-1637

Appeal P_9800103
Ministry of Finance



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

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

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

NATURE OF THE APPEAL:

A request was made to the Ministry of Finance (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for the following records:

A preliminary report prepared by [a named accounting firm] and delivered to the Ministry of Finance within the last year concerning the relationship between the Deposit Insurance Corporation of Ontario (DICO) and the Ministry of Finance, or simply relating to the Ministry of Finance, **and**

all correspondence, documents and other material relating thereto.

In response to the request, the Ministry located a large number of records and granted partial access to them. The Ministry advised the requester that she would be required to pay a fee of \$2,175.90 for copies of the records to which access was granted. The Ministry denied access to the remainder of the records pursuant to sections 14, 17, 18, 19 and 21 of the Act. In its decision letter, the Ministry provided the requester with an Index of Records showing a chronological listing of the documents. The Index of Records showed that some records were denied as they did not fall within the scope of the request.

The requester paid the fee to obtain the records to which access was granted and appealed the decision to deny access to certain specified records.

During mediation, the requester (now the appellant) withdrew her appeal for Records C-065 (denied as being non responsive to the request), K-013 (denied under section 21); and the portion of C-076 to which section 21 had been applied.

This office sent a Notice of Inquiry to the appellant, the Ministry and 30 affected parties. Representations were received from the Ministry and seven affected parties, including DICO. In its representations, DICO indicates that it is relying on those provided by the Ministry. In its representations, the Ministry indicates that it is withdrawing its reliance on sections 18(1)(c), (d) and (g) of the Act. Consequently, the following exemptions are at issue in this appeal:

- law enforcement - section 14(1)(c);
- third party information - section 17(1);
- solicitor-client privilege - section 19;
- invasion of privacy - section 21.

In addition, the appellant takes issue with the Ministry's decision that certain records are not responsive to the request.

RECORDS:

The records at issue in this appeal include a proposal submitted in response to a Request for Proposals (RFPs), correspondence, documents relating to the RFPs, Ministry records relating to DICO inspections and examinations, legal opinions and reports generated by DICO.

The records at issue are described in the Index of Records which was provided to the appellant. Using the Ministry's numbering system, I have set out below the records at issue and the exemptions which have been applied to each one.

Records not responsive to request

C-218 and C-222

Section 19

A-166, A-149 and C-310

Section 14(1)(c)

C-096, C-220 and K-014

Section 21

K-012

Section 17

C-057, C-076, C-097, C-219 and C-241,

A-011, A-013, A-122, A-123, A-128, A-130, A-136, A-139, A-145, A-146, A-147, A-148, A-157 and A-171,

K-006, K-012, K-031, K-032, K-036, K-039, K-051, K-056, K-057, K-063 and K-066.

DISCUSSION:

NON-RESPONSIVE RECORDS

The Ministry indicates that Record C-218 contains a review of proposed new DICO bylaws, and that Record C-222 contains an outline of the proposed examination of DICO by the Superintendent of Deposit Institutions for 1996. The Ministry argues that these two records deal with operational issues between the Superintendent of Deposit Institutions and DICO rather than the Ministry/DICO study which is the subject of this appeal. Therefore, the Ministry submits that these two records are not responsive to the request.

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request:

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The record itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request [Order P-880; see also Order P-1051].

In my view, the appellant was very clear in what she was seeking. She has identified that she is only interested in information pertaining to a particular preliminary report prepared by a named accounting firm and all correspondence, documents and other material which relate to this preliminary report. In my view, she is not seeking any and all information pertaining to the relationship between DICO and the Ministry.

I have reviewed these two records in light of the request as worded. I find that, although they clearly relate to the relationship between DICO and the Ministry, they do not fall within the parameters of the request, which is, as I indicated, for all records relating to a specific preliminary report. Consequently, I find that these records are not "reasonably related to the request" and they are, therefore, not responsive to the request. Accordingly, I will not consider them further in this order.

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The Ministry indicates that Record K-012 contains a calculation of the charge out rates of Ministry credit union examination staff, and as such, contain salary amounts for the various positions. The Ministry acknowledges that the record does not identify specific individuals by name, however, it submits that because of the limited number of persons holding the particular positions referred to in the record, it would be possible to determine their individual salaries.

I note that page one of this record contains the actual salary amount for an individual holding each position identified. I accept the Ministry's position that, because there are a limited number of individuals holding these position, they would be known to knowledgeable or involved parties and it would be possible to determine their individual salaries from this record. Therefore, I find that page one contains the personal information of the individuals who hold the positions described in the record as defined in section 2(1)(b) of the Act.

Page two of this record contains a table of expenses and costs, broken down by budgeted costs, Year to Date Expenditures and Balances. I note that this page contains a variety of different costs and expenses relating to the work performed by credit union examination staff, such as travel and related costs, services and purchases. In my view, this information pertains to costs to the Ministry and cannot reasonably be attributed to individuals as part of their income. This

information is not personal information. Although the first four categories on this table relate to salaries and benefits, they only describe the total budgeted allocations and actual amounts used. In my view, on the basis of this record, it would be extremely difficult if not impossible to break down these amounts in such a way as to be able to determine the actual salaries of any identifiable individual. Therefore, I find that this page of the record does not contain personal information.

In order for section 21(1) to apply to a record, it must first qualify as personal information. Therefore, I will only consider the application of this section to page one of the record.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 21(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 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that the only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 21 exemption [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Ministry submits that disclosure of the information in this record would constitute a presumed unjustified invasion of privacy pursuant to section 21(3)(f) of the Act which provides:

A disclosure of personal information is presumed to constitute 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 credit-worthiness.

I am satisfied that page one of Record K-012 describes the salaries for the positions referred to in the records and that, because the individuals who hold these positions can be ascertained with little difficulty, disclosure of this information would describe their income. Therefore, I find that its disclosure would constitute a presumed unjustified invasion of personal privacy under section 21(3)(f), and it is properly exempt under section 21(1).

THIRD PARTY INFORMATION

The Ministry claims that Records C-057, C-076, C-097, C-219, C-241, A-011, A-013, A-122, A-123, A-128, A-130, A-136, A-139, A-145, A-146, A-147, A-148, A-157, A-171, K-006, K-012, K-31, K-32, K-36, K-039, K-051, K-056, K-057, K-063 and K-066 are exempt pursuant to sections 17(1)(a) and/or (c) of the Act. As I have already found that page one of Record K-012 is exempt under section 21(1), I will not deal with it in this discussion.

Whether the analysis of certain records should be conducted under section 17 or section 18 of the Act

Record K-012

As I indicated above, page two of Record K-012 contains a table of expenses and costs, broken down by budgeted costs, Year to Date Expenditures and Balances. This page contains a variety of different costs and expenses relating to the work performed by credit union examination staff, such as travel and related costs, services and purchases. I found above that this information pertains to costs to the Ministry. The scheme of the Act contemplates that harm to the competitive or financial position of an institution should be addressed by a claim for exemption pursuant to section 18 of the Act and not section 17 (Order P-218). The Ministry originally claimed the application of sections 17, 18 and 21 for this record, however, it has withdrawn its reliance on section 18. In the circumstances, I find that section 17 does not apply to this information as it does not relate to a “third party”, but rather, it relates to the Ministry.

Records relating to DICO

The Ministry indicates that although DICO is a Crown agency, it is funded by deposit insurance premiums paid by credit unions rather than by the Government of Ontario. The Ministry explains that any additional costs or losses incurred by DICO will result in increased deposit insurance premiums for credit unions. The Ministry states that in order to maintain deposit insurance premiums at the lowest possible level, DICO must conduct its operations on a commercial basis to maximize efficiency and minimize the costs to credit unions. The Ministry argues that the operations of DICO are therefore analogous to those of a business operation.

I have reviewed Part XIV of the Credit Unions and Caisses Populaires Act, 1994 (the CUCPA) which establishes DICO as a corporation without share capital. Its members are credit unions incorporated in the province of Ontario. Its objects include, among other things, the provision of deposit insurance, the promotion of standards of sound business and financial practices for member credit unions, to act as an administrator of a credit union and to provide financial assistance to assist a credit union under administration (section 261). The CUCPA provides that DICO may do a number of things in furtherance of its objects, including, for example, establishing and maintaining the Deposit Insurance Fund, acting as liquidator of a credit union, acquiring assets or assuming the liabilities of credit unions and acquiring, holding, improving and alienating real and personal property (section 262).

Sections 256 to 260 provide that DICO shall provide, to the Ministry, an annual report on its activities and any other information related to its affairs. In my view, it is clear that DICO performs an oversight function with respect to credit unions on behalf of the Ministry and its records are, therefore, within the Ministry’s control, if not its custody by virtue of sections 256 to 260. However, I accept that, in order to effectively manage its role in this industry, DICO must

operate on a commercial basis and its interests are the interests of its member credit unions. Therefore, I find that DICO has a commercial nature apart from the Ministry's institutional interests which are identified in section 18 of the Act, and I will consider whether section 17 applies to them.

Section 17(1)

For a record to qualify for exemption under sections 17(1)(a), (b) and/or (c), 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) and/or (c) of section 17(1) will occur.

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P_373 and restored Order P_373. In that decision the Court stated as follows:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "**detailed and convincing**" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)]

Part One

The Ministry submits that disclosure of the above-noted records would reveal commercial and financial information. The Ministry indicates that, in general, all of these records contain commercial or financial information with respect to credit unions, DICO and persons carrying on business with these entities or the Ministry.

Types of information defined

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises (Order P-493).

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs (Orders P-47, P-87, P-113, P-228, P-295 and P-394).

Findings on Part One

Records C-057 and C-076 contain information from the proposals submitted by a number of consulting firms, including the named accounting firm, in response to the RFP for the contract to prepare the report. I am satisfied that the information in these records relates to the "buying or selling of merchandise or services" and thus qualifies as commercial information.

Records A-123, A-128, A-148, A-171, C-097, K-032, K-036 and K-066 all contain financial and/or commercial information about credit unions with deficiencies or losses. Some of these records also contain examination findings relating to specific credit unions. In my view, this information relates to the commercial activities of these credit unions.

Records A-011, A-013, A-130, A-139, A-145, A-146, A-147, C-219, C-241, K-031 and K039 contain financial and/or commercial information about a number of credit unions. Some of these records also contain examination findings relating to specific credit unions. In my view, this information relates to the commercial activities of the credit unions.

The remaining records; Records A-122, A-136, A-157, K-006, K-051, K-056, K-057 and K-063 all relate to DICO's activities. In addition, although not specifically referred to by record number by the Ministry, I note that the first three and part of the fourth and last pages of Records K-066, C-097, C-219, C-241 and A-145 contain an outline of the strategies employed by DICO in conducting examinations. Also, Record A-130, referred to above, is a duplicate of Record K-006. In my view, these portions of the records also relate to DICO's activities. I find that they contain financial and/or commercial information.

Part Two

The Ministry submits that all of the information at issue in this discussion was supplied to it either explicitly or implicitly in confidence in accordance with the CUCPA. Specifically, the Ministry indicates that information concerning credit unions was obtained by it pursuant to the examination powers under sections 225, 226 and 227 of the CUCPA. The Ministry states that the information about DICO was obtained by it under section 257 of the CUCPA which provides for the annual examination of DICO by the Ministry. The Ministry refers to a number of orders of this office which have held that information received from financial institutions by the Ministry in the course of examinations is supplied on a confidential basis (Orders P-480, P-314 and P-661). The Ministry submits that the reasoning in these orders applies equally to the examination process under CUCPA.

In Order P-480, former Adjudicator Anita Fineberg stated:

“The Ministry submits that the scheme of the LTCA clearly contemplates that the information received through the Act’s provisions will remain confidential. In this regard the Ministry quotes [former] Assistant Commissioner Tom Mitchinson in P-134 as stating:

I am satisfied that a certain degree of confidence is essential to the regulatory process under the LTCA and, in my view, the institution and affected party have provided sufficient evidence to indicate that the information contained in the records was implicitly supplied in confidence.

In Order P-314, the information was supplied to the Ministry under the provisions of section 134 of the LTCA. The Ministry submits that, although the relevant sections of the LTCA in this Appeal deal with examinations rather than returns filed by registrants as in section 134 one should not expect a lesser degree of confidentiality to be placed on financial and commercial information received by the Ministry in the course of an examination than in section 134. I agree. I am satisfied that the records at issue were supplied in confidence.

I agree with these conclusions. In my view, the CUCPA establishes a regulatory scheme which is similar to that provided by the LTCA. I am satisfied that the credit unions and DICO would have supplied any information pertaining to their commercial and/or financial activities to the Ministry with an expectation of confidentiality. I find that this expectation was reasonable, by virtue of the nature of the relationship. Therefore, I find that part two has been met.

With respect to the proposals submitted by some of the affected parties in response to the RFP, their representations indicate, and I accept, that these records were submitted during the competitive tendering process with an expectation of confidentiality. In some cases, this expectation was explicitly stated, and in some, it was implicit. I find, in the circumstances, that the expectation of confidentiality was reasonable.

Part Three

To discharge the burden of proof under the third part of the test, the Ministry and/or the affected parties must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Order P-373).

The Ministry indicates that much of the information in the records relates to the financial condition of the credit unions referred to in them. The Ministry submits that their position in the marketplace is highly sensitive to financial information which is disclosed to the public. In this regard, the Ministry states that, not only is depositor confidence affected by any negative information about a credit union, but the credit union's ability to enter into future merger and/or other business negotiations would be negatively impacted by disclosure of this type of information.

The Ministry indicates further that the financial information about credit unions which is contained in the records requires sophisticated analysis to be properly understood. The Ministry submits that disclosure, in the form in which it is contained in the records, could reasonably be expected to result in misinterpretation of the information which, in turn, could reasonably be expected to impact negatively on the deposits of the credit union.

The Ministry refers to, and relies on, Order P-719 in which it was held that the disclosure of an examination report of a credit union could reasonably be expected to result in one of the harms set out in section 17(1) of the Act. The Ministry submits that the information in that appeal was analogous to the information contained in the records at issue.

The Ministry indicates further that some of the information relates to credit unions which are in the process of administration by DICO or liquidation. The Ministry argues that since the objective of administration is to rehabilitate a credit union, the consequences of disclosure of its financial or commercial information is the same as for any other credit union.

With respect to credit unions which are in the process of liquidation, the Ministry acknowledges that they will not be subject to the same competitive harms as would be suffered by a credit union which is a going concern. However, the Ministry submits that the disclosure of the financial and commercial information in the records concerning these credit unions would also cause the harms set out in sections 17 (1)(a) and (c) of the Act because disclosure of this information would impair the ability of the liquidator to obtain the best price for the assets of the credit union and thereby cause losses for DICO as deposit insurer and possibly for depositors as well.

The Ministry refers to Order P-480, which deals with a request for access to financial and commercial information concerning a trust corporation which was in the process of being liquidated. In that case, it was held that "disclosure of the records would give rise to a reasonable expectation that the types of harm specified in sections 17(1)(a) and/or (b) would occur." The Ministry submits that this finding is equally applicable to a credit union.

The Ministry states that certain of these records contain commercial information about DICO relating to its strategic plan and operations. The Ministry submits that in order for DICO to effectively carry out its role as deposit insurer it is important that credit unions not be in a

position to anticipate every action that DICO may take. The Ministry claims that such knowledge might allow a credit union to take steps to frustrate the legitimate prudential activities of DICO. This could interfere significantly with the negotiations of DICO with the Credit union within the meaning of section 17(1)(a) of the Act or cause undue loss to DICO within the meaning of section 17(1)(c) of the Act by precipitating the requirement for a payment by DICO from the insurance fund, according to the Ministry.

The representations of one of the affected parties echoes the Ministry's concerns relating to the disclosure of information pertaining to credit unions. It states that the information supplied by credit unions in reporting to the Ministry and DICO is extremely valuable to their competitors. It submits that an individual with the requisite knowledge could use this information to analyse the profitability and cost structure of the credit union and plan effective competitive strategies.

This affected party also asserts that disclosure of the financial information in the records could result in credit unions minimizing their disclosure of information to the regulator and deposit insurer which would result in harm to their ability to regulate, thus increasing the risk to the general public (section 17(1)(b)). Another affected party submits that it would be disinclined to provide the types of information requested by the Ministry and DICO as part of the tendering process.

Taking the above comments into consideration, I have reviewed the records to determine whether either sections 17(1)(a), (b) and/or (c) would apply to any or all of them in the circumstances.

Section 17(1)(b) - "similar information no longer being supplied"

I do not accept that section 17(1)(b) has any applicability with respect to the disclosure of the records at issue in this appeal. In my view, the legislation regulating credit unions is sufficiently comprehensive to enable the Ministry and DICO to obtain the required information. It is apparent that the credit unions are obligated to provide the financial information requested by the Ministry and/or DICO.

With respect to the tender information which is at issue in this appeal, in my view, if companies expect to be seriously considered by the Ministry in submitting tenders for government contracts, they will, with some exceptions (see Orders M-892 and M-1106, for example) provide the necessary information, at least as it pertains to the requirements of the RFP (Order MO-1199-F).

Sections 17(1)(a) and/or (c) - "competitive harm/negotiations" and/or "undue loss or gain"

Records relating to the tendering process

A number of affected parties submitted representations on the disclosure of the proposals submitted by them in response to the RFP. With the exception of Record C-076, these records are not at issue in this appeal. However, the remaining portion of Record C-057 consists of a two-page document entitled "Review of Request for Proposals" (pages 3 and 4). This document contains details relating to the estimated costs and time to perform the project, as well as an analysis by Ministry/DICO staff of the six proposals submitted in response to the RFP.

In reviewing Record C-057, I note that portions of the information contained therein refer directly to key elements of the proposals submitted by the affected parties. In my view, the concerns raised by the affected parties regarding their proposals are equally applicable to this information.

In this regard, the affected parties expressed similar concerns, that is, that the proposals contain details of each affected party's unique approach to the task and their pricing structures. All of these parties submit that disclosure of this information to their competitors would significantly prejudice their competitive position within this particular marketplace and would be available to be used by their competitors in future bidding which would result in financial loss to them.

Many previous orders of this office have examined proposals submitted during the competitive tendering process and have found, in many cases, that disclosure of the unique details of a tender, including the pricing structure, could reasonably be expected to result in the harms in sections 17(1)(a) and/or (c) (see, for example, Orders P-1553 and P-1613). Based on the information in the records, it is apparent that this is a very competitive field and the uniqueness of design and service, as well as pricing, are carefully analysed and factored into the decision to award the contract. In my view, disclosure of the details extracted from the proposals which form part of Record C-057 would provide competitors with the unique strategies developed by each company. In the circumstances, I find that disclosure of this information could reasonably be expected to result in one of the harms in sections 17(1)(a) and/or (c). As all three parts of the test have been met for this information, it is exempt from disclosure under section 17(1).

However, there are portions of this record which reflect the analysis made by Ministry and/or DICO staff of the different proposals. In my view, this information is very general and does not include, nor would it reveal, details of the proposals themselves. I find that disclosure of this information could not reasonably be expected to result in any of the harms in section 17(1) and these portions are, therefore, not exempt. Accordingly, as no other exemptions apply to this information, it should be disclosed to the appellant.

Record C-076 is the proposal submitted by the named accounting firm. As I indicated above, the portion of this record for which section 21(1) has been claimed is not at issue in this appeal. This part of the record is entitled "Our Team". The discussion under section 17(1) will consider the remaining portions of this record.

I find that the discussion relating to Record C-057 is equally applicable to portions of this proposal. In particular, I find that disclosure of the information under the headings "Our Approach", "Project Deliverables", "Value Proposition" and "Pricing" could reasonably be expected to result in the harms in sections 17(1)(a) and/or (c). The remaining information is very general and much of it relates to the requirements of, parameters for, the task as established by DICO and the Ministry. I find that disclosure of this information could not reasonably be expected to result in any section 17(1) harms. As no other exemptions apply to this information, it should be disclosed to the appellant.

Information pertaining to credit unions

I have reviewed the records which contain examination information pertaining to a number of credit unions. Much of this information is essentially a snapshot of each credit union at a particular point in time. However, I accept that the information could be subject to misinterpretation and manipulation and could reasonably be expected to interfere with a credit union's ability to enter into business negotiations. Collectively, I am satisfied, based on the Ministry's and affected parties' representations, and consistent with previous orders of this office, that disclosure of this, at times critical, information could reasonably be expected to significantly prejudice the competitive position of the credit unions referred to in them in the financial industry. These records include Records A-123, A-128, A-139, A-146, A-147, A-171, K-031, K-032, K-036 and parts of Records A-130, A-145, A-148, C-097, C-219, C-241, K-063 and K-066.

Record A-011 contains handwritten notes on one side and a listing of statistical reports generated by DICO. Record A-013 similarly contains a list of DICO produced reports. I find that neither of these two records contains any information which could, in any way, be connected to a particular credit union. Nor am I persuaded that disclosure of the notes or the types and distribution of reports could jeopardize the commercial and/or financial interests of either the credit unions or DICO. Therefore, I find that disclosure of these two records could not reasonably be expected to result in any of the harms in section 17(1), and they should be disclosed to the appellant.

The remaining portions of Record A-148 consist of draft notes regarding the relationship between the Ministry and DICO. The remaining portions of Record K-063 contain notes relating to the DICO/Ministry study. I find that these portions of the two records do not relate, in any way, to a particular credit union. I will also consider these portions of the records below under the heading "information pertaining to DICO".

Record K-039 is a table entitled "Credit Unions and Caisses Populaires in the Capital Rehabilitation Program". Three of the affected parties consented to the disclosure of the information pertaining to them in this record. One other affected party consented to the disclosure of information pertaining to the dollar value of assets and surplus of the credit union.

One affected party objects to disclosure of any information in the records pertaining to it, but its representations appear to focus on information obtained during and as a result of examinations conducted by the Ministry and/or DICO. As I noted above, this affected party states that the information supplied by credit unions in reporting to the Ministry and DICO is extremely valuable to their competitors. It submits that an individual with the requisite knowledge could use this information to analyse the profitability and cost structure of the credit union and plan effective competitive strategies.

However, two of the affected parties who consented indicate that the information contained in Record K-039 is public knowledge and is the type of information included in the credit unions' annual reports.

In considering the representations on this record, I find that the objections to the disclosure of the information contained therein are very general and do not address the nature of the specific information at issue. In my view, the Ministry and the affected parties have failed to provide me

with detailed and convincing evidence to establish that disclosure of the record could reasonably be expected to result in any of the harms in section 17(1). Moreover, I find the representations of the consenting affected parties, that this information is in the public domain and that its disclosure could not reasonably be expected to result in any of the harms contemplated by sections 17(a) and (c), to be compelling. Therefore, I find that the third part of the test has not been met for this record and it is not exempt from disclosure under section 17(1).

Information pertaining to DICO

In considering the Ministry's representations concerning records relating to DICO, I am satisfied that information pertaining to its current strategies and operations could reasonably be expected to significantly interfere with its activities in performing its unique role in the examination, inspection and monitoring and assisting credit unions. Therefore, I find that disclosure of this information could reasonably be expected to result in the harms in sections 17(1)(a) and (c). This information is found in Records A-157, A-136, K-051, K-057 and the remaining portions of Records A-145, C-097, C-219, C-241 and K-066.

The remaining portions of Record K-063 contain a discussion of the relationship between the Ministry and DICO and concerns raised during the DICO/Ministry study. I find that this record does not contain any details of DICO's operational or strategic practices or planning to trigger any of the harms in sections 17(1)(a) or (c). I am not persuaded that disclosure of the remaining parts of record K-063 could reasonably be expected to result in one of the harms in section 17(1). Therefore, I find that these portions of this record are not exempt under section 17(1) and should be disclosed to the appellant.

Records A-122 and K-056, and the first two pages of Records K-006 and A-130 contain the results of an examination into DICO and its predecessor, OSDIC. These are Ministry documents and do not relate to DICO's strategic plan or current operations. In my view, these records reflect the Ministry's oversight responsibilities with respect to the organization and administration of DICO but not to the manner in which it conducts its business operations. I am similarly not persuaded that disclosure of these records and parts of records could reasonably be expected to result in one of the harms in section 17(1). Therefore, these records and parts of records should be disclosed to the appellant.

Finally, to complete the analysis of Record A-148, I have considered DICO's interests in disclosure of this record. It appears that this record was prepared by Ministry staff, although that is not clear. In any event, I find that, similar to my findings above, it pertains to the relationship between the Ministry and DICO and not to its strategic or operational practices. Therefore, I find that disclosure of the remaining portions of Record A-148 could not reasonably be expected to result in any of the harms in section 17(1) and they should be disclosed to the appellant.

In summary, I find that Records C-097, C-219, C-241, A-123, A-128, A-136, A-139, A-145, A-146, A-147, A-157, A-171, K-031, K-032, K-036, K-051, K-057, K-066, and portions of Records C-057, C-076, A-130, A-148, K-006 and K-063 are exempt from disclosure under section 17(1) in accordance with the above discussion. For clarity, I have highlighted the portions of Records C-057, A-148 and K-063 which are exempt under section 17(1) on the

copies of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with this order.

As I have found that no other exemptions apply to Records A-011, A-013, A-122, K-039, K-056 and portions of Records C-057, C-076, A-130, A-148, K-006, K-063 and page two of Record K-012, they should be disclosed to the appellant.

LAW ENFORCEMENT

The Ministry claims that the discretionary exemption in section 14(1)(c) applies to exempt Records C-096, C-220 and K-014 from disclosure. This section provides:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

Record C-096 is entitled "Deposit Insurance Corporation of Ontario Inspection Program". This document contains the procedures used by DICO in inspecting credit unions.

Record C-220 is a letter from the Manager, Examinations to the accounting firm dated May 23, 1996. This document contains the Ministry Rating System for evaluating credit unions.

Record K-014 is entitled "Report Outline". This document contains an outline of the Ministry examination procedures for credit unions.

The Ministry notes that previous orders of this office have found that the Ministry, in carrying out its regulatory responsibilities under the Loan and Trust Corporations Act (the LTCA) and the Mortgage Brokers Act (the MBA), is a law enforcement agency for the purposes of the Act (see: Orders P-480 and P-1491, for example). The Ministry submits that its duties and powers under CUCPA to enforce the CUCPA are similar to its duties and powers for the enforcement of the LTCA and the MBA. The Ministry argues that its activities in enforcing the CUCPA therefore constitute law enforcement for the purposes of the Act. The Ministry submits further that DICO, through its inspection program, assists the Ministry in the enforcement of the CUCPA and is also engaged in law enforcement.

The Ministry submits that all of these records contain information about the procedures employed by the Ministry and DICO in carrying out inspections and examinations. It argues that in order for the inspection and examination programs to be effective it is important that a credit union not be in a position to manage its activities to inhibit the Ministry or DICO from obtaining a true picture of its operation. For this reason, it is vital that the examination techniques and procedures employed by the Ministry and DICO be maintained on a confidential basis.

In order to constitute an “investigative technique or procedure” it must be the case that disclosure of the technique or procedure to the public would hinder or compromise its effective utilization. The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that such a compromise would not be effected by disclosure and, accordingly, that the technique or procedure in question is not within the scope of section 14(1)(c) (Orders P-170, P-1487 and P-1653).

I have carefully reviewed Record C-220 and the withheld portions of Records C-096 and K-014 and find that they all contain information which may properly be characterized as an “investigative technique or procedure” within the meaning of section 14(1)(c). The records contain detailed methodologies for Ministry and/or DICO staff to use in the course of performing their duties. I find that much of the information outlined in the record was designed to provide Ministry and/or DICO staff with a step-by-step procedure for conducting inspections and examinations in order to enforce the CUCPA.

It is well-established that the Ministry’s regulatory responsibilities under the LTCA and the MBA, which include provisions for the conducting of examinations, audits and inspections of registered corporations, provisions dealing with enforcement and civil remedies as well as offences, qualify as “law enforcement” activities for the purposes of section 14 of the Act (Orders P-480 and P-1491). In order P-1120, Adjudicator Holly Big Canoe considered the provisions in CUCPA and found that:

The CUCPA is a statute that provides for the establishment, regulation and supervision of credit unions in the province. It sets up a regulatory scheme and imposes statutory obligations on credit unions. In addition, the Act also prohibits certain actions in respect of the operations of credit unions. In respect of both the positive obligations and the prohibited actions the CUCPA prescribes penalties and sanctions for the contravention of its provisions.

Section 138(1) of the CUCPA (now section 139(1) of the Credit Unions and Caisses Populaire Act, R.S.O. 1990, C.44) required the Director of Credit Unions to review the annual statements of all credit unions. In addition, the section also authorized the Director (or his or her appointee) to “... inspect and examine into the conditions and affairs of any credit union ... to ascertain its condition and ability to provide for the payment of its liabilities as they become due, and whether or not it has complied with this Act.”

I find that the record at issue was prepared in the course of an inspection for the purpose of determining whether there was compliance with the CUCPA. As that legislation provides certain penalties and sanctions for non-compliance with its provisions, I am satisfied that the record at issue in this appeal relates to a law enforcement matter as defined by section 2(1) of the Act.

I agree with the conclusions in the orders referred to above and find that their reasoning is equally applicable to the current matter.

DICO is established, through Part XIV of the CUCPA as the examination and inspection body for the purposes of enforcing the CUCPA. I am satisfied that, in carrying out its inspections functions, DICO is also engaged in law enforcement as an agent for the Ministry. This finding is consistent with a previous decision that the fact that certain records were prepared by an outside consultant does not affect the application of section 14 where they were prepared with the authority of the Ministry which, as a result of its statutory powers and sanctions, was in a position to insist upon the full co-operation of the management of the Corporation in the process.

I am satisfied that the disclosure of Record C-220 and the withheld portions of Records C-096 and K-014 would reveal law enforcement techniques and procedures which are not widely known to the public. Accordingly, I find that section 14(1)(c) applies to the withheld information in these records.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that section 19 applies to exempt Records A-166, A-149 and C-310 from disclosure. Section 19 of the Act provides:

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

Section 19 of the Act 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 Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry relies on Branch 2 to withhold these three records from disclosure.

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

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.

[Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

The Ministry has claimed the application of solicitor-client communication privilege to all three records.

Record A-149 - "Credit Unions Act-Divisions of Responsibilities under the Act".

The Ministry states that this document is a legal opinion from legal counsel at the Ministry's Legal Services Branch to the Manager, Policy Co-ordination, Financial Services Policy Branch regarding the division of responsibilities of the Minister, the Superintendent, the Director, DICO, Leagues, and Designated Stabilization Authorities.

Record A-166 - "Credit Unions Act-Authority to pay leagues to do DICO inspections".

The Ministry indicates that this document is a legal opinion from legal counsel at the Ministry's Legal Services Branch to the Manager, Examinations, Credit Unions Branch concerning the application of the Act.

Record C-310 - "Comparison of Director's Duties and Responsibilities Under Current and Proposed Credit Unions and Caisses Populaires Act".

The Ministry indicates that this document was prepared by legal counsel at the Ministry's Legal Services Branch and contains advice and opinions about the application of various provisions of the Act.

Solicitor-client communication privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551). The privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...

[Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P_1409]

The privilege has been found to apply to “a continuum of communications” between a solicitor and client:

... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as “please advise me what I should do.” But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

[Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P_1409]

Solicitor-client communication privilege has been found to apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729].

I am satisfied that all three documents are communications of a confidential nature between Ministry counsel and staff for the purpose of giving legal advice. Accordingly, I find that Records A-166, A-149 and C-310 are subject to solicitor-client communication privilege and are exempt under section 19 of the Act.

ORDER:

1. I uphold the Ministry's decision to withhold Records C-096, C-097, C-219, C-220, C-241, C-310, A-123, A-128, A-136, A-139, A-145, A-146, A-147, A-149, A-157, A-166, A-171, K-014, K-031, K-032, K-036, K-051, K-057, K-066, portions of Records C-057, C-076, A-130, A-148, K-006 and K-063 and page one of Record K-012 from disclosure. For clarity, I have highlighted the exempt portions of Records C-057, A-148 and K-063 on the copies of the records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with this order. The exempt portions of Records C-076, A-130 and K-006 can be readily determined from the discussion above under section 17(1).
- 2.. I order the Ministry to provide the appellant with copies of Records A-011, A-013, A-122, K-039, K-056 and portions of Records C-057, C-076, A-130, A-148, K-006, K-063 and page two of Record K-012 in accordance with the discussion above by **July 2, 1999** but not before **June 28, 1999**.
3. 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 2.

Original signed by: _____

_____ May 28, 1999

Laurel Cropley
Adjudicator