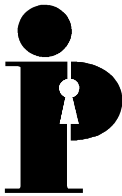

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1186

Appeal P-9500742

Ministry of Finance

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NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The requester sought access to all records related to his assessment roll number for properties at three identified locations for the years 1978-1995.

The Ministry located the responsive records and issued a decision granting access to them in their entirety for a fee of $39. The requester (now the appellant) appealed the Ministry's decision to charge a fee on the basis that his request was for personal information.

During mediation of the appeal, the Ministry reconsidered its decision and reclassified certain of the responsive records as constituting the personal information of the appellant. The Ministry disclosed these records to the appellant at no charge. The revised fee for access to the remaining records was $11.50, consisting of $4 for reproduction costs and $7.50 for the preparation of the record.

The remaining records may be described as follows:

1. Assessment record (2 pages)
2. Description of property and structure (5 pages)
3. Diagram of structure (2 pages)
4. Assessment roll (1 page)
5. Handwritten notes (6 pages)
6. Memorandum (2 pages)
7. Logs (2 pages)

The appellant also advised that the Ministry had not located all the records which he believes are responsive to his request. The appellant maintains that the following three records should exist:

1. A document containing legal advice pertaining to a 25% obsolescence allowance to offset a 1,500 square foot excess measurement of the appellant's property;

2. A legal brief prepared in response to a letter dated January 23, 1995; and

3. An affidavit dated on or about May 14, 1993 related to the fact that the appellant filed no supplementary assessment appeal.

This office sent a Notice of Inquiry to the Ministry and the appellant. Representations were received from the Ministry only.

In its representations, the Ministry advised that it had located an additional record, a memorandum dated February 27, 1995 from a Ministry solicitor to the Associate Deputy Minister concerning a response to a complaint filed by the appellant. The appellant agreed that this document constitutes the second record listed above which he believes should exist. Accordingly, this item is no longer at issue in the context of the Ministry's search for responsive records.

The Ministry sent the appellant a decision denying access to the February 17, 1995 memorandum on the basis of the exemption in section 19 of the Act (solicitor-client privilege). The appellant advised this office that he was disputing this decision and wished to have this matter incorporated into his current appeal. The Ministry had provided submissions on the application of section 19 to this record in its submissions. The appellant advised that he would not be submitting any representations on this issue.

Because the memorandum appeared to contain the personal information of the appellant, the Ministry was requested to consider whether the exemption in section 49(a) might apply. This exemption provides an institution with the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 19, would otherwise apply to that information. The Ministry provided supplementary representations on the application of section 49(a) to the memorandum.

To summarize, the issues I will address in this order are: (i) whether the Ministry is entitled to charge fees for access to the remaining records and, if so, whether the calculation was reasonable; (ii) whether section 49(a) applies to exempt the February 27, 1995 memorandum from disclosure; and (iii) whether the Ministry's search to locate the responsive records was reasonable.

DISCUSSION:

FEES AND PERSONAL INFORMATION

This appeal was filed prior to the legislative amendments concerning the charging of photocopying fees for access to one's own personal information. Accordingly, it is to be decided on the basis of the legislation in effect at that time. Section 57(1) of the Act set out the types of fees which may be charged for access to records under the Act. Section 57(2) created an exception to the Act's fee provisions. It stated as follows:

> Despite subsection (1), a head shall not require an individual to pay a fee for access to his or her own personal information.

In order to decide whether the Ministry can charge for access to the records in this case, I must first determine whether the request was for personal information and whether, in fact, the records at issue contain the appellant's personal information. I will first consider the wording of the request which I will quote below:

> I wish to submit this F.O.I. request for all personal information of mine, general records containing personal information of mine and all general records related to the above assessment roll number ....

This request may be characterized as seeking access to three groups of documents: those constituting the personal information of the appellant, general records containing his personal information and general records relating to the assessment roll number. The issue is into which category the records at issue fall.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information **about** an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (emphasis added).

The Ministry submits that the records were located in the assessment files of particular municipal addresses and all contain information about the appellant's property, as well as about other properties used as comparables in the assessment appeals filed by the appellant. Therefore, the position of the Ministry is that the records contain information about property, rather than constituting personal information.

In this regard, the Ministry refers to Order 23, a decision of former Commissioner Sidney B. Linden in which he considered the issue of whether assessment information which contains the name of the assessed individual is personal information. In that order he determined that information concerning the municipal location of a property and its estimated market value was information about a property and not about an identifiable individual. His rationale for this determination was based on the following considerations:

(i) the information related to properties and not to an individual;
(ii) a property owner might not reside at the property so that the information might not be about an individual's address;
(iii) the property owner might not be an individual; and
(iv) the municipal address is clearly visible to the public.

I agree with this analysis. Applying it to the records in this appeal, I find that, with one exception, the Ministry's characterization of the records as containing information about property, as opposed to personal information, is correct. The majority of the records are about the assessment of the appellant's property and the Ministry comparables. Thus, they are responsive to that part of the request dealing with access to general records relating to the assessment roll number.

The one exception is one page of undated handwritten notes which, although they relate to the assessment, contain additional personal information about the appellant. I have enclosed a copy of this page with the copy of the order being sent to the Freedom of Information and Privacy Co_ordinator of the Ministry. It should be disclosed to the appellant at no charge.

As far as the balance of the records are concerned, I will now consider whether the Ministry correctly calculated the fees.

Section 6 of Ontario Regulation 460, then in effect, permitted an institution to charge $0.20 per page for photocopying and $7.50 for each 15 minutes spent for preparing the record for disclosure. At this time, there are 19 pages remaining at issue. Therefore, the Ministry may charge $3.80 for reproduction costs. The Ministry has provided no information on how it calculated its preparation charge of $7.50 or what activities were undertaken to support this charge. Therefore, I disallow the preparation charge. The result is that the Ministry may charge the appellant $3.80 for the 19 pages of records at issue.

In neither of its decision letters did the Ministry advise the appellant that he could have applied for a fee waiver pursuant to section 57 of the Act. However, in my view, no useful purpose would be served at this time in requiring the Ministry to advise the appellant of his right to request a fee waiver. The administrative expense involved in that process would, in my opinion, outweigh the value of the potential of collecting $3.80 in fees.

Furthermore, if the appellant requested a fee waiver, because the fee is less than $5, section 8 of Ontario Regulation 460 would require the head of the Ministry to consider whether the amount of the payment was too small to justify requiring payment.

Based on all the considerations outlined above, in my view this is an appropriate case for the head to waive the fees. Accordingly, I order the head to provide access to the records at no charge to the appellant.

DISCRETION TO DENY ACCESS TO REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The Ministry states that the February 27, 1995 memorandum contains the personal information of the appellant in that it deals with the complaint filed by the appellant against the Ministry. Having reviewed the record, I agree with this characterization of the information in the document. I also accept the submissions of the Ministry that the memorandum contains the personal information of another individual.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. This section states as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information. (emphasis added)

Accordingly, I will consider whether section 19 applies in order to determine whether the memorandum is exempt under section 49(a).

Section 19 of the Act states:

> 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 consists of two branches, which provide an institution 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 February 27, 1995 memorandum addresses counsel's suggestion as to how the Ministry should respond to and deal with a complaint filed by the appellant with the Ombudsman. It sets out the history of the matter, discusses the relevant legislation and the manner in which the Ministry has dealt with similar complaints in the past. Based on this information, counsel then provides the Associate Deputy Minister with his advice on how the Ministry should respond to the appellant's complaint.

Although it is not entirely clear, it appears that the Ministry is claiming that the record is exempt under both branches of section 19.

Turning to Branch 2, it is clear that the record was prepared by counsel for the Ministry and that it was prepared for use in giving legal advice to the Associate Deputy Minister as to the appropriate Ministry response to the Ombudsman complaint. Accordingly, the record qualifies for exemption under Branch 2 of section 19 of the Act. Therefore, it is exempt from disclosure pursuant to section 49(a) of the Act.

REASONABLENESS OF SEARCH

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

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

As I have indicated, the appellant believes that the following documents should exist:

1. A document containing legal advice pertaining to a 25% obsolescence allowance to offset a 1,500 square foot excess measurement of the appellant's property; and

2. An affidavit dated on or about May 14, 1993 related to the fact that the appellant filed no supplementary assessment appeal.

The appellant has provided no submissions in support of this contention.

As part of its representations, the Ministry has provided an affidavit of the property assessor who was responsible for assembling the records responsive to the appellant's request (the assessor).

The assessor states that he located some of the records in the Regional Assessment office for the region which deals with the appellant and his property. The assessor also obtained documents from the Assessment Division's head office personnel. In addition, he received documentation from other Ministry personnel including the Associate Deputy Minister and Ministry counsel.

In his affidavit, the assessor describes how the February 27, 1995 memorandum was inadvertently missed during the Ministry's search. He also affirms that this document was the only legal advice on the file and that no record containing legal advice pertaining to a 25% obsolescence allowance was located. Finally, the assessor notes that he did not find any affidavit pertaining to the fact that the appellant had not filed an appeal of a supplementary assessment.

Having reviewed the representations of the Ministry, I am satisfied that it conducted a reasonable search in order to locate records responsive to the request.

ORDER:

1. I uphold the decision of the Ministry to not disclose the memorandum dated February 27, 1995.

2. I order the Ministry to disclose the balance of the records to the appellant at no charge by sending copies of them to him no later than **June 7, 1996**.

3. The Ministry's search for responsive records was reasonable and the appeal relating to the search for records and the existence of additional records is dismissed.

Original signed by: May 23, 1996

Anita Fineberg
Inquiry Officer