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

ORDER P-885

Appeal P-9400665

Ministry of Natural Resources

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Natural Resources (the Ministry) received a request for a report distributed to a particular committee meeting on a given date, as well as other records relating to archaeological research produced by the Ministry out of its Temagami District office. The requester also sought a fee waiver on the basis that payment of fees would cause him financial hardship.

The Ministry located the responsive records and provided the requester with access to the report distributed to the Comprehensive Planning Council Meeting at no charge. The Ministry granted partial access to other archaeological documents and issued a fee estimate in the amount of $180. The Ministry also made the decision not to waive the fees.

The requester appealed the Ministry's decisions regarding access, the calculation of the fee and the fee waiver.

The records which are at issue in this appeal consist of 14 Heritage Site Assessment documents, two pages of oral history notes and 11 other reports on archaeological research. The Ministry relies on the following exemptions to deny access to these records, either in whole or in part:

- facilitate commission of unlawful act - section 14(1)(l)
- third party information - section 17(1)
- valuable government information - section 18(1)(a)

A Notice of Inquiry was provided to the appellant, the Ministry and the Indian band identified by the Ministry as having supplied the information contained in the Heritage Site Assessment reports and the oral history notes (the affected party). Representations were received from the appellant and the Ministry only.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry claims that sections 17(1)(b) and/or (c) of the Act apply to exempt the Heritage Site Assessment reports and the oral history notes in their entirety.

For a document to qualify for exemption under this provision, the Ministry and/or the affected party must satisfy each part of the following three-part test:

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

2. the information must have been supplied to the institution in confidence, either

implicitly or explicitly; **and**

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

Failure to satisfy any part of the test renders the section 17(1) claim invalid.

I will first consider the second part of the test.

Part Two of the Test

To satisfy part two of the test, the Ministry and/or the affected party must show that the information was **supplied** to the Ministry, and that it was supplied **in confidence**, either implicitly or explicitly.

Several previous orders have determined that information contained in a record would reveal information "supplied" within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry.

The Ministry's representations on part two of the test only address the application of section 17(1) to the locations of the archaeological sites. The Ministry states that this information, as contained in the Heritage Site Assessment Reports and oral history notes, was supplied to the Ministry in confidence by the affected party. However, I have not been provided with any evidence to conclude that this was, in fact the case.

I have carefully reviewed all of the records. I note that each Site Assessment Report contains a list of references citing multiple sources for the information contained in the document. However, it is not evident from either the references or the Ministry's representations that it was the affected party that supplied the specific information relating to the archaeological sites. There is no clear connection made between this information and the affected party as the supplier of the site locations. Similarly, the oral history notes do not particularize the origin of the facts contained in the two pages.

Accordingly, I cannot conclude that all the information contained in the Heritage Site Assessment Reports and the oral history notes was supplied to the Ministry by the affected party for the purposes of section 17(1).

As I have noted above, failure to satisfy the requirements of any part of the test will render the section 17(1) claim invalid. As the second part of the test has not been satisfied, I find that these records do not qualify for exemption under section 17(1) of the Act.

FACILITATE COMMISSION OF UNLAWFUL ACT

The Ministry relies on section 14(1)(l) to exempt the information relating to the exact location of archaeological sites contained in all of the records at issue.

Section 14(1)(l) of the Act reads as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

Previous orders have found that in order to qualify for exemption under this section, the Ministry must establish "a clear and direct linkage" between the disclosure of the specific information at issue and the harm mentioned in the exemption.

As part of its representations, the Ministry has included an affidavit from the Manager of the Archaeology and Heritage Planning Unit, Cultural Programs Branch of the Ministry of Culture, Tourism and Recreation. The affidavit provides a comprehensive and detailed explanation of the institution's policies, priorities and programs for the conservation, protection and preservation of the heritage of Ontario pursuant to the Ontario Heritage Act.

In particular, the affidavit discusses the growing market for archaeological artifacts and cites examples of how disclosure of the location of archaeological sites has resulted in such sites being looted. The removal of archaeological artifacts without a licence or the looting of archaeological sites is an offence under the Ontario Heritage Act. Accordingly, the Ministry submits that disclosure of the exact location of archaeological sites would result in increased number of incidents of looting, thereby facilitating the commission of such unlawful acts.

I find that the information contained in the affidavit and the Ministry's submissions demonstrates a clear and direct linkage between disclosure of the site locations in the records and the type of harm described in section 14(1)(l) of the Act. Accordingly, this information is properly exempt from disclosure.

Because of the manner in which I have resolved this issue, it is not necessary for me to consider the possible application of the exemption provided by section 18(1)(a). The Ministry had also claimed that this exemption applied to the site locations only.

FEE ESTIMATE

The costs of the search to respond to the request and charges related to making the records available to the requester are set out in the Act and the regulations made under the Act. Where no provision is made for a fee to be charged under any other Act, sections 57(1) and (6) of the Act provide that the Ministry shall

require a requester to pay for costs related to the request, such as (1) a search charge for every hour of manual search required in excess of two hours to locate a record, (2) the costs of preparing the record for disclosure, (3) computer and other costs incurred in locating, retrieving, processing and copying a record, (4) shipping costs and (5) that the foregoing costs should be paid and distributed according to the regulations made under the Act. Where these costs exceed $25, the Ministry is also required to provide a reasonable estimate of the costs.

The amount and distribution of fees payable is set out in section 6 of the Regulations made under the Act:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> ...
>
> 3. For manually searching for a record after two hours have been spent searching, $7.50 for each fifteen minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each fifteen minutes spent by any person.
>
> ...

In its representations, the Ministry submits that a total of 31 hours was expended by four staff persons to respond to the request. However, the Ministry chose to charge the appellant for only 8 hours of search time and preparation of the records at $30 per hour, less two free hours, for a total of $180.

In reviewing the Ministry's fee estimate, my responsibility under subsection 57(5) of the Act is to ensure that the amount estimated is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the Ministry. In my view, the Ministry discharges this burden by providing me with detailed information as to how the fee estimate has been calculated, and by producing sufficient evidence to support its claim.

In support of its fee estimate, the Ministry has provided an affidavit sworn by the District Planner who co-ordinated and participated in the search and the preparation of the records for disclosure. This individual submits that a search was conducted of the Temagami Comprehensive Planning Program Office files to locate the responsive records. The search consumed one hour of time and yielded 1,179 pages of responsive records.

The Ministry submits that 632 pages of responsive records required severing. The Ministry claims that task took 20 hours in total, less than 2 minutes per page. In my view, this is a reasonable time for making the

severances. Accordingly, I find that the Ministry would have been allowed to charge the requester a totalof $600 for the preparation of the records for disclosure. However, as previously explained, the Ministry chose to charge the appellant only $180.

Accordingly, the $180 fee for the preparation of the records complies with section 57(1) of the Act. Pursuant to the Regulations, the Ministry may also charge photocopying costs of $0.20 per page for each page of the record that is provided to the appellant. I note that the appellant has indicated that he would like to view the records. The Ministry has agreed to this request. Should the appellant view the records, the Ministry may still charge $0.20 per page for photocopying in order to enable the appellant to view the documents with the exempt portions removed (Order 2).

FEE WAIVER

Section 57(4) of the Act and section 8 of Regulation 460 under the Act set out the factors to be considered by the Ministry when a request for a fee waiver is made. Section 57(4) states, in part, that:

> A head shall waive the payment of all or any part of an amount required to be paid under this Act where, in the head's opinion, it is fair and equitable to do so after considering,
>
> ...
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> ...
>
> (d) any other matter prescribed in the regulations.

Section 8 of Regulation 460 then prescribes that:

> The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> 1. Whether the person requesting access to the record is given access to it.

It has been established in a number of previous orders that a person requesting a fee waiver must justify such a request. In addition, I am mindful of the Legislature's intention to include a user pay principle in the Act, as evidenced by the provisions of section 57.

The appellant claims that the proposed fee would represent a financial hardship for him. He has provided some evidence of his financial situation to the Ministry. The Ministry contends that the appellant has not discharged the burden of establishing financial hardship as he did not provide any evidence of his "future financial prospects".

Nonetheless, the Ministry indicates that it did consider the appellant's financial situation and attempted to accommodate him. Thus, it appears that the Ministry was prepared to accept that an expenditure of $180 would cause the appellant financial hardship and then went on to consider whether it was "fair and equitable" to waive the fee. Accordingly, I will now determine whether it was fair and equitable for the Ministry **not** to have waived the payment of the fee in this particular case.

Previous orders have set out a number of factors to be considered to determine whether a denial of a fee waiver is "fair and equitable". These factors are:

(1) the manner in which the institution attempted to respond to the appellant's request;

(2) whether the institution worked with the appellant to narrow and/or clarify the request;

(3) whether the institution provided any documentation to the appellant free of charge;

(4) whether the appellant worked constructively with the institution to narrow the scope of the request;

(5) whether the request involves a large number of records;

(6) whether or not the appellant has advanced a compromise solution which would reduce costs.

In my view, a further consideration to be taken into account when deciding whether a fee waiver is fair and equitable is whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

The Ministry submits that it considered several of these factors to determine whether a fee waiver was fair and equitable in the circumstances. It indicates that the severances were necessary in order to maximize the appellant's access to the records. The Ministry also took into account the size of the reduction of the fee and the principle that the Act is premised on the concept of "user pay". The Ministry, therefore, takes the position that its decision not to grant a complete fee waiver was fair and reasonable.

I have carefully considered the representations of the parties in light of the factors outlined above. I find that a waiver of the fee in the circumstances of this appeal would shift an unreasonable burden of the cost of access from the appellant to the Ministry. I find, therefore, that the Ministry's refusal to provide a full waiver of the fees was "fair and equitable" in the circumstances of this appeal.

ORDER:

[IPC Order P-885/March 7, 1995]

1. I uphold the decision of the Ministry not to disclose the portions of the records which are highlighted on the copies the Ministry has provided to the Commissioner's office for the purposes of this appeal.

2. I uphold the Ministry's decision to charge a fee in the amount $180 for preparation of the records.
3. I allow the Ministry to charge photocopying costs at a rate of $0.20 per page for each page of the record to be disclosed to the appellant, and each page viewed by him, which requires severing prior to being viewed.

4. I uphold the Ministry's decision not to waive the fee.

5. I order the Ministry to disclose the non-highlighted portions of the records referred to in Provision 1 to the appellant, upon receipt of the payment of the fee, and within thirty-five (35) days of the date of this order, but not earlier than the thirtieth (30th) day after the date of this order.

6. 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 5.

Original signed by: March 7, 1995
Anita Fineberg
Inquiry Officer