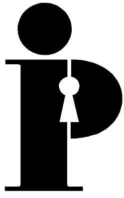

Information and Privacy Commissioner/Ontario
Commissaire à l'information et à la protection de la vie privée/Ontario

ORDER P-1202

Appeal P-9500616

Ministry of Community and Social Services

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BACKGROUND:

Under the Constitution Act, 1867, provincial governments are given jurisdiction over the areas of social services and social assistance. In carrying out this mandate, provincial and territorial Ministers responsible for social services meet on a regular basis to discuss issues of common concern, including program management and delivery, policy development, relations among provinces and territories, and relations with the federal government.

The most recent Provincial/Territorial Ministers' Meeting (the P/T Ministers' Meeting) was held in September of 1995 in Winnipeg.

Under the provisions of the federal Canada Assistance Plan Act (CAP), the federal government shares the cost of all provincial expenditures on social assistance and services that comply with the requirements of the CAP and its regulations. The CAP has formed the basic framework for social assistance and social services in Canada since it came into force in 1966.

In the 1995 federal budget, the government announced measures that will change the federal/provincial relationship with respect to social assistance and services, including the planned elimination of CAP, effective April 1, 1996. Because of the significance of the announced changes, the provincial Premiers created the Ministerial Council on Social Policy Reform and Renewal (the Ministerial Council) in August of 1995. This body was asked to examine the issues arising from the budget and to report to the Premiers. Ontario's representative on the Ministerial Council is the Minister of Intergovernmental Affairs, not the Minister of Community and Social Services.

The first meeting of the Ministerial Council was held in November 1995.

NATURE OF APPEAL:

In late September 1995, the Ministry of Community and Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for documents relating to "the Ministerial Council on Social Policy Reform and Renewal conference held in Manitoba this month". Without consulting the requester, the Ministry concluded that the request related to the September P/T Ministers' Meeting, not the Ministerial Council Meeting, since the former took place in September 1995, and the first meeting of the latter had not even been held at the time of the request.

The Ministry identified 51 responsive records, and denied access to all of them under section 13 of the Act (advice to government).

The requester (now the appellant) appealed the denial of access.

Within the 35-day period provided in the Confirmation of Appeal letter for raising additional discretionary exemptions, the Ministry provided the appellant with a second decision letter identifying sections 15(a) and (b) (relations with other governments) as additional exemption claims.

A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from both parties. After the Notice of Inquiry was issued, the Ministry disclosed four records (Records 46-49) to the appellant, and agreed to disclose portions of five others (Records 18, 19, 22, 30 and 40). Also, the appellant indicated that he was no longer appealing the denial of access to Records 1, 5-14 and 49, and also raised the application of section 23, the so-called "public interest override".

PRELIMINARY ISSUE:

In his response to the Notice of Inquiry, the appellant pointed out that a document produced by the Ministerial Council had been placed in the public domain, and information contained in this document had been reported in a number of newspapers. The appellant questioned whether this would have an impact on the exemption claims raised by the Ministry. A Supplementary Notice of Inquiry was sent by this office to the appellant and the Ministry, inviting representations on this issue, as well as section 23.

The Ministry did not respond to the specific issues raised in the Supplementary Notice of Inquiry, even when encouraged to do so. Rather, it provided representations which purported to alter its previous decision regarding access. According to the Ministry, it now "realized that the appellant and the Ministry were talking about two completely different meetings with completely different membership". Consequently, the Ministry asserted that "we do not have any records responsive to the original request, as the meeting specified in the request did not take place". The Ministry went on to state that: "The appellant should be advised to forward any requests concerning the Ministerial Council on Social Policy Reform and Renewal Conference which was held in November 1995, to the Ministry of Intergovernmental Affairs, which is the lead Ministry responsible for the Ministerial Council".

Sections 24(1) and (2) of the Act outline procedures for making requests, and establish responsibilities of both requesters and institutions. Section 24(1) was amended in February 1996 by the Savings and Restructuring Act (Bill 26). The appropriate provisions of section 24 for the purpose of this appeal are the sections which were in force at the time of the request and commencement of the appeal, which read as follows:

(1) A person seeking access to a record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

When the request was received in September 1995, the Ministry apparently was sufficiently confident about its interpretation of the scope of the request that it identified records relating to the September P/T Ministers' Meetings as being responsive, without consulting with the appellant. In its response to the Supplementary Notice of Inquiry, the Ministry is attempting, again unilaterally, to impose another interpretation on the appellant's request despite the fact that

it disclosed some records to the appellant in their entirety, indicated a willingness to disclose portions of others, and made extensive representations on the application of the exemptions claimed for the remaining records.

In his representations, the appellant states that although the Ministry had made its original interpretation without speaking to him, the Ministry was correct in assuming that he was seeking information relating to the September P/T Ministers' Meeting.

In the circumstances of this appeal, I am satisfied that the records originally identified by the Ministry are those which respond to the appellant's request, and I will proceed on that basis. Section 24 of the Act provides procedures to deal with situations where clarity is required. The Ministry determined that clarification was not required in the first instance, and the appellant has confirmed that he is interested in receiving access to the records identified by the Ministry. In my view, the appellant would be prejudiced if I did not proceed and resolve his appeal of the Ministry's initial decision. If the appellant is also interested in records relating to the November 1995 meeting of the Ministerial Council, he can make a new request to the Ministry of Intergovernmental Affairs.

DISCUSSION:

According to the Ministry, two categories of documents are traditionally prepared for P/T Ministers' Meetings:

(1) common briefing notes to focus the issues and discussion. One province takes the lead in drafting each common briefing note; and

(2) specialized briefing materials prepared for each Minister by his or her own officials.

In its representations, the Ministry deals with each category separately, and I will structure my order in the same manner.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims that sections 15(a) and/or (b) of the Act apply to all records or parts of records which remain at issue in this appeal.

These sections read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;

> and shall not disclose any such record without the prior approval of the Executive Council.

In support of its position with respect to both sections 15(a) and (b), the Ministry's representations provide an overview of the context in which discussions between provinces and territories are conducted at P/T Ministers' Meetings. The Ministry indicates that disclosure of the type of records which are at issue in this appeal would call into question long standing practices and understandings reached among the provinces and territories concerning meetings, exchange of information, preparation of common briefing notes, and exchange of documents. The Ministry states that supporting documentation prepared for P/T Ministers' Meetings is always shared on a confidential basis. According to the Ministry, if the records at issue in this appeal are disclosed, this would severely prejudice relations with other provincial and territorial governments and inhibit Ontario's ability to participate in future interprovincial/territorial meetings and exchanges of information and documents.

I will first consider the application of section 15(b) to those records prepared by other provincial governments. The Ministry submits that all of these records, Records 2-4, 15-17, 20, 23-27, 33, 35-39, and 41-43 qualify for exemption under section 15(b).

For a record to qualify for exemption under this section, the Ministry must establish that:

1. the records reveal information received from another government or its agencies; **and**

2. the information was received by an institution; **and**

3. the information was received in confidence.

[Order 210]

In his representations with respect to section 15(b), the appellant submits that the records should be disclosed because the Ministry has not demonstrated that the information is confidential. He states that the information contained in the records reflects a common position and not the stated position of another government.

Previous orders have established that relations with other provincial governments fall under the definition of intergovernmental relations (Order P-210). I find that relations with territorial governments also fall into this category.

Having reviewed the records and representations, in my view, the Ministry has provided sufficient evidence to establish that Records 2-4, 15-17, 20, 23-27, 33, 35-39 and 41-43 were all prepared by other provincial governments and received by Ministry officials on a confidential basis. Accordingly, I find that the requirements of section 15(b) of the Act have been satisfied, and these records qualify for exemption under this section.

Turing now to the records prepared by Ministry officials, the Ministry submits that the undisclosed portions of Records 18, 19, 22, 30 and 40, and Records 21, 28, 29, 31, 32, 34, 40, 44, 45, 50 and 51 in their entirety qualify for exemption under section 15(a) and /or sections 15(b).

Most of these records are briefing notes which describe and address issues raised in the common briefing notes provided by other provinces. These records were prepared before the September 1995 P/T Ministers' Meeting for use by the Ontario Minister at the meeting. Applying the same reasoning outlined above with respect to the first group of records, I find that disclosure of the portions of the briefing notes prepared by Ontario officials which discuss the contents of the other provinces' briefing notes would reveal exempt information, and these portions of the second group of records qualify for exemption under section 15(b) of the Act.

As far as section 15(a) of the Act is concerned, in order for a record to qualify for exemption under this section, the Ministry must establish that:

1. the relations must be intergovernmental, that is relations between an institution and another government or its agencies; and
2. disclosure of the records could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations.

[Order P-908]

The appellant's representations simply state that the Ministry has failed to provide sufficient evidence to demonstrate that disclosure of the records will prejudice federal-provincial negotiations or intergovernmental relations.

The Ministry's representations point out that all of the records concern relations between the Ontario government and its provincial, territorial and federal counterparts. I agree, and find that the first requirement of the section 15(a) exemption claim has been established.

The Ministry also submits that the process of P/T Ministers' Meetings has allowed the development of practices that encourage interprovincial/territorial co-operation and information-sharing which benefits all participants. According to the Ministry, the understandings and practices have helped to generate a sense of confidence and trust among provincial and territorial officials and Ministers which has gone beyond the P/T Ministers' Meetings themselves, and resulted in the opening of channels of communication which operate throughout the year.

The Ministry has provided detailed representations regarding the context of each record and reasons why it feels that prejudice to the conduct of intergovernmental relations would result from disclosure. Having reviewed these representations and the records, I find that the Ministry has provided sufficient evidence to establish that disclosure of the exempt portions of Records 18, 19, 22, 30 and 40, and all of Records 21, 28, 29, 31, 32, 34, 40, 44, 45, 50 and 51 could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations. Therefore, I find that these records qualify for exemption under section 15(a) of the Act.

As far as the public release of the document prepared by the Ministerial Council is concerned, the appellant has confirmed that his request relates to the September P/T Ministers' Meeting, and not the November Ministerial Council meeting. I have reviewed this document and find that its public availability has no bearing on my finding that the records at issue in this appeal qualify for exemption under sections 15(a) and (b).

Because I have found that all of the records or undisclosed portions of the records qualify for exemption under either sections 15(a) or (b), it is not necessary for me to consider the possible application of section 13.

PUBLIC INTEREST IN DISCLOSURE

In this order I have found that all of the records or parts of records which remain at issue in the appeal qualify for exemption under sections 15(a) or (b) of the Act. I must now consider the appellant's argument that there exists a compelling public interest in the release of these records under section 23 of the Act.

The so-called "public interest override" as set out in section 23 of the Act states:

> An exemption from disclosure of a record under sections 13, **15**, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

In order for section 23 of the Act to apply, two requirements must be met. First, there must be a **compelling** public interest in the disclosure of the record; and second, this interest must **clearly** outweigh the **purpose** of the exemption which otherwise applies to the record.

The Act is silent as to who bears the burden of proof in respect of section 23. The burden of proof in law generally is that a person who asserts a position must establish it. However, where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, I have reviewed the records with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the sections 15(a) and (b) exemptions.

In his representations, the appellant states that the information requested is important to understand the development of public policy in the critical area of social policy, particularly in light of the federal government's announced changes in transfer payments for social programs. The appellant states the significant fiscal and policy changes will affect the lives of a large number of Ontario residents. He argues that withholding this information impairs the public's ability to fully assess changes in crucial government policy.

Although I accept that the public has an interest in the changes which may occur to social policy and programs, in my view, the appellant has failed to establish a sufficient linkage between this interest and the disclosure of the specific records which are at issue in this appeal. In addition,

even if I were to find that this public interest is compelling, and was linked directly to these records, section 23 would only apply if this compelling public interest was sufficient to clearly outweigh the purpose of the exemptions found in sections 15(a) and (b).
Section 15 of the Act recognizes that the Ontario government will create and receive records in the course of its relations with other governments, and that individual institutions should have discretion to refuse to disclose records where it is expected that disclosure would result in any of the consequences enumerated in this section. In my view, section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of section 15(b) is to allow the Ontario government to assure other governments that it is able and prepared to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern.

In the circumstances of this appeal, I find that any public interest in the disclosure of the records I have found to qualify for exemption, does not clearly outweigh the purpose of the sections 15(a) and/of 15(b) exemption claims. Therefore, section 23 of the Act does not apply.

SEVERANCE

The wording of section 10(2) of the Act which was in force at the time of the request and appeal states:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 the head shall disclose as much of the record as can reasonably be severed without disclosing the information that fall under one of the exemptions.

In its representations, the Ministry identifies certain portions of Records 18, 19, 22, 30 and 40 which can be severed and disclosed to the appellant. The Ministry also states that it has reviewed all other records in the context of section 10(2) and determined that no other severances are possible. I accept the Ministry's position.

ORDER:

1. I uphold the Ministry's decision to refuse to disclose Records 2-4, 15-17, 20, 21, 23-29, 31-39, 41-45, 50 and 51 in their entirety, and those portions of Records 18, 19, 22, 30 and 40 which have not been severed by the Ministry under section 10(2) of the Act.

2. I order the Ministry to disclose to the appellant the remaining portions of Records 18, 19, 22, 30 and 40 which are identified in its representations. I order this disclosure to take place on or before **June 27, 1996**.
3. In order to verify compliance with 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 is accordance with Provision 2.

______________________________ June 7, 1996

Tom Mitchinson
Assistant Commissioner