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

ORDER PO-1934

Appeal PA-000204-2

Ministry of the Solicitor General

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Solicitor General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies "of the interview questions and the anticipated answers to the questions with the associated maximum scores possible for the following job competitions":

SGCS - 225 (Assistant Section Head, Gaming)
SGCS - 194 (Forensic Document Examiner)
SGCS - 64 (Senior Forensic Scientists)
SGCS - 63 (Forensic Technician Electronics)
SGCS - 662 (Forensic Biologists)
SGCS - 406 (Senior Forensic Scientist, Hair and Fibre Unit)
SGCS - 449 (Section Head, Biology)
SGCS - 336 (Senior Forensic Scientist, Chemistry)
SGCS - 405 (Forensic Technicians)
SGCS - 235 (Property Clerk)
SGCS - 81 (Quality Assurance Technologist)
SGCS - 554 (Forensic Pathologist's Assistant)
SGCS - 672 (Centre Receiving Officer).

The Ministry denied access to the records on the basis that they were excluded from the scope of the *Act* pursuant to section 65(6). The appellant appealed this decision and Appeal PA-000204-1 was opened. Appeal PA-000204-1 was resolved by Order PO-1863, in which Adjudicator Dora Nipp found that all of the records, with the exception of Record 12 (SGCS – 554 – Forensic Pathologist's Assistant), were excluded from the scope of the *Act*. The adjudicator ordered the Ministry to issue a decision on access in respect of Record 12. The Ministry subsequently applied to the Divisional Court for judicial review of this decision.

The Ministry then issued a decision as required by provision 1 of Order PO-1863 and denied access to Record 12 on the basis that the exemptions contained in sections 18(1)(a) (valuable government information), 18(1)(c) (economic and other interests) and 18(1)(h) (examination questions) of the *Act* applied.

The appellant appealed the denial of access.

During mediation, the Ministry indicated that it maintains its position that section 65(6) applies to the record. Mediation was not possible and the file was moved to inquiry.

I decided to seek representations from the Ministry, initially, and sent it a Notice of Inquiry setting out the facts and issues in this appeal. The Ministry submitted representations in response, indicating that it withdraws its reliance on the discretionary exemption in section 18(1)(h) as a ground for non-disclosure of the requested information. After reviewing the Ministry's representations relating to the application of sections 18(1)(a) and (c) to the record at issue, I decided that it was not necessary to hear from the appellant.

RECORD:

The record at issue consists of the interview questions, the maximum scores possible and general reference questions for the position of Forensic Pathologist's Assistant

DISCUSSION:

VALUABLE GOVERNMENT INFORMATION/ECONOMIC AND OTHER INTERESTS

Sections 18(1)(a) and (c) of the *Act* provide:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

Section 18(1)(a): information that belongs to an institution and has monetary value

In order to qualify for exemption under section 18(1)(a), the Ministry must establish that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value.

(Orders 87, P-662, PO-1921)

Type of information

The Ministry submits that the record at issue consists of technical and commercial information and states:

> In Order P-454, former Assistant Commissioner Irwin Glasberg defined the term technical information as used in section 17(1) of the [*Act*] as follows:

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

In Order P-662, former Inquiry Officer John Higgins adopted this definition for the purposes of section 18(1)(a).

The responsive records contain technical information relating to the process of recruiting a suitable candidate for the position of Forensic Pathologist's Assistant with the Office of the Chief Coroner.

...

[t]he responsive information can also be viewed as commercial information which has an intrinsic monetary value. In Order P-493, former Inquiry Officer Anita Fineberg interpreted the term commercial information in section 17(1) of [the *Act*] as follows:

> In my view, 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.

This interpretation was adopted for the purposes of section 18(1)(a) in Order P-636.

[T]he competition materials are valuable business information assets in the human resources marketplace. As per the attached information from two internet sites, it is clear that there is a market for quality recruitment tools.

Private organizations are able to control dissemination of their valuable business information assets. The Ministry is of the view that similar protection should be extended to the responsive record which can be viewed as a business information asset belonging to the Ministry.

I accept the Ministry's submission that the appropriate interpretations of "technical" and "commercial" information are set out in Orders P-454 and P-493, respectively. In addition, the term "scientific" information has been defined by this office as:

> Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the *Act* [Order P-454].

Having viewed the record, I do not accept the Ministry's characterization of it as either technical or commercial. Nor do I find that it contains scientific information. The record contains a number of questions relating to how the prospective candidate would deal with certain types of situations and general questions aimed at obtaining information about the prospective candidate relevant to the position that the Ministry is seeking to fill. As noted above, it also sets out the maximum possible score that the prospective candidate might achieve in responding to each question.

As I said, the questions are directed at obtaining information about the candidate relative to the requirements of the position of Forensic Pathologist's Assistant in the Coroner's office. These types of records are used in the "human resources" field. In Order P-662, former Adjudicator John Higgins considered the Ministry's application of section 18(1)(a) to a similar type of record. I agree, in part, with his conclusion that, "[s]ince the questions and ideal answers used in these two competitions are not related to the applied sciences or mechanical arts, I find that they do not fit within the meaning of technical information in section 18(1)(a)". Although human resources matters could arguably fall within the field of social sciences, the records do not relate to the observation and testing of specific hypotheses or conclusions.

Moreover, previous orders of this office have concluded that a record must be or reflect more than a mere reference to a technical matter in order to meet the definition set out above (see: Order PO-1707, for example). I have no doubt that some of the work that a Forensic Pathologist's Assistant would perform would in all likelihood qualify as either technical or scientific. It is possible that certain answers elicited by the questions might contain details of a scientific or technical nature. However, the questions, in and of themselves, do not contain any detail of this nature. Consistent with other decisions, I find that the human resources questions in the record at issue relating to a technical or scientific position are not sufficiently technical or scientific in nature to bring them within the definitions as set out above.

For all of the above reasons, I find that the record at issue does not contain technical or scientific information.

Former Adjudicator Higgins also considered whether this type of record contained commercial information. Although he noted that the Ministry did not make any representations to support

the statement in its decision letter that the records contain commercial information, he concluded, "[s]ince interview questions and ideal answers are not related to the buying, selling or exchange of merchandise or services, I find that they do not fit within the meaning of commercial information in section 18(1)(a)".

The Ministry asserts that a record containing interview questions and possible scores is a "business information asset" on the basis that there is a market for human resources information and materials. The Ministry does not indicate whether it has any intention of entering this market. Nor does it indicate how specific questions for a specific government position could have any value within this market.

There are markets "out there" for virtually any activity one could think of and the internet is, without question, a prime source for discovering this information. In my view, the Ministry must do more than simply identify a potential market. The Ministry must provide sufficient evidence to substantiate its claim that the record in question relates to the buying or selling of services or goods. I find that the Ministry's representations fall short of doing so. Further, in the absence of cogent evidence to support a different conclusion, I agree with former Adjudicator Higgin's summation of this type of information.

Because the records do not contain any of the information required for the application of section 18(1)(a), I find that it does not apply. Before leaving this discussion, however, I would like to comment on the Ministry's representations relating to the third requirement of the section 18(1)(a) test.

Has monetary or potential monetary value

As I noted above, the Ministry must also establish that the information belongs to the Government of Ontario or an institution and that it has monetary value or potential monetary value.

In Order M-654, Adjudicator Holly Big Canoe stated with respect to part 3 of the test for exemption under the municipal counterpart to section 18(1)(a):

> The use of the term **"monetary value"** in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information ...[emphasis in original].

The Ministry addresses this issue as follows:

> The responsive competition materials were developed in house by the Ministry at considerable financial and other cost to ensure that suitable candidates are recruited and that appropriate standards and procedures are followed. These materials were created by and belong to the Ministry, an Ontario Government

> institution. The materials have been consistently treated in a confidential manner by Ministry staff.
>
> ...
>
> [T]he competition materials are valuable business information assets in the human resources marketplace. As per the attached information from two internet sites, it is clear that there is a market for quality recruitment tools.
>
> Private organizations are able to control dissemination of their valuable business information assets. The Ministry is of the view that similar protection should be extended to the responsive record which can be viewed as a business information asset belonging to the Ministry.

The record at issue is, as I noted above, a human resources record which was developed by the Ministry for the purpose of determining the suitability of prospective candidates for employment in the Coroner's office as a Forensic Pathologist's Assistant. In my view, the fact that there exists a human resources marketplace does not automatically render every human resources document a "valuable business information asset". As noted by Adjudicator Big Canoe, the record itself must have intrinsic value, the disclosure of which would deprive the Ministry of the monetary value of the information.

The attachments to the Ministry's representations indicate that there is literature being marketed relating to the recruitment process, including guides that describe the "how to's" for recruiting, such as "Establishing a scoring system" or "How to craft Behavioural Descriptive Interview Questions". However, as I noted above, the Ministry does not address how this particular record has value within this marketplace or whether the Ministry has any intention of entering the market. Moreover, the specificity of the interview questions designed to elicit information about the candidates for this particular position, in my view, raises questions as to the record's general applicability as a recruitment tool in the larger market.

Therefore, even if I were to find that the record contains one of the requisite types of information, the exemption in section 18(1)(a) is not available to withhold the record because the Ministry has failed to establish that the record has monetary or potential monetary value.

Section 18(1)(c): prejudice to economic interests/competitive position

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Orders P-441, PO-1921).

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The Ministry states:

> As evidenced in the comments regarding the application of section 18(1)(a), the Ministry is of the view that there is currently a market for competition materials. The Ministry expends financial and human resources to develop competition materials. The Ministry believes that competition materials in general are valuable business information assets in the human resources community. Uncontrolled and routine public release of such records could result in the taxpayers of Ontario subsidizing private organizations that market competition materials. These organizations would avoid paying the expenses that the Ministry has incurred to develop competition materials. This circumstance would prejudice the economic interests of the Ministry.
>
> The Ministry's Human Resources Branch does not have a central database of questions and answers for re-use in competitions. However, the Branch maintains competition files in accordance with appropriate retention schedules which require that such information be retained for several years. The Branch refers to closed competition files periodically to obtain questions and answers for similar types of recruitment.
>
> Public dissemination of competition materials could potentially influence and flaw future competitions. The Ministry, as an employer, has a continuing legal and management interest in ensuring that job competitions are fair. As noted above, questions asked in one competition have the potential to be re-used in competitions for identical or similar positions. There are significant labour relations implications if the questions and/or answers are known in advance to some, but not all, of the applicants. Situations where candidates believe competitions are flawed may lead to grievances being filed pursuant to collective agreements or the *Public Service Act*. Additionally, the Ministry is bound by the *Ontario Human Rights Code* with respect to job competitions and recruitment activities. Candidates who believe they have been discriminated against may file complaints alleging violations of their human rights.

> The process of resolving grievances and human rights complaints has significant financial implications for the Ministry. It is estimated that it costs the Ministry approximately $5,000 to respond to a grievance that requires adjudication before the Grievance Settlement Board or a human rights complaint that is successfully mediated at an early stage of the process.

The Ministry has made it very clear, both during mediation and in its representations that it disagrees with Adjudicator Nipp's finding that section 65(6) does not apply to this record. The Ministry has, as is its right, brought an application for judicial review of her decision and this issue will ultimately be determined in that forum. Since the Ministry's submissions relating to its "legal interest" in the labour relations issues relating to these types of documents have already been addressed in Order PO-1863, I will not revisit them here.

In Order PO-1921, Senior Adjudicator Goodis addressed virtually identical submissions by the Ministry in that case relating to the disclosure of policies and procedures manuals from the Office of the Fire Marshal. Although there are differences in the types of records and some of the factual circumstances in that case, Senior Adjudicator Goodis' comments relating to the Ministry's submissions on its competitive position in the marketplace and the adverse consequences for its economic interests (as noted above) are similarly applicable in the current appeal, and I adopt them for the purpose of disposing, in part, of this issue. He stated:

> The Ministry does not support this assertion by offering any additional documentation or other evidence that describes any actual or potential plans for implementing such a training program at any time, let alone in the reasonably foreseeable future. The Ministry itself submits that it would only be at a competitive disadvantage "in the event that it ultimately decides to offer external fee for service training", suggesting that any reasonable prospect of competitive harm in the context of offering such a program is at best speculative. The Ministry indicates that it is proposed that such a program, if one is ultimately developed and implemented, would be on a cost-recovery basis, so that it is not apparent that its economic interests would be affected in any significant or material way by disclosure of what it describes as source documents.
>
> The Ministry further submits that it has expended considerable financial and human resources to develop the records, and that Ontario taxpayers would thereby end up subsidizing private organizations which would avoid paying these significant expenses to develop similar materials. I am not persuaded by these assertions that the Ministry's competitive or economic interests could reasonably be expected to be prejudiced by disclosure. Firstly, I have been provided with no detail or other evidence beyond these bare assertions. Secondly, there is nothing else on the record before me to suggest that the appellant or any other private entity could reasonably be expected to use the materials to crib or piggyback on the Ministry's efforts for competitive gain.

I found above that these questions are unique to the position for which they were created. It is not apparent that a private organization would find any significant advantage in using these questions or scoring for their own purpose.

Moreover, as far back as 1992, the Ministry has expressed concerns about prejudice to its economic interests should this type of record be disclosed. In Order P-339, Assistant Commissioner Tom Mitchinson addressed them as follows:

> The institution submits:
>
> > Unsuitable correctional officers can represent a significant financial drain on the ministry's resources. This results from increased training needs, increased work absences, increased administrative errors, and increased operational and security errors - all of which prove to be very costly for the ministry.
> >
> > Furthermore, security errors can also prove to be quite costly for other agencies such as transfer payment agencies, the police and the courts.
> >
> > A further prejudice relates to the time and money invested in developing competition questions and ideal responses. In this period of constraint, it is questionable for this ministry to utilize scarce resources in order to constantly prepare new questions and ideal responses. Given the clearly defined and very limited scope of the correctional officer position - essential duties centre around the care, custody, and control of offenders - it is time-consuming, difficult and costly for human resources personnel to keep developing fresh questions.
>
> In my view, the information contained in the question and answer sheets is not the type of information which section 18 was designed to protect. I find that the institution has failed to establish the requirements for exemption under sections 18(1)(c) and/or (d), and I order the institution to disclose the question and answer sheets to the appellant, subject to the agreed-upon severance of all identifying personal information.

With respect to the estimated costs to the Ministry associated with responding to a grievance, I find that the Ministry's submissions are highly speculative with respect to the possible consequences of disclosure of this record.

Further, as part of its submissions in regard to this section and above with respect to section 18(1)(a), the Ministry indicates that, on the one hand, there is a market for this type of human resources record. I presume the intention in raising the possibility of entering this market is that the Ministry might be contemplating selling this information to the public. On the other hand,

the Ministry asserts that disclosure of this document could lead to grievances if one prospective candidate finds out that another had access to the questions. These two positions are not only inconsistent but are incompatible.

Finally, I find that the Ministry's submissions consist primarily of generalized and/or vague assertions concerning both the basis for arguing that there is a competitive marketplace for the record at issue and that disclosure of this record could reasonably be expected to prejudice its economic interests or competitive position in such a marketplace or in any other capacity.

Based on my rejection of the various arguments put forth by the Ministry, consistent with previous orders of this office, and the generality of its submissions, I cannot conclude that there is any material competitive advantage to other organizations, or a corresponding competitive disadvantage to the Ministry, in the disclosure of this record. Nor am I able to conclude that the Ministry's economic interests could reasonably be expected to be prejudiced by disclosure of this record within the intended meaning of the exemption in section 18(1)(c). Accordingly, I find that the Ministry has failed to provide detailed and convincing evidence to establish a reasonable expectation of probable harm as contemplated by section 18(1)(c) and this section does not apply.

As no other exemptions have been claimed for this record, it should be disclosed to the appellant.

As I noted above, the Ministry has brought an application for judicial review of the decision in Order PO-1863. In order to preserve the Ministry's right to have this issue determined by the court, I will stay my disclosure order.

ORDER:

1. I order the Ministry to disclose the record, in its entirety, to the appellant.

2. My order for disclosure of the record under Provision 1 of this order is stayed pending the disposition by the Superior Court of Justice (Divisional Court) of the current judicial review of Interim Order PO-1863.

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 record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: July 31, 2001
Laurel Cropley
Adjudicator